# THE
# INDIAN LAW REPORTS
## ALLAHABAD SERIES


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

2024 - VOL. X
(OCTOBER)

PAGES 1 TO 1033

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

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Abdul Mannan & Ors. Vs. State of U.P. & Ors. **Page**- 797

Ajay Kumar Pandey Vs. State of U.P. & Ors. **Page**- 220

Akash Srivastava Vs. State of U.P. & Ors. **Page**- 162

Amardeep Kashyap Vs. State of U.P. & Ors. **Page**- 205

Ambika Yadav Vs. State of U.P. & Ors. **Page**- 621

Anil Kumar Vs. State of U.P. & Anr. **Page**- 1013

Anil Tuteja Vs. S.H.O. & Ors. **Page**- 538

Ankur Agarwal Vs. State of U.P. & Anr. **Page**- 926

B.S.N.L. & Anr. Vs. Chaurasiya Entp. & Ors. **Page**- 434

Bhagwan Dei Vs. State of U.P. **Page**- 765

Bindu Singh Vs. State of U.P. & Ors. **Page**- 260

C/M Ram Bharose Maiku Lal Inter College Thru Manager Sri Shree Kant Sahu & Anr. Vs. State of U.P. & Ors. **Page**- 236

Chetram @ Mintu & Ors. Vs. State of U.P. & Ors. **Page**- 626

Garden View Owners Welfare Assc. Thru Secy. & Anr. Vs. The Dy. Registrar Firm Societies & Chits Lko. & Ors. **Page**- 273

Greater Noida Industrial Development Auth. Vs. Hem Singh & Ors. **Page**- 646

Hakim Vs. State of U.P. **Page**- 803

Hari Prasad Pandey Vs. State of U.P. & Ors. **Page**- 877

Irfan Qureshi Vs. Up State Industrial Development Auth. & Anr. **Page**- 607

Jagdish Singh @ Jagdish Kumar Singh Vs. State of U.P. & Anr. **Page**- 348

Jawahar Lal Vats Vs. State of U.P. & Ors. **Page**- 518

Jitendra Pratap Singh @ Jeetu Vs. State of U.P. **Page**- 746

Justice Vinod Chandra Misra Vs. State of U.P. & Ors. **Page**- 166

Kaisar Jaha Vs. The S.P., Distt. Sultanpur & Ors. **Page**- 902

Keshav Prasad Singh & Ors. Vs. State of U.P. & Ors. **Page**- 665

Km. Cheenu Vs. Bishambhar Singh & Anr. **Page**- 613

Larsen & Toubro Ltd. Vs. State of U.P. & Ors. **Page**- 957

M/S Archita Tour and Travels Vs. State of U.P. & Ors. **Page**- 201

M/s Pitambra Books Pvt. Ltd. Vs. U.O.I. & Ors. **Page**- 707

M/s Theme Engg. Services Pvt. Ltd. Vs. National Highway Authority of India & Anr. **Page**- 178

M/S Young Style Overseas Vs. State of U.P. & Ors. **Page**- 671

Mahatam Sharma Vs. State of U.P. & Ors. **Page**- 266

Mahfooz Vs. State of U.P. **Page**- 4

Maya Tiwari Vs. State of U.P. **Page**- 859

Mohd. Muslim & Ors. Vs. State of U.P. & Ors. **Page**- 195

Mrs. Jayshree Kailash Wani Vs. Official Liquidator **Page**- 18

Ms. Supreme Transport Co., Lucknow Vs. Smt. Suman Devi & Anr. **Page**- 12

Nagendra Sharma & Anr. Vs. Court Of Prin. Judge Family Court Gonda & Anr. **Page**- 226

Pawan Kumar Pandey Vs. Sudha **Page**- 913

Pranjal Shukla & Ors. Vs. State of U.P. & Ors. **Page**- 425

Pundrik Kumar Pandey @ Pundrik Pandey Vs. State of U.P. & Ors. **Page**- 282

Rajendra Prasad Vs. State of U.P. & Ors. **Page**- 824

Rajiv Kumar Vs. State of U.P. & Ors. **Page**- 332

Rajvir Singh Vs. Randhir Singh **Page**- 574

Ram Prakash Giri Vs. Rakesh Giri & Ors. **Page**- 763

Samrah Ahmad Vs. State of U.P. & Ors. **Page**- 26

Sanjay Chaudhary Vs. Guddan @ Usha **Page**- 828

Santram Vs. State of U.P. & Ors. **Page**- 345

Sarita Sharma Vs. State of U.P. & Anr. **Page**- 308

Satya Homes Pvt. Ltd. & Anr. Vs. State of U.P. & Ors. **Page**- 936

Shashi Pal Vs. Sachin Kumar Pal **Page**- 906

Shivam Yadav Vs. State of U.P. & Ors. **Page**- 889

Shrey Gupta Vs. State of U.P. & Anr. **Page**- 399

Shubhi Saxena Vs. Rahul Srivastava & Anr. **Page**- 634

Siddharth Singh Vs. State of U.P. & Ors. **Page**- 315

Smt. Farzana Vs. State of U.P. & Ors. **Page**- 636

Smt. Maya Devi Vs. State of U.P. & Ors. **Page**- 340

Smt. Sangeeta Devi Vs. State of U.P. & Ors. **Page**- 249

State of U.P. & Ors. Vs. M/S Virat Construction **Page**- 450

Sukarmpal @ Amit Jat Vs. State of U.P. & Ors. **Page**- 291

Surendra Kumar Vs. Dr. Aditya Kumar Sharma **Page**- 817

Suresh Kumar Shukla @ Suresh Dutt Shukla Vs. State of U.P. & Anr. **Page**- 369

Surya Prakash Mishra Vs. State of U.P. & Ors. **Page**- 214

Sushil Kumr Trivedi Vs. Smt. Richa **Page**- 560

The New India Insurance Co. Ltd. Vs. Shallo Begum & Ors. **Page**- 591

U.P. Bhumi Sudhar Nigam Thru. Managing Director Vs. Appellate Authority Under P.G. Act Lko. & Ors. **Page**- 883

University College Ret. Teachers Welfare Assc. Lko. Thru Its President Dr. S.S. Chauhan & Anr. Vs. State of U.P. & Ors. **Page**- 865

Upendra @ Balveer Vs. State of U.P. **Page**- 471

Veda @ Vedpal & Ors. Vs. State of U.P. **Page**- 485

Vinay Kumar Pandey Vs. State of U.P. & Ors. **Page**- 789

Vinod Kumar Shukla & Anr. Vs. State of U.P. & Ors. **Page**- 299

Wasi Ahmad Vs. State of U.P. & Ors. **Page**- 327

Yash Pratap Singh Vs. State of U.P. **Page**- 755

Zulfikar Abbasi Vs. State of U.P. & Anr. **Page**- 710

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**(2024) 10 ILRA 4**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

**THE HON'BLE ARVIND SINGH SANGWAN, J.**
**THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.**

Criminal Appeal No. 180 of 2014

**Mahfooz ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Sri S.K. Tripathi, Sri Ajay Kumar

**Counsel for the Respondent:**
Govt. Advocate

**(A) Criminal Law - Appeal against conviction - Conviction Overturned - Indian Penal Code, 1860 - Sections 302 – Murder - Principle of benefit of doubt - wrongful conviction - material contradictions - tainted investigation - fair trial.**

**(B) Practice & Procedure - Appellant Spent 17 years of actual sentence and 20 years of total sentence with remission without a criminal history, entitled to pre-mature release, but the case has not been processed - No proper investigation was conducted by the police. Acquittal restores innocence, emphasizing need for rigorous investigation and fair trials. (Para - 36H)**

Appellant was convicted of murder - 17 years of actual imprisonment and 20 years with remission - prosecution relied on witness testimonies that were later found inconsistent - No substantial evidence to connect appellant to the crime - tainted investigation. (Para 1-19)

**HELD: -** Court acquitted Appellant due to material contradictions in prosecution witnesses' statement of informant - PW-1 and eye-witness - PW-6. Appellant's conviction set aside after 17 years due to unreliable witness testimony and tainted investigation. Appellant entitled to benefit of doubt. Conviction and sentence set aside. Appellant released from judicial custody forthwith. (Para - 36,37,38)

**Appeal allowed.** (E-7)

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. This appeal is preferred against the judgment of conviction dated 21.05.2013, passed by Additional Sessions Judge/ Special Judge (SC/ST Act), Kannauj in Sessions Trial No. 25 of 2008 (State Vs. Mahfooz) vide which the appellant was held guilty of offence punishable under Section 302 of I.P.C. as well as the order of sentence of the same date vide which the accused-appellant was awarded life sentence along with fine of Rs. 25,000/- and in case of default in payment of fine, to undergo further sentence of five months.

2. Heard Sri Ajay Shankar, the legal aid counsel who addressed the argument on behalf of the appellant in the main appeal and learned AGA for the State.

3. The Trial Court's record is received and paper books are ready. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

4. Brief facts of the case, as per the complaint given to the police Ex.Ka-1, is as under :

*"सेवा में,*
*श्रीमान कोतवाल*
*साहब कन्नौज,*
*श्रीमानजी,*

*निवेदन है कि प्रार्थी सुभाष कहार पुत्र सन्ना कहार ग्रा० मलिकापुर थाना कन्नौज का है मेरा बडा भाई दिनेश मछली बेचने का धंधा करता है आज दि० 19.10.06 को भाई मछली बेचने वंशीपुरवा गया था तथा वंशीपुरवा बाजार में व ग्रांव के नरेश भंगी पुत्र शम्भू के शाथ बाजार गया था मेरा भाई मछली बेचकर जल्दी चला आया मै व नरेश भी खरीददारी करके वापस आ रहे थे परमदेव मन्दिर महाचन्द्रापुर के पास समय करीब साढे पांच बजे ग्रांव अहमदपुर रौनी के महफूज पुत्र हवलदार तथा मुद्दू ने भाई को रोक कर मछली के पैसे मांगे मना करने पर मुद्दू ने भाई को पकड़ लिया तभी महफूज ने हाथो में लिए तमंचा से गोली मार दी भाई की तत्काल मौत हो गयी मैने व नरेश ने घटना को देखा व मुल्जीमान को पहचाना है हमारे शोर गुल पर ग्रा० महचद्रापुर के काफी लोग आ गये तथा गांव वालो ने मुद्दू को पकड़ने में हल्की फुल्की चोट लगी जिससे बाद में उसकी भी मौत हो गयी महफूज तमंचा फरहाते भाग गया सूचना को आया हूँ। कार्यवाही करने की कृपा करे।*

*दि० 19.10.06*
*प्रार्थी नि० अं० सुभाष*
*सुभाष पुत्र सन्ना कहार*
*नि० ग्रा० मलिकापुर*
*था० जि० कन्नौज*

प्रदर्श क-1"

5. The police, thereafter, registered the chik F.I.R. and prepared the Panchayatnama of deceased-Dinesh as well as deceased-brother of the appellant-Muddu. The dead bodies were sent to the post-mortem and as per the post-mortem report of Dinesh, the following injuries were found :

*"Ante-mortem Injuries*

*1. Fire Arm W.O.E. Gutter shaped 8.0 cm x 1.0 cm x chest cavity deep over left side upper part of chest involving axillary (ant.) fold margins inverted lacerated and relymosed. On dissection left side IIIrd fractured, left pleura & lung, diaphragms, liver & intestines lacerated, chest and abdominal cavity full of blood with faecal matter. One bullet recovered from abdominal cavity Direction – left to right & downwards and backwards."*

6. Postmortem of Muddu was also conducted and as many as seven injuries on the head, abdomen and the nature of lacerated wound, multiple contusion, abrasions on the entire body were found.

7. However, no F.I.R. was registered with regard to murder of Muddu, the real brother of the appellant. Thereafter, the police conducted the further investigation, recorded statement of prosecution witnesses under Section 161 Cr.P.C. and submitted the charge-sheet against the appellant. Thereafter, the case was committed to the Court of Sessions and the following charges were framed :

*"मै डा० मंजू निगम सत्र न्यायाधीश कन्नौज आप अभियुक्त महफूज को निम्न आरोप से आरोपित करती हूँः-*

*यह कि दिनांक 19.10.2006 को समय करीब 5.30 बजे शाम स्थान बरमदेव मंदिर के पास वहद ग्राम महचन्दापुर थाना कोतवाली कन्नौज जिला कन्नौज के अंतर्गत वादी के भाई दिनेश की मृत्यु कारित करने के आशय से तमन्चे से गोली मारकर मृत्यु कारित करके हत्या कर दी। इस प्रकार आपने भारतीय दण्ड संहिता की धारा 302 के अंतर्गत दण्डनीय अपराध कारित किया जो सत्र न्यायालय के संज्ञान के अंतर्गत है।*

*आरोप अभियुक्त को सुनाया व समझाया गया। अभियुक्त ने आरोप को इन्कार किया एंव विचारण की मांग की।*

*दिनांक – 08.04.2008*
*ह०अप०*
*(डा० मंजू निगम)*
*सत्र न्यायाधीश, कन्नौज।*

*एतद्द्वारा मैं आपक निर्देश देती हूँ कि आपका परीक्षण उक्त आरोप के लिए सत्र न्यायालय द्वाराकिया जाय।*

*दिनांक – 08.04.2008*
*ह०अप०*
*(डा० मंजू निगम)*
*सत्र न्यायाधीश, कन्नौज।"*

8. Subhash appeared as PW-1 and his statement read as under :

"19.10.06 की घटना है। मेरा भाई दिनेश घर से मछली बेचने के लिये वंशीपुरवा के बाजार गया था। उसके साथ मैं तथा गांव के नरेश भी गये थे। जब मेरा भाई मछली बेचकर वापस घर आ रहा था। तो महाचन्दापुर के आगे बृहमदेव मन्दिर के पास पहुचा तो वहां पर हाजिर अदालत मुल्जिम महफूज तथा मद्दू मिले। **मै अपने भाई के 20-25 कदम पीछे चल रहे थे। मेरे साथ नरेश भी था।** शाम के साढे 5 बजे का समय था। इन लोगो ने मेरे भाई से पैसे मांगे। पैसे दिये नही तो मद्दू ने मेरे भाई को पकड़ लिया तो महफूज ने अपने हाथ में लिये तमंचे से गोली मार दी जो मेरे भाई के बगल में लगी। तो मैने तथा नरेश ने घटना देखी व चिल्लाये तो महचन्दापुर के तथा आस पास के लोग आ गये जिन्होने मद्दू को पकड़ लिया उसे मारा पीटा जिससे उसकी मौत हो गई। महफूज तमंचा लहराता हुआ भाग गया। घटना की तहरीर मैनें एक व्यक्ति से बोलकर लिखाई थी जो मैनें बोला था वो उसने लिखा था पढवाकर सुनकर उस पर अपना निशानी अंगूठा लगाया था। गवाह को तहरीर कागज सं० 4A/2 पढकर सुनाया गया तो गवाह तहरीर पर अपने निशानी अंगूठा की तस्दीक करता है। प्रदर्श क-1 डाला गया। तहरीर लेकर थाने गया वहां मेरी रिपोर्ट लिखी गई। मेरे भाई की गोली लगने से मौके पर ही मृत्यु हो गई। रिपोर्ट लिखने में पुलिस मौके पर आई थी। मृतको का पंचायातनामा मेरे सामने भरा गया था। दरोगाजी ने अन्य लोग को पंच नियुक्त किया था। पंचायतनामा कागज सं० 8A/1व 8A/2 व 10A/1 व 10A/2 पर मेरे निशानी अंगूठा है। इस पर क्रमशः प्रदर्श क-2 व क-3 डाला गया। लाशो को कपड़ो में सीलमोहर कर पुलिस के सुपुर्द कर वास्ते कराने पोस्टमार्टम भेज दिया था।"

9. In cross examination, this witness stated that his brother used to sell fish and used to bring the same in the market on a bicycle. He further deposed as under :

"घटना वाले दिन मै मछली खरीदने अपने भाई के साथ नही गया लेकिन बाजार भाई के साथ गया था। मछली खरीद कर मेरे भाई करीब दिन के 12 बजे घर आ गया था। जब मेरा भाई घर पर आया तब मै घर पर मौजूद था। मल्लिकापुर से वंशीपुरवा पश्चिम दिशा में है। यह करीब 2-1/2 Kmदूर है। मल्लिकापुर से वंशीपुरवा पहुचने में साइकिल से पौन या करीब 1 घण्टा लगता है। घटनास्थल से वंशापुरवा पश्चिम दिशा में करीब 1 Km दूर है। मेरे गांव से अहमदपुर रौनी उत्तर दिशा में एक-सवा km दूर होगा। घटना स्थल से अहमदपुर रौनी उत्तर दिशा में करीब 2-1/2 Km दूर है। **घटना वाले दिन मेरा भाई दिनेश एक बजे दिन में घर से बाजार गया था। मै मृतक दिनेश एक बजे दिन में घर से बाजार गया था। मै मृतक दिनेश के साथ नही गया था। बल्कि उनके बाद बाजार गया था। मै दो बजे बाजार गया था। पौने दो बजे करीब मेरा भाई बाजार पहुच गया होगा। "**

10. In further cross examination, he stated that he had no knowledge whether Mahfooz had any money dispute with his brother or that he had demanded money from his brother as this fact is not mentioned in the F.I.R. He further stated that the bullet was fired from a very close range. The public had caught hold of Muddu and, thereafter, the mob killed him by giving beatings and then they brought the dead body near the place where his brother was murdered. About five hundred people gathered at the spot. He further stated that he has no knowledge when appellant Mahfooz was arrested and only one firearm injury was caused.

11. Dr. Narendra Kumar (PW-2), who conducted the post-mortem of Muddu and Dinesh deposed as under :

"साक्षी डा० नरेन्द्र कुमार वरिष्ठ परामर्शदाता डा० राम मनोहर लोहिया अस्पताल फर्रूखाबाद ने आज दि. 16.3.10 को सशपथ साक्ष्य दिया कि-

दि० 20.10.06 को मैं जिला चिकित्सालय फर्रूखाबाद में बतौर वरिष्ठ परामर्शदाता तैनात था। इस दिनांक को मेरी पोस्टमार्टम हेतु ड्यूटी लगी थी। उस दिन समय 2.00 पी.एम. पर मुद्दू S/O अज्ञात R/O अहमदपुर (Sic) P.S. कोत० कन्नौज जि० कन्नौज की की बाडी सर्वमुहर एक सील्ड बंडल में प्राप्त हुई। जिसे S.H.O. कन्नौज द्वारा भेजा गया था जिसे C.P. No. 230 बंकेश कुमार व C.P. 362 महावीर लेकर आए थे। मेरे द्वारा समय अपराह्न 2.45 बजे शव परीक्षण किया गया। मृतक की आयु करीब 36 वर्ष थी। मृतक औसत कद काठी का था। मृत्यु पूर्व चोटे

शव के शरीर पर आई चोटों का मृत्यु पूर्व का विवरण निम्नवत है।

1. बहुसंख्यीय फटे घाव सिर चेहरे तथा बांए कान के ऊपर जिसका आकार 6 सेमी x 1 सेमी से लेकर 3 सेमी x 1.5 सेमी तथा हड्डी तक गहराई के घाव थे। विच्छेदन करने पर बाई

टेम्पोरल, पैराइटल, मैन्डिबल तथा मैक्सिलरी हड्डी टुकडों में टूटी हुई थी। मैनेन्जीज व ब्रेन भी फटे हुए थे।

2. बहुसंख्यीय खरोंच के साथ नीलगू चोटें जो गर्दन पर सीने पर दोनों तरफ तथा पेट पर पाई गई जिनका आकार 22.0 Cm x 11.0 Cm से लेकर 15.0 Cm x 3.0 Cm तक था। विच्छेदन करने पर दाई ओर की दूसरी से दसवीं तक पसलियां व बाई ओर तीसरी से नौंवी तक पसलियां टूट हुई थी। स्टर्नम भी टूटी मिली। दोनों तरफ प्लूरा फेफडों तथा लीवर स्पलीन फटे हुए मिले। सीने तथा पेट की कैविटी खून से भरी मिली।

3. नीलगू चोट आकार 18.0 Cm x 3.0 Cm दाई जांघ के सामने पाए गए।

4. नीलगू चोट जो संख्या में आठ थी। बाई जांघ पर सामने और बाहर के हिस्से पर पाई गई जिनका आकार 16.0 Cm x 3.0 Cm से 12.0 Cm x 2.5 Cm तक था।

5. बहुसंख्यक खरोच के साथ नीलगू चोटें दोनों चूतड़ के पीछे जिनका आकार 15.0 Cm x 10.0 Cm से 13.0 Cm x 4.0 Cm था।

6. खरोंच सहित नीलगू चोट आकार 5.0 Cm x 3.0 Cm बांए हाथ के पीछे की ओर।

7. नीलगू चोट 6.0 Cm x 4.0 Cm दाए हाथ के पीछ था।

विच्छेदन से पूर्व शव की दशा अांखे बंद मुँह थोडा खुला हुआ सूखा जमा खून सिर पर व चेहरे पर मिला हुआ था। पेट थोडा फूला हुआ था तथा शरीर पर डस्ट मौजूद थी। पी.एम. स्टेनिंग डिवेन्डेन्ट पार्ट पर मौजूद थी तथा राइगर मार्टिस ऊपर लिम्ब से जा चुकी थी तथा लोअर लिम्ब पर मौजूद थी।

आंतरिक परीक्षण

सिर तथा ग्रीवा ऊपर बताया जा चुका है। करोटि का आधार फ्रैक्चर पाया गया। रीढ तथा वर्टिब्रा सामान्य, स्पाइनल कार्ड नही खोला गया। थोरेक्स, वाल्स, कार्टिलेज, रिब्स प्लूरा ऊपर बताए जा चुके है। पैरीकार्डियम में हीमेटोमा पाया गया। हृदय खाली था। पैरीटोनियम हीमेटोमा कैविटी खून से भरी हुई । आमाशय खून से मिला हुआ, पेस्टी फूड 200 M.L. पाया गया जिसमें एल्कोहल की गंध पाई गई। बडी आंत गैसयुक्त, फीकल मेटर के साथ जगह जगह हीमोटोमा पाया गया। जननांग सामान्य व सरकमसाइज्ड मिला।

मेरी राय में मृत्यु का कारण मृत्यु पूर्व आई चोटों से रक्त बहने व शाक के कारण हुई। शव परीक्षण की रिपोर्ट की एक कापी एक संलग्नक के साथ S.P. फतेहगढ को भेजी गई। एक प्रति जिसके साथ एक सीलड बंडल था जिसमें बनियाइन एक अंडरवियर एक पैन्ट एक टोटल तीन कपडे जो शव पर पाए गए थे S.H.O. कोतवाली कन्नौज को भेजे गए।

एक प्रति सी.एम.ओ. फर्रूखाबाद को भेजी गई। यह पी.एम.आर. कागज सं. 7A/1 मेरे द्वारा शव विच्छेदन के समय ही तैयार की गई थी जो मेरे लेख व हस्ताक्षर में है। इस पर प्रदर्श क-4 डाला गया।

उसी दिन 2.00 PM पर ही मृतक **दिनेश** S/O सन्ना R/O मलिकापुर P.S. कोत० कन्नौज की Dead बाडी S.H.O. कन्नौज द्वारा भेजी गई थी जिसे का० 230 लोकेश कुमार व 362 महावीर ही लेकर आए थे उक्त का शव विच्छेदन मेरे द्वारा 3.30 P.M. पर किया गया था मृतक की उम्र करीब 30 वर्ष थी। मृतक की कद काठी औसत थी।

दशा- आंखे तथा मुँह थोडा खुला व पेट थोडा फूला हुआ था। पीछे की ओर P.M. स्टेनिंग मौजूद थी। राइगर मार्टिस ऊपर तथा दोनों लिम्बस पर मौजूद थी। सीने में बाई ओर सूखा जमा खून मौजूद था।

मृत्यु पूर्व आई चोटें

1. गोली के घुसने का घाव गटर के आकार का 8 Cm x 1.0 Cm x चेस्ट कैविटी तक गहरा था। सीने पर बाई ओर ऊपरी हिस्से पर एग्जिलरी फोल्ड तक मौजूद थी। किनारे अन्दर को झुके हुए फटे हुए तथा इकाई कोस्ट था। विच्छेदन पर बाई ओर की तीसरी पसली टूटी थी बांए प्लूरा, फेफडा, डायफ्राम लिवर तथा छोटी व बडी आंते फटी पाई गई। चेस्ट तथा एब्डामिन कैविटी खून व फीगस मैटर से भरी थी। एक गोली एब्डामिन कैविटी से रिकवर की गई। घाव की दिशा बाई ओर से दाई ओर नीचे की ओर तथा पीछे की ओर थी।

अांतरिक परीक्षण-

1. सिर तथा गर्दन सामान्य

2. थोरेक्स में उपरोक्त के अलावा बाकी सब सामान्य।

3. एब्डामिल उपरोक्त के अलावा आमाशय में लगभग 120 ग्राम पेस्टी फूड मौजूद पाया गया। बाकी सब सामान्य था।

मेरी राय में मृत्यु का कारण मृत्यु पूर्व आई आग्नेयास्त्र से आई चोटों से होने वाले हेमरेज, शाक के कारण हुई थी। पी.एम.आर. कागज सं० 9A मेरे द्वारा शवविच्छेदन के समय ही तैयार किया गया था जो मेरे लेख व हस्ताक्षर में हैं। प्रदर्श क-5 डाला गया। इस शव परीक्षण की रिपोर्ट की एक प्रति एस.पी. फतेहगढ को आठ संलग्नक सहित भेजी गई तथा एक प्रति मय एक सील्ड बंडल जिसमें मृतक के कपडे शर्ट एक, बनियान एक, पेन्ट एक, अंडरवियर एक, मोजा एक जोडा, पीले कंग की धातु का एक छल्ला कुल छः आइटम S.H.O. कन्नौज को भेजे गए।

सीलबंद एक लिफापा जिसमें एक गोली थी एस.पी. फतेहगढ को भेजा गया तथा शव परीक्षण रिपोर्ट की एक प्रति सी.एम.ओ. फतहेगढ को भेजी गई।

*x x x x By Defence Sri Ramendra Singh Katara Ad.*

दोनों शव परीक्षण हेतु एक साथ लाए गए थे। मृतक मुद्दू के मृत्यु पूर्व चोटों में भाले की चोट नही हो सकती है बल्कि सरिया की चोट हो सकती है।

मृतक मुद्दू व दिनेश की मृत्यु लगभग एक ही समय में हुई होगी। इक्ज क-5 में शव परीक्षण के समय मैनें सरिया की चोट से आंतरिक अंगों का चुटहिल होना नही पाया गया। प्रदर्श क-5 में भाले की चोट बाह्य तथा आंतरिक चोटों में मैनें नही पाई। शव परीक्षण से लगभग 24 घंटे पूर्व चोटें आना संभव है। मृतक दिनेश के शव पर जो चोट मैनें दर्शाई है उस चोट के अलावा कोई अन्य चोट नही पाई गई थी। मृतक दिनेश का मुह थोडा खुला हुआ था यह जरूरी नही है कि उसके चिल्लाने से खुला रह गया हो। **दिनेश के बाह्य चोट में कालिमा मौजूद नही थी।** घाव के पास बारूद की कोई दुर्गन्ध नही थी। दिनेश के जो घाव है कितनी दूर से फायर किया गया हो यह मैं नही बता सकता। दिनेश का परीक्षण बाद में किया गया। चोट नं० 2 मुद्दू की एब्रेडिड कन्टूजन है। कोई कट नही पाया गया। मुद्दू की चोट नं० 1 के कारण ही मृत्यु होना संभव है। ”

12. PW-3, SI Bhagwat Singh Hundal, stated that on 19.10.2006, the investigation was handed over to him and he prepared the Panchayatnama of Muddu at about 6.45 PM which was witnessed by Prabhashchand, Gajodhar, Ram Pratap, Radheyshyam and Subhash. Thereafter, he prepared the challan (Ex.Ka-6) and sent a letter to Chief Medical Officer (Ex. Ka-7 and 8) for conducting post-mortem of Muddu. He also stated that he has given a letter to Chief Medical Officer to give the cause of death vide Ex.Ka-9 to Ex.Ka-11.

In further examination, this witness stated that on the same day, he prepared the Panchayatnama of deceased Dinesh at about quarter to 8.00 PM.

13. S.H.O. V.P. Singh (PW-4) stated that the panchayatnama of deceased Muddu and Dinesh was conducted by SSI B.S. Hundal and site plan was prepared which is Ex.Ka-12. He further stated that accused-Mahfooj was not arrested till 23.11.2006 and further investigation was handed over to S.H.O. T.P. Singh.

14. Raj Kumar Srivastava (PW-5) stated that he was posted as Constable Moharrir and on receiving the complaint, he registered Chik F.I.R. (Ex.Ka-13) and prepared G.D. which is Ex.Ka-14. He stated that the complainant came at 6.40 PM on 19.10.2006 for registration of the case.

15. Naresh (PW-6) stated that he along with Dinesh and Subhash were coming from the market. He was 20-25 steps behind when he saw that Dinesh and Mahfooz were having altercation. Muddu was also along with Mahfooz. He and Subhash were 20-25 feet behind. In the meantime, Mahfooz fired upon Dinesh who died. People caught hold of Muddu and gave him beatings, however, Mahfooz escaped from the spot.

16. In cross examination, this witness stated that he is working as Sweeper in Delhi and he has been brought to the Court by Subhash. He pleaded ignorance about the time when deceased-Dinesh had taken the fish to the market and further stated that he had not seen Muddu prior to the incident though he knew Mahfooz. He further stated that he did not remember the date of incident and also stated that he do not know about the shops abutting the shop of Dinesh, where people sell fish. He further stated that Muddu and Subhash had a scuffle at the spot and on the date of incident, he did not meet any other person except Dinesh and Subhash as people were busy in planting potato and groundnuts crops. He stated that at the place of incident, only three persons were present.

He further stated when accused person fired and then he had seen towards the place of incident. He stated that three shots were fired by the accused person and deceased-Muddu did not receive any firearm injury because he was running. This witness stated that he had not seen any empty cartridge at the spot and deceased – Muddu ran towards North of the place of incident. He pleaded ignorance about the colour of the clothes worn by the deceased. He also pleaded ignorance as to who had come to report the matter to the police. However, he stated that the police came at the spot after about half an hour. He further stated that due to firing he ran away from the spot. He denied the suggestion that he along with Subhash had killed Muddu and he had gone to Delhi to save his skin. He further pleaded ignorance that he has no knowledge whether Muddu was killed by Subhash or any other person as after 4 days of the incident, he had gone to Delhi.

17. Tejpal Singh (PW-7) stated that he conducted the further investigation of the case and obtained the Non-bailable warrants of Mahfooz which is Ex.Ka-15 and thereafter the investigation was transferred to S.H.O. Dayanand.

18. Thereafter, the statement of the appellant under Section 313 Cr.P.C. was recorded, in which all the incriminating evidence was put to him. He denied all the allegations and stated that due to party faction he had been falsely implicated in the present case. No defence evidence was led.

19. Thereafter, the Trial Court vide impugned judgement convicted the appellant and sentenced him to life imprisonment as mentioned above.

20. Counsel for the appellant has argued that strangely two persons were murdered i.e. Dinesh who is brother of the informant and Muddu who is the brother of the accused-appellant, however, despite the fact that the panchayatnama of Muddu was conducted, his post-mortem was conducted as per the statement of PW-2 but despite a cognizable offence being committed, no F.I.R. was registered regarding the murder of Muddu and defence set up by appellant is that PW-1 and PW-6 murdered Muddu and police did not register F.I.R. to save them.

21. It is next argued that the Trial Court has disbelieved the statement of Naresh (PW-6). The reason for disbelieving this witness is that he is not an eye-witness, therefore, he has not given any statement to the Investigating Officer during investigation. This witness has stated that immediately after the incident, he had gone to Delhi and returned after six years and, therefore, the Trial Court has disbelieved the statement of this witness. Counsel submits that however the perusal of the statement of PW-6 proves that even PW-1 is also not an eye-witness. Counsel submits that perusal of statements of PW-1 and PW-6 reveals that both of them stated that they were 20-25 feet behind the deceased, Dinesh. As per PW-1, Muddu caught hold of Dinesh and Mahfooz fired from country made pistol and PW-6 stated that Muddu and Dinesh had first altercation with each other and they were fighting with each other. Therefore, there is material contradictions in the statements of both the witnesses i.e. PW-1 and PW-6.

22. It is next argued that the statement of PW-6, which is disbelieved by the trial court, otherwise proves the innocence of the appellant as both PW-1 and PW-6 have

stated that after firing upon Dinesh, mob gathered and caught hold of Muddu, brother of the appellant and by giving him beatings, he was also murdered.

23. Learned counsel argues that it has come in the statement of PW-1 that about 500 persons gathered at the spot, who gave beating to Muddu, causing multiple injuries on his entire body, proves that it was Muddu who committed the murder and that is why he was beaten to death.

24. Learned counsel submits that this fact is also proved from the statement of PW-6- Naresh as he has stated in the cross-examination that at the spot, Muddu and Subhash had a scuffle with each other and thereafter, a shot was fired resulting into death of Dinesh. It is also argued that even this witness also stated that Muddu tried to escape but was overpowered by people and was beaten to death whereas the appellant-Mahfooz was never apprehended at the spot.

25. Learned counsel thus submits that though PW-6 is disbelieved by the trial court for a different reason, however, the material contradiction in the statements of informant- PW-1 and PW-6 show that a dispute occurred between deceased Muddu, brother of the appellant and deceased-Dinesh, brother of the informant and by firing upon Dinesh, he was murdered and later on, the mob gathered and caught hold of Muddu and he was beaten to death. PW-6 even stated that only three persons were there at the spot. It is thus argued that the case of the prosecution is highly suspicious about both PW-1 and PW-6.

26. Learned counsel has further submitted that even PW-1, in the complaint given to the police Ex.Ka.1 stated that Muddu was also given beatings by the mob and he was also murdered, however, no FIR was registered in this regard by the police which also shows that the police has not conducted a fair and impartial investigation. Learned counsel has referred to the statement of PW-1 where he has stated on the date of incident, his brother- Dinesh had gone to the market at about 1:00 PM whereas he had gone to market at about 2:00 PM. It is argued that this fact also proves that PW-1 is also not an eye-witness.

27. Counsel has next argued that no recovery of any firearm was effected from the appellant and in fact no recovery of any weapon was effected during investigation. It is also argued that even the empty cartridges were not recovered by the police or were not sent for forensic examination.

28. It is submitted that it has come in the statement of PW-2 that there was no tattooing or blackening on the entry wound i.e. injury no.1, caused by firearm. It is submitted that the occular version of the prosecution do not corroborate the medical version as PW-1 has stated that from point-blank range, the fire was shot upon deceased- Dinesh but as per the statement of PW-2, Dr. Narendra Kumar, it is not proved.

29. Learned counsel has next argued that PW-3 who prepared the Panchayatnama of both the deceased persons i.e. Muddu, brother of the appellant and Dinesh, brother of the informant, stated that at the first instance, he has prepared the Panchayatnama of Muddu at about 18:45 PM and then the dead body was sent for post-mortem examination. Thereafter, he prepared the Panchayatnama of Dinesh at about 8:00 PM after preparing the Panchayatnama of deceased Muddu.

30. It is also argued that in the similar way as per the statement of PW-2, Dr. Narendra Kumar, who conducted the post-mortem of both the deceased persons i.e. Muddu and Dinesh, however, at the first instance he conducted post-mortem of Muddu and prepared a report at about 2:45 PM on 20.10.2006 i.e. after four days of the incident and found as many as seven multiple injuries on the body of Muddu. This witness stated that on injury no.1, there was multiple fractures on the temporal, parietal, mandible and maximal bones and even the membranes of brain were torn. Similarly, there was some other injuries on the neck, chest, stomach of the dead body and all the ribs were broken. There was injuries on the legs and back as well. It is further argued that this witness also stated that on the same day, he conducted the post-mortem of Dinesh and found a single entry wound in the chest cavity of Dinesh. In cross-examination, this witness stated that both Muddu and Dinesh have died at almost same time and there was no blackening or tattooing on the injury sustained by Dinesh and no smell of gun powder was there.

31. It is thus argued that the prosecution has failed to prove whether Muddu was murdered prior to murder of Dinesh or subsequent thereto, as no eye-witness of the vicinity was examined by the prosecution to prove this fact especially when PW-6 has been disbelieved by the trial court.

32. Learned counsel submits that in fact the appellant was not present at the spot and he was arrested after one year of incident on 13.10.2007 and no recovery of firearm was effected from him, therefore, his presence at the spot is not proved by the prosecution as no scientific investigation was conducted to prove his presence at the spot.

33. Learned counsel submits that PW-7- Tejpal Singh, SHO stated that the incident pertains to 16th October 2006 and as per PW-7, the appellant was arrested after one year on 13.10.2007, by one SHO, Dayanand Singh, however, Dayanand Singh was never examined as witness though he concluded the investigation and submitted the charge-sheet.

34. It is thus argued that the entire investigation by the police is tainted as no FIR was registered regarding the murder of Muddu, the arrest of the appellant was made after one year, no weapon of offence was recovered, PW-6, eye-witness has already been disbelieved by the trial court and statement of doctor does not corroborate the version of PW-1- informant that from point blank range fire was shot upon the deceased and therefore, the appellant be acquitted.

35. It is worth noticing that the appellant is in custody since 13.10.2007 i.e. for a period of 17 years of actual sentence and 19 years of total sentence including remission. This appeal is being prosecuted by the High Court Legal Services Committee, by appointing a Legal Aid Counsel and the appellant has no criminal history and despite this case is being falling under the policy of the Government for premature release, as per the information supplied by the State Counsel, is not being processed by Jail Authorities.

36. After hearing counsel for the parties and on re-appreciation of the entire evidence, we find merit in the present appeal for the following reasons:

A. There are material contradictions in the statement of informant-PW-1 and eye-witness- PW-6.

B. The prosecution has failed to explain why no FIR was registered with regard to murder of Muddu, brother of the appellant, who according to PW-6 had a scuffle with deceased – Dinesh at the place of incident when, deceased Dinesh, brother of informant, was fired by the appellant and murdered.

C. It is the case of the prosecution that many people at the spot caught hold of Muddu and gave him merciless beatings with sticks and iron rods which resulted into breaking of all the bones of his body, he was murdered at the spot but no police action was taken despite a cognizable offence was committed.

D. The appellant was never arrested at the spot and was arrested after one year of incident and no firearm was recovered from him.

E. The police did not recover any empty cartridge at the spot and never sent it for forensic examination.

F. As per PW-1, the firearm injury was caused to deceased Dinesh from point blank range whereas the statement of PW-2- Doctor who conducted the post-mortem reflects that no blackening or tattooing was found which show that the fire was shot from a distance.

G. As per the I.O., PW-3, he first prepared the Panchayatnama of Muddu, brother of appellant, and then of Dinesh, brother of the informant. Even PW-2, Dr. Narendra Kumar who conducted the post-mortem stated that he first conducted the post-mortem of Muddu and then of Dinesh, which raises a suspicion that Muddu was murdered prior to murder of Dinesh and in the absence of any FIR or investigation being conducted regarding death of Muddu who was beaten to death by the mob at the spot, it is apparent that no proper investigation was conducted by the police. Therefore, the appellant is entitled to be given benefit of doubt.

H. Lastly, the appellant is in judicial custody for 17 years of actual sentence and 20 years of total sentence with remission, having no criminal history, as per the State police is entitled to pre mature release but is case was never processed.

37. In view of above, we allow this appeal and set aside the impugned judgment of conviction and order of sentence.

38. The appellant who is in judicial custody be released forthwith, if he is not involved in any other case.

39. Record and proceedings of the Trial Court be transmitted to it forthwith.

40. The fee of Sri Ajay Shankar, learned legal aid counsel, be released by the High Court Legal Services Committee.

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**(2024) 10 ILRA 12**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 16.10.2024**

**BEFORE**

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

First Appeal From Order Defective No. 129 of 2024

**Ms. Supreme Transport Co., Lucknow ...Appellant**

**Versus**

**Smt. Suman Devi & Anr. ...Respondents**

**Counsel for the Appellant:**
Afaq Zaki Khan

**Counsel for the Respondents:**

**Civil Law - Motor Vehicle Act, 1988 - Sections 165, 166 & 140 - Condonation of delay - Plea of Pardanashin lady not taken in affidavit filed along with application for condonation of delay, but such was taken in supplementary affidavit without disclosing as to she was Pardanashin lady - Not taken earlier before Tribunal - A litigant, who was negligent that he/she would not inquire for status of case for such a long period in which allegations are against him/her and he/she has put in appearance and filed written St.ment and documents, was not prevented from preferring appeal in time - Appellant failed to show even a single ground for condonation of such a long delay of 3107 days and destroy right of parties - Failed to disclose that who was person on whose shoulder he has put burden of such a long delay even for period of four years after his death, therefore, grounds are nothing but concocted story to get delay of such a long period condoned in matter of accident claim, in which he had contested case throughout and after affording sufficient opportunity of hearing, tribunal passed impugned award. (Para 7, 8, 14)**

**Appeal Dismissed.** (E-13)

**List of Cases cited:**

1. Maniben Devraj Shah Vs Municipal Corpn. of Brihan Mumbai, (2012) 5 SCC 157, (Para 24, 25)

2. K.B. Lal (Krishna Bahadur Lal) Vs Gyanendra Pratap & ors.; 2024 (42) LCD 828, (Para 10)

3. Sheo Raj Singh & ors.Vs U.O.I.& anr..; (2023) 10 SCC 531, (Para 31, 32)

4. N. Balakrishnan Vs M. Krishnamurthy; AIR 1998 Supreme Court 3222

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

***(Application No.IA/1/2024)***

1. Heard Shri Aftab Zaki Khan, learned counsel for the appellant.

2. This highly belated F.A.F.O. under Section 173 of the Motor Vehicles Act, 1988 has been preferred against the judgment and order dated 01.01.2014 passed in claim petition no.276 of 2012 (Suman Devi Vs. M/S Supreme Transport Company and Another) under Section- 165, 166 and Section 140 of Motor Vehicle Act, 1988 by Motor Accident Claim Tribunal/ District Judge, Lucknow alongwith an application for condonation of delay in filing appeal.

3. The office has reported a delay of 3107 days in filing the appeal. The appeal under Section 173 of Motor Vehicles Act, 1988 may be preferred within ninety days from the date of award. Second proviso to Section 173 provides that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. Therefore, this Court has to see as to whether the appellant was prevented by sufficient cause from preferring the appeal within time or not.

4. The ground for condonation of delay has been given in paragraph nos.3, 4 and 5, which are extracted here-in-below:-

*"3. That, in this case during pendency of claim petition after filing the objection against the claim petition counsel of appellant has never informed the appellant about the status of the claim petition.*

*4. That, One Sri. Sujaudin was doing pairvi from the side of appellant and he expired 4 years ago.*

*5. That, the appellant was not aware about the Judgement and award dated 01-01-2014 and first time he came to know about the judgement when recovery notice has been issued on 22-07-2024 and served upon him on 30-07-2024. Copy of recovery letter and notice are being annexed as annexure no.1 to this affidavit."*

5. Since the ground was not sufficient for such a long delay, therefore, the appellant after arguing at some length had prayed for and was granted time on the last date for filing better affidavit in support of the application for condonation of delay. The appellant has filed a supplementary affidavit in support of application for condonation of delay. The supplementary affidavit indicates further grounds in paragraph nos.3 and 4, which are extracted here-in-below:-

*"3. That, one Shujauddin, who was doing pairavi on behalf of the appellant before the M.A.C.T expired on 21.07.2020 but his family member could not obtain the Death Certificate from Nagar Nigam as such it was not necessary for them.*

*4. That, it is also pertinent to mention here that Appellant is a Pardanashin Lady and Husband of the Appellant namely Mohammad. Laiq Khan has also expired during Covid-19 on 20.05.2021, as such appellant was in Trauma, therefore delay has been caused."*

6. In view of above, it is apparent that no ground for condonation of such a long period has been given. Only pleas have been taken that the counsel had never informed about status of claim petition and one Shri Sujauddin was doing pairvi from the side of the appellant and he died four years ago. Who was Sujauddin and why he was doing Pairvi on behalf of the appellant, when the case was contested by the appellant before the tribunal by filing written statement and the relevant documents on record and husband of appellant was alive, have not been disclosed? Even otherwise, as per own admission of the appellant, the said Sujauddin had died on 21.07.2020 i.e. after more than six years of passing of the impugned judgment and award and since then also more than four years have passed. Therefore firstly it has not been disclosed as to who was Sujauddin and why he was doing Pairvi. Even if any such person was doing Pairvi, then the plea that the counsel had not informed about claim petition to the appellant is not tenable. Secondly, if any such person was doing Pairvi, this Court is unable to comprehend that he would not have told to the appellant about the status of claim petition because without instruction and support of the appellant he would not have been doing Pairvi of case. Even otherwise if the appellant had not tried to know about the status of case for such a long period and even after his death in 2020, the appellant has been thorough negligent in doing Pairvi of case and it can not be said that the appellant was prevented from sufficient cause in preferring appeal in time.

7. Plea of Pardanashin lady was not taken in the affidavit filed in support of the application for condonation of delay but a plea has been taken in supplementary affidavit without disclosing as to how the appellant is Pardanashin lady. Even otherwise she is the sole proprietor of the appellant transport company as admitted by learned counsel for the appellant, therefore, it is apparent that the plea has been taken only because the grounds taken by the appellant in the affidavit filed in support of

the application for condonation of delay are not sufficient. On a query being put as to whether the plea of Pardanashin was taken before the tribunal or not also, learned counsel for the appellant has not given any reply. However, the impugned judgment and award does not indicate that any such plea was taken before the tribunal, therefore, it is nothing but an after thought just to get the delay condoned in this appeal.

8. In view of above, the grounds taken by the appellant of such a long delay are not sufficient to condone the delay. A litigant, who is such negligent that he/she would not inquire for the status of case for such a long period in which the allegations are against him/her and he/she has put in appearance and filed written statement and documents, can not be said to was prevented from sufficient cause from preferring appeal in time because if he/she has not pursued the case diligently and has been negligent in doing so can not be said to have been prevented, therefore the grounds taken are nothing but excuses for such a long delay. Such a litigant is not entitled for any discretion of Court. Therefore no fruitful purpose will be served even by issuing notices to the respondents for calling objection on the application for condonation of delay, when this Court is satisfied that the grounds taken for condonation of delay of such a long period are not sufficient at all.

9. The Hon'ble Supreme Court, in the case of **Maniben Devraj Shah Vs. Municipal Corpn. of Brihan Mumbai, (2012) 5 SCC 157,** has held that if the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. The relevant paragraphs 24 and 25 are extracted here-in-below:-

*"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.*

*25. In cases involving the State and its agencies/instrumentalities, the court can take note of the fact that sufficient time is taken in the decision-making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."*

10. The Hon'ble Supreme Court, in the case of **K.B. Lal (Krishna Bahadur Lal) Vs. Gyanendra Pratap and Other; 2024 (42) LCD 828**, has held that the discretionary power of a court to condone delay must be exercised judiciously and it is not to be exercised in cases where there is gross negligence and/or want of due diligence on part of the litigant. The relevant paragraph 10 is extracted here-in-below:-

*10. There is no gainsaying the fact that the discretionary power of a court to condone delay must be exercised judiciously and it is not to be exercised in*

*cases where there is gross negligence and/or want of due diligence on part of the litigant (See Majji Sannemma @ Sanyasirao v. Reddy Sridevi & Ors. (2021) 18 SCC 384). The discretion is also not supposed to be exercised in the absence of any reasonable, satisfactory or appropriate explanation for the delay (See P.K. Ramachandran v. State of Kerala and Anr., (1997) 7 SCC 556). Thus, it is apparent that the words 'sufficient cause' in Section 5 of the Limitation Act can only be given a liberal construction, when no negligence, nor inaction, nor want of bona fide is imputable to the litigant (See Basawaraj and Anr. v. Special Land Acquisition Officer., (2013) 14 SCC 81). The principles which are to be kept in mind for condonation of delay were succinctly summarised by this Court in Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors., (2013) 12 SCC 649, and are reproduced as under:*

*"21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice. 21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation. 21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*

*21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.*

*21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*

*21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice. 21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

*21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

*21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration.*

*It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

*21.10. (x) If the explanation offered is concocted, or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

*……." (emphasis supplied)*

*Having perused the application under Order IX, Rule 7 of the CPC dated 23.11.2020, filed by the appellant, and the accompanying affidavit, wherein the appellant had sought the benefit of Section 5 of the Limitation Act, for condonation of a delay of almost 14 years, we find there*

*was no satisfactory or reasonable ground given by the appellant explaining the delay. We say this for two reasons. First, it is an admitted position by the appellant himself that upon an inspection of the case file in the year 2011, he came to know about the order dated 06.09.2006, by which the Trial Court had decided to proceed ex-parte against him. What prevented the appellant from filing the application under Order IX, Rule 7 that year itself has not been satisfactorily explained at all, as the first application was only filed in the year 2017. Secondly, the explanation offered by the appellant, which is that the advocate appointed by him did not pursue the matter diligently, and then another advocate was appointed by him who inadvertently forgot to file the application does not find support from the records. What is clear is that the appellant has been grossly negligent in pursuing the matter before the trial court. Thus, the trial court, the revisional court as well as the High Court, were correct in dismissing the belated claim of the appellant. We find no reason to interfere with the impugned order dated 19.05.2022 of the High Court of Judicature at Allahabad.*

*The appeal stands dismissed."*

11. This Court has to see the sufficient 'explanation' for condonation of delay and not the 'excuses' for condoning the delay as held by the Hon'ble Supreme Court in the case of **Sheo Raj Singh & Others Vs. Union of India and Another; (2023) 10 SCC 531**. The relevant paragraphs 31 and 32 are extracted here-in-below:-

*"31. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an "explanation" and an "excuse". An "explanation" is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must, however, be taken to distinguish an "explanation" from an "excuse". Although people tend to see "explanation" and "excuse" as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real.*

*32. An "excuse" is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an "excuse" would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication."*

12. Learned counsel for the appellant relying on the judgment of the Hon'ble Supreme Court, in the case of **N. Balakrishnan Vs. M. Krishnamurthy; AIR 1998 Supreme Court 3222**, submits

that the delay may be condoned and appeal may be heard and decided on merit.

13. The Hon'ble Supreme Court, in the aforesaid case relied by learned counsel for the appellant, has held that Rules of Limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time. This case is not of any help to the appellant for condoning delay of such a long period. The relevant paragraph is extracted here-in-below:-

*"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."*

14. In view of above, the delay can be condoned if sufficient ground is shown for condonation of delay. However as indicated above, what to say of sufficient ground, the appellant has failed to show even a single ground for condonation of such a long delay of 3107 days and destroy the right of parties. He has even failed to disclose as to who was the person on whose shoulder he has put the burden of such a long delay even for the period of four years after his death, therefore, the grounds shown by the appellant are nothing but a concocted story to get the delay of such a long period condoned in the matter of accident claim, in which he had contested the case throughout and after affording sufficient opportunity of hearing the tribunal passed the impugned judgment and award.

15. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that the appellant has failed to show that the appellant was prevented from sufficient cause to file the appeal and only excuses have been given, therefore, the application for condonation of delay is misconceived and liable to be dismissed.

16. The application for condonation of delay is **dismissed.**

17. Consequently, the appeal is **dismissed.**

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**(2024) 10 ILRA 18**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.10.2024**

**BEFORE**

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

Special Appeal No. 963 of 2024

**Mrs. Jayshree Kailash Wani ...Appellant**
**Versus**
**Official Liquidator ...Respondent**

**Counsel for the Appellant:**
Amit Krishna

**Counsel for the Respondent:**
Arnab Banerji

**A. Civil Law - Allahabad High Court Rules-Chapter VIII, Rule 5-Companies Act,1956-Section 483-The assets of M/s Ganga Asbestos Cement Pvt. Ltd. Under liquidation, were auctioned via e-auction in 2022 on an "as is where is and whatever there is" basis-Appellant emerged as the highest bidder with a bid of Rs. 51 crores and was required to deposit the full amount within 60 days from july 26,2023-After failing to meet the initial deadline , she received a one-month extension on 1 december 2023, with a clear warning of no further extensions-on September 2, 2024 the appellant filed another extension application, citing undisclosed defects on the auctioned land-this application was rejected by the Company Judge on 12 Sep. 2024-the respondent stated that auction terms clearly allowed site inspection, which the appellant neglected-Held, the e-auction terms explicitly stated the "as is where is" basis and the appellant had a chance to inspect the property before bidding, failure to deposit the bid amount despite multiple opportunities constituted a breach of obligations-rewriting auction terms to accommodate the appellant's conditions was beyond the court's domain-Hence, the court upheld the rejection of time extension application, emphasizing the appellant's negligence and the binding nature of auction terms.(Para 1 to 28)**

**The writ petition is dismissed.** (E-6)

**List of Cases cited:**

1. Llovegeet Dhuria Vs SBI & ors.(2022) 0 Supreme(P&H) 728

2. S.K.Bakshi Vs PNB & ors.(2022) 0 Supreme(J&K) 731

3. M/s Kalyani(India) Pvt.Ltd. Vs PNB, Branch Mgr. PNB(2024) Law Suit(Del) 176

4. Palika Towns LLP Vs St. of U.P. & ors.(2022) 7 ADJ 331(DB)

5. Neutral Citation No.-2024:AHC-LKO:68457

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This intra-court appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules read with Section 483 of the Companies Act, 1956 is against the order of the Company Judge dated 12.9.2024 whereby the Civil Misc. Application No.46 of 2024 preferred by the appellant seeking extension of time to deposit the bid amount in pursuance of the orders dated 26.7.2023 and 1.12.2023 of the Company Court was rejected.

**Facts**

2. Broadly, the facts of the case are that M/s Ganga Asbestos Cement Pvt. Ltd. ( In short 'Company') was directed to be wound up by the Company Judge by order dated 25.4.1995. Thereafter, the Company Judge on 29.11.2022 directed for e-auction of the assets of the company in liquidation situate in Village Dariyapur, District Raebareilly.

3. An e-auction notice came to be published in the year 2022 for auctioning of the land measuring 9.211 hectares or 92110 sq. meters containing a reserved price of Rs.15 crores. As per the e-auction notice the earnest money being 10% of the reserved price was Rs.1.5 crores and the date and the time of the inspection of the demised property which was put to auction was scheduled on 2.1.2023 and 3.1.2023 from 11.00 a.m. to 5.00 p.m. The date of submitting the earnest money deposit was

9.1.2023 upto 5.00 p.m. and the bidding was scheduled on 10.1.2023 upto 6.00 p.m.

4. The appellant herein, participated in the e-auction and bidded for Rs. 51 crores which was stated to be highest. On 26.7.2023 the bid of the appellant came to be accepted by the Company Court and an order is stated to have been passed in Misc. Company Application No. 3 of 1995 on 26.7.2023 which is as under:-

*"In Re: Civil Misc. Recall Application No. 40 of 2023*

*Heard Sri Udayan Nandan, learned counsel for the applicant.*

*The recall application is misconceived and is hereby dismissed.*

*In Re: Civil Misc. Application Nos. 36 and 37 of 2023*

*Sri Shashi Nandan, learned Senior Advocate assisted by Sri Udayan Nandan, learned counsel appearing for M/s. Garnet Shelters Pvt. Ltd., Sri Amit Krishna, learned counsel for Mrs. Jayshree Kailash Wani and Sri Arnab Bannerji, learned counsel for Official Liquidator are present. Sri O.P. Mishra, Advocate has also appeared for Kotak Mahindra Bank.*

*The representatives of two companies, M/s. Garnet Shelters Pvt. Ltd. and Mrs. Jayshree Kailash Wani are present in the chamber. The bidding was made which was carried to several rounds and finally bid was settled in favour of Mrs. Jayshree Kailash Wani at Rs.51 crores.*

*The highest bidder is directed to deposit the entire amount of the bid within a period of 60 days from today failing which the earnest money deposited shall be forfeited.*

*The earnest money which is deposited with Rail Tel Corporation of India Ltd. by M/s. Garnet Shelters Pvt. Ltd. shall stand refunded to the company, M/s. Garnet Shelters Pvt. Ltd., within 15 days from today along with interest.*

*The application nos. 36 and 37 of 2023 stand disposed of."*

5. As per terms and conditions of the e-auction as well as the order of the Company Court dated 26.7.2023 in Misc. Company Application No. 3 of 1995 the appellant was requuired to deposit the entire amount of the bid within a period of 60 days from the passing of the order dated 26.7.2023, failing which the earnest money deposited was to be forfeited.

6. The appellant, thereafter, preferred a Civil Misc. Time Extension Application No.42 of 2023 before the Company Court in Misc. Company Application No.3 of 1995 in which on 1.12.2023 the following order was passed:-

*"Order on Civil Misc. Time Extension Application No.42 of 2023*

*Heard Sri Amit Krishna, learned counsel for the applicant and Sri Arnab Banerjee, learned counsel for the Official Liquidator.*

*This is an application seeking extension of time by the applicant who was the highest bidder in the auction conducted on 26th July, 2023. The applicant, being the highest bidder, was required to deposit the bid amount, within 60 days. The said amount was not deposited by the applicant within the time framed and this application has been moved for seeking extension of time.*

*This Court finds that the amount was to be deposited by 25th September, 2023 and more than four months have elapsed since the auction has taken place, but the applicant has not deposited any amount.*

*As a last opportunity, the applicant is granted one month's time to deposit the entire amount, out of which, half of the amount shall be deposited by 15th December, 2023 and balance amount shall be deposited within next 15 days.*

*In view of the said fact, application stands disposed of.*

*It is made clear that no further time will be granted to the applicant, in case he fails to deposit the required amount."*

7. Thereafter, the second time extension application came to be filed by the appellant on 2.9.2024 seeking further extension of time to deposit the bid amount in pursuance of the order dated 26.7.2023 and 1.12.2023 passed by the Company Court which came to be numbered as Civil Misc. Application No.46 of 2023. The said application was rejected by the Company Judge on 12.9.2024.

8. Questioning the order dated 12.9.2024 rejecting the Time Extension Application No. 46 of 2024 the present intra-court appeal has been preferred by the appellant.

**Submission of counsel for Appellant**

9. Sri Amit Krishna, learned counsel for the appellant has sought to argue that the order of the Company Judge rejecting the Civil Misc. Application No.46 of 2024 for extension of the time to make the payment of bid amount cannot be sustained for a single moment inasmuch as the Company Court has misconstrued the entire case and has adopted an incorrect approach. Elaborating the said submission, it has been submitted that pursuant to the e-auction notice, the appellant participated in the auction. He was found to be the highest bidder offering Rs.51 crores. According to him the appellant has also deposited the earnest money, however, due to the ill-health of the appellant he could not make the site inspection of the demise property which was scheduled on 2.1.2023 and 3.1.2023 however, when for the first time spot inspection was made on 18.11.2023 then it was found that there existed a drainage of Nagar Palika/Nagar Nigam, Raebareilly which was utilized for flushing the waste of AIMS, Raebareilly, which was flowing in the middle of the auctioned land. The total area/land on which the said drainage was constructed is measuring 18,436 sq. feets. Apart from this, there also existed one pond of about one bigha which had already been allotted for fishery purposes to individuals by the State Government. Besides the same, there was a substation of 33 KV of AIMS Raebareilly, constructed in the middle of the auction land. Submission is that the said aspects were neither depicted nor disclosed in the auction notice and it was rather element of surprise for the appellant to know about the existence of the same. Contention is that had the appellant being apprised about the said facts while mentioning in the e-auction notice, he would have not participated in the bid.

10. Reliance has also been placed upon the decision in **Llovegeet Dhuria v. State Bank of India & Ors. 2022 0 Supreme (P & H) 728, S.K. Bakshi v. Punjab National Bank & Ors, 2022 0 Supreme (J&K) 731 and M/s Kalyani (India) Private Limited v. Punjab National Bank; Branch Manager Punjab National Bank 2024 Law Suit (Del) 176** so as to contend that the e-auction notice is required to disclose all information and suppression of any vital fact makes it fatal. In nutshell, the submission is that on

account of non-disclosure of the said vital facts, fraud has been practised upon the appellant.

11. In order to show bona fides it is being argued that the appellant has arranged the amount Rs.49,40,000,00/- and the photocopy of the cheques have already been appended along with the memo of the appeal and the same would be paid in case the said obstructions are removed from the auctioned land. It is thus prayed that the order of the learned Single Judge be set aside and the appeal be allowed in toto.

**Submission of counsel for Respondents**

12. Countering the submissions of the learned counsel for the appellant Sri Arnab Banerjee, who appears for the Official Liquidator, has submitted that the order of the Company Judge needs no interference in the present appeal. He has further submitted that the appellant is a defaulter and he is not entitled to any relief whatsoever. Submission is that the e-auction notice itself provided for grant of opportunity for inspection and the date fixed was on 2.1.2023 and 3.1.2023 between 11 a.m. to 5 p.m. and it was always open for the appellant to have inspected the premises in question and thereafter participate in the auction as the date of submission of the earnest money was 9.1.2023 and the bidding was scheduled on 10.1.2023.

13. According to the counsel for the Official Liquidator the terms and the conditions of the e-auction itself provided that the same was "AS IS WHERE IS AND WHATEVER THERE IS BASIS" According to him once the appellant participated in the bid with open eyes then it is not open for him to resile and question the auction proceedings.

14. Contention is that on 26.7.2023 the bid of the appellant stood accepted by the Company Judge, with the stipulation that the bid amount was to be paid within a period of 60 days from the said date failing which the earnest money deposited shall stand forfeited and thereafter on 1.12.2023, another Time Extension Application No.42 of 2023 came to be preferred by the appellant and on his request one more opportunity was accorded to him to deposit the entire amount out of which half of the amount was to be deposited by 15.12.2023 and balance amount within next 15 days with a clear stipulation that no further time would be granted. However, the appellant instead of honouring the undertaking given before the Company Judge has now filed another application seeking extension of time for making the payments that too conditional after a period of 9 months on 2.9.2023 which was not maintainable and it has been rightly rejected by the Company Judge. Therefore, the appellant is not entitled to any relief and the appeal is to be dismissed.

15. Before delving into the tenability of the arguments advanced by the rival parties, it would be apposite to reproduce the relevant extract of the auction notice and the terms and the conditions of the auction notice:-

**E-Auction Notice**

*"Pursuant to order dated 29.11.2022 passed by the Hon'ble High Court of Judicature al Allahabad in M.C.A. No. 3 of 1995, following immovable assets (land) of M/s Ganga Asbestos Cement Ltd. (In Liquidation) situated at Village*

*Dariyapur, District - Raebareilly (U.P.) will be put to sale on "as is where is basis and whatever there is basis" through e-auction.*

*Description*

| *Assets* | *Reserved Price (In Rs.)* | *Earnest Money 10% (In Rs.)* | *Date and time of Inspection* |
|---|---|---|---|
| *Land measuring 9.211 hectare Or 92110 Sq.mtr.* | *15 Crores* | *1.50 Crores* | *02.01.2023 & 03.01.2023 (11:00 AM to 05:00 PM)* |

*Date of submitting the E.M.D. 09.01 2023 upto 5.00 PM*

*Date of bidding:- 10.01.2023 up to 06.00 PM.*

*All the details along with terms and conditions of e-auction are available on poral https://olauction.enivida.com of M/s Rail Tail Corporation Ltd. For queries with regard to said e-auction contact no. (i) _____(ii) _____ & (iii)011-49606060. The details also available on www.mca.gov.in (website of MCA)*

*RAJNEESH KUMAR SINGH*
*OFFICIAL LIQUIDATOR"*

**Terms and Conditions of Auction**

*"E-Auction bids are invited for sale of movable / immovable properties of M/s Ganga Asbestos Cement Ltd. (in liquidation) by office of Official Liquidutor (OL)Attached to Hon'ble Allahabad High Court on "AS IS WHERE IS AND WHATEVER THERE IS BASIS". It would be deemed that by submitting the Bid request, the bidder has made a complete and careful examination of the Property and has satisfied himself/itself of all the relevant and material information in relation to the Property. The Hon'ble High Court has absolute right to accept or reject the bid requestor adjourn, postpone, extend the auction without assigning any reasons whatsoever and no objections will accrue in such an event. No encumbrances in relation to the above mention properties are known to OFFICIAL LIQUIDATOR (OL) and Hon'ble High Court vide its order dated 29.11.2022 had authorized Railtel to conduct E-Auction proceeding and interested bidders are requested to file their bids on RailteleNivida portal i.e. https://olauction.enivida.com."*

16. We have heard the learned counsel for the parties and have perused the record carefully.

17. The facts are not in issue. It is not in dispute that pursuant to the order dated 29.11.2022 of the Company Judge e-bids were invited for sale of movable and immovable properties of the company in liquidation by the official liquidator. It is also not in dispute that e-auction notice came to be issued in the year 2022 for auctioning the land (assets) of the company in liquidation being land admeasuring 9.211 hectares or 92110 sq. meters, the reserved price was Rs.15 crores and the earnest money, being Rs.1.5 crores. In order to enable bidders to have and over all view 2.1.2023 and 3.1.2023 was that date fixed for inspection of the premises in question from 11.00 a.m. to 5.00 p.m. The date of submission of the earnest money deposit was 9.1.2023 upto 5.00 p.m. The date of bidding was 10.1.2023 upto 6.00 p.m.

18. It is admitted to the appellant that he participated in the e-auction and his bid was found to be highest to the tune of Rs.51 crores. On 26.7.2023 company court accepted the bid of the appellant directing him to deposit entire amount of the bid within a period of 60 days from the said

date failing which, the earnest money deposited shall be forfeited.

19. The appellant preferred a Civil Misc. Time Extension Application No.42 of 2023 before the Company Judge seeking further time to deposit the bid amount. On the said application, the Company Judge on 1.12.2023 as a last opportunity, granted one months time to the appellant to deposit the bid amount out of which the half was directed to be deposited by 15.12.2023 and the balance amount within next 15 days with a clear stipulation that no further time shall be allowed to the appellant in case he fails to deposit the required amount. The orders dated 26.7.2023 and 1.12.2023 has attained finality, as it has been apprised to the Court that the same has not to been put to challenge. However, now after a period of approximately nine months on 2.9.2024, the second Time Extension Application came to be filed by the appellant, Civil Misc. Application No.46 of 2024 seeking further time to deposit the bid amount taking a stand that since the e-auction notice did not disclose the facts that there exist a drain, pond and a sub-station of the electricity department, thus the appellant was kept in dark and the appellant is agreeable to make the payment of the entire bid amount subject to removal of the obstructions from the auction land. The said application has been rejected.

20. Apparently, we find that the e-auction notice itself provided for an opportunity to the appellant to make an inspection of the site in question on 2.1.2023 and 3.1.2023 i.e. much before the date of the submission of the earnest money i.e. 9.1.2023 and the date of the bid which was on 10.1.2023. The terms and the conditions of the e-auction itself contained a stipulation that the auction was "AS IS WHERE IS AND WHATEVER THERE IS BASIS" and it would be deemed that by submitting the bid request the bidder has made a complete and careful examination of the property and has satisfied himself/itself of all the relevant and material information in relation to the property.

21. Pertinently, the appellant for the reasons best known to him had not made physical inspection of the property in question before auction, however, it has come on record that for the very first time inspection was conducted by the appellant on 18.11.2023 as apparent from para 6 of the application preferred seeking extension of time to make deposit of the bid amount.

22. Certainly, for the inaction or lethargy on the part of the appellant, the respondent cannot be held to be responsible. Further more, once the terms and the conditions as set forth in the e-auction notice itself recites that the auction "AS IS WHERE IS AND WHATEVER THERE IS BASIS" then there is no question of non disclosure of the vital fact. Not only this, it is on the instance of the appellant itself that the auction stood settled in his favour by the Company Judge on 26.7.2023 and by order dated 1.12.2023 whereby, on the request of the appellant time was extended for a period of one month to make the entire payments of the bid amount. Once the said orders have been passed on the request and the undertaking of the appellant and have attained finality then it does not lie in the mouth of the appellant to question the auction.

23. A Division Bench of this Court in **Palika Towns LLP vs. State of U.P. and others 2022 (7) ADJ 331 (DB)** had the occasion to interpret "AS IS WHERE IS

AND WHATEVER THERE IS BASIS" while holding as under:-

*31. Apparently the words "AS IS WHERE IS" finds its root in the common law doctrine of "Caveat Emptor" which means "let the buyer beware'. This doctrine puts the duty on the purchaser to carry out all necessary inspection of the property before entering into an agreement. If the purchaser fails to conduct such an inspection, then later, on identification of defects in the property may not be a ground to revoke or claim damages under the contract. In such cases it is presumed that the purchaser had the notice of defects, if any.*

*32. Section 3 of the Transfer of Property Act 1882 incorporates the doctrine of constructive notice under Section 3 which is read as under:-*

*"A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have know it.*

*Explanation II: Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."*

*33. Nonetheless the Transfer of Property Act, 1882, also envisages the duty of the seller to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover. This is, however, subject to the presence of contract to contrary between the parties.*

*34. Now, another facet needs to be examined as to what are the types of defects which a buyer is expected to inquire into before purchasing the property. There are two types of defects namely latent defects and patent defects. Latent defects are such type of defects which are unlikely to be discovered by a purchaser during investigation. On the other hand, the second category is patent defects which are discoverable if the buyer would have carried out inspection. Here in the present case the defects falls under the second category, being patent defects as Court finds that on 24.09.2018 the public announcement was made by Liquidator inviting claims due from the Corporate Debtor wherein in item no. 5 the details of the demised premises in question was given. Further the sale notice for assets of the Corporate Debtor was also published which is annexure- 4 at page no. 45 wherein again description of the land was given. It is a matter of common knowledge that whenever a property is being sought to be sold through auction and the reserve price runs into crores of rupees (which in the present case is 145.67 crores) then it is clearly expected that purchaser might have got carried out inspection of the title deed as well as of the liabilities attached to it. The petitioner herein is a registered liability partnership company duly registered with Government of India Ministry of Corporate Affairs and thus, it becomes highly implorable and inconceivable that the petitioner was not having knowledge about the liability of the Corporate Debtor. The present case can also be analyzed from another point of angle that the petitioner is not a illiterate person but the presumption is that legal option is freely accessible to it. It is not a case wherein the demised premises which is being put to auction is in remote part of the country or there is no via media of getting internal details of the Corporate*

*Debtor and its liabilities particularly when it is a matter of common knowledge that once the demised land is leasehold then obviously an intending party would approach the lessor to get the details with respect to title and position of lease rentals. In other words, this Court cannot peep into mind of the petitioner so as to perceive as to whether any investigation was conducted at the level of intending party or to what extent.*

24. So far as the reliance placed upon the judgements **in Llovegeet Dhuria (Supra), S.K. Bakshi (Supra) and M/s Kalyani (India) Private Limited (Supra)** are concerned, they are not applicable in the facts of the case as the issue involved in those cases was relatable to a pending litigation at the instance of the secured creditor which was not disclosed in the auction notice. However, in the present case, there is no dispute to the ownership and the title of the land in question.

25. Nonetheless, the present case is a classic example of approbating and reprobating at the same time while resiling from an obligation which stood entered at the own volition of the appeal.

26. As regards the submission that the appellant is ready to deposit the bid amount subject to the removal of the obstructions from the auction land is concerned, the same cannot be accepted for the simple reason that it is not within the domain of the Court to re-write the terms and the conditions of the auction which stood settled between the parties.

27. Viewing the case from all the points of angle, we are of the firm opinion that order of the Company Judge dated 12.9.2024 passed in Civil Misc. Application No.46 of 2024 in Company Misc. Application No.3 of 1995 does not suffer from any legal infirmity so as to warrant interference in the appeal.

28. Resultantly, the appeal is **dismissed.**

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**(2024) 10 ILRA 26**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

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

Writ A No. 7076 of 2021

**Samrah Ahmad ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Siddharth Khare, Sr. Advocate

**Counsel for the Respondents:**
Aditya Bhushan Singhal, C.S.C., Pranjal Mehrotra

**Civil Law - Service Law - Recruitment - U.P. Jal Nigam (Urban) and U.P. Jal Nigam (Rural) - Segregation of tainted and untainted candidates - Appointment of Unblemished Candidates - Rejection of Tainted Candidates - Corporation annulled the entire selection and appointment of RGC, AE, JE on the ground that entire selection process stood compromised and it was very difficult to trace out and explain as to at what stage and in what manner manipulations had taken place and it was difficult to identify as to who were the untainted candidates. *Issue:* Whether material discussed in the orders impugned were cogent enough to reach out to a conclusion that entire selection process in respect of vacancies of AE/JE/RGC in question was so much compromised that there left no possibility**

**to segregate tainted from untainted candidates, and was imperative to cancel entire selections and appointments made in respect of those very posts. *Held:* There was sufficient material available with the respondents especially the CFSL report to hold 169 candidates to be tainted candidates and the order impugned therefore, in respect of untainted candidates set aside. Doctrine of impossibility would not attract, once 169 candidates were found to be only candidates with inflated marks during the forensic examination by the established and recognized Central Forensic Laboratory, Hyderabad, there remains nothing further to undertake any enquiry for segregation of tainted and untainted candidates. No finding either by the SIT or the other two in-house inquiry reports which can be indicative of the fact that any other candidate was indulged in any corrupt practice or tried to influence the selectors to award him/her special marks. There was no sufficiency of material collected on the basis of which satisfaction came to be recorded, nor there was any material to be indicative of fact that any candidate in order to find favour committed any kind of fraud in connivance with or in conspiracy with the selectors. SIT report do not indicate of any widespread and systemic level malpractice. Impugned order quashed and as a consequence the Court restored the appointment orders of all those petitioners, who were untainted (other than 169 candidates) and have found place in the merit list and were given appointments. It was provided that petitioners will not be entitled to any arrears of pay for the period they have remained unemployed, but their seniority shall be restored and so also pay protection shall be granted accordingly with notional increments. U.P. Jal Nigam (Urban) and U.P. Jal Nigam (Rural) each directed to adjust 50% of untainted candidates in their respective departments. The adjustment was to be roster based. (Para 375)**

**Allowed.** (E-5)

**List of Cases cited:**

1. Ashok Kumar Yadav Vs St. of Har. & ors., 1997 AIR SC 454

2. Gohil Deshraj Anubhai & ors. Vs St. of Guj. & ors., (2017) 13 SCC 621,

3. St. of Tamilnadu & ors. Vs Kalaimuni & ors., (2021) 16 SCC 217

4. Puneet Bhardwaj Vs Delhi St. Government being Writ – C No. 15270 of 2022

5. R. Premlata & ors. Vs St. of Tamilnadu Writ Petition No. 19939 of 2014 dt 17.11.2022 (Madras HC)

6. Madhya Pradesh Vs Narmada Bachao Andolan & ors. and the connected matters, (2011) 7 SCC 3639

7. IN Re: Special Reference No. 1, (2002) 8 SCC 237

8. U.O.I.Vs O. Chakradhar, (2002) 3 SCC 146

9. M/s. Aptech Ltd. Vs U.O.I., 2021 (1) High Court Cases Del. 580

10. Bank of India Vs Vijay Transport & ors. (2000) 8 SCC 512

11. Indrapreet Khalon & ors. Vs St. of Pun. & ors. 2006 (11) SCC 356

12. Benni TD Vs Registrar Cooperative Societies (1998) 55 SCC 269

13. Omkar Lal Bajaj Vs U.O.I.(2003) 2 SCC 673

14. Joginder Pal & anr. Vs. St. of Pun. (2014) 6 SCC 644

15. St. of N.C.T. Delhi & anr. Vs Sanjeev @ Bittu, (2005) 5 SCC 181

16. Akanksha Yadav Vs St. of U.P. & ors. in Special Appeal Defective No.- 127 of 2023 dt 12.04.2023

17. Ran Vijay Singh & ors. Vs St. of U.P. & ors. (2018) 2 SCC 437

18. Vanshika Yadav Vs U.O.I.& ors.; 2024 SCC Online SC 1870

19. Anamika Mishra & ors. Vs Uttar Pradesh Public Service Commission, Allahabad, 1990 Suppl. SCC 692

20. Kapil Kumar & ors. Vs St. of U.P. & ors., (2023) SCC Online 4024

21. Shri Dhar Yadav & ors. Vs St. of U.P. & ors.

22. Mohinder Singh Gill & anr. Vs Chief Election Commissioner & ors., 1978 (1) SCC 405

23. M/s Aptech Ltd. Vs U.P. Power Corporation & ors., (2019) SCC Online Allahabad 4906

24. Teri Oat ESt.s Pvt. Ltd. Vs Union Territory, Chandigarh, (2004) 2 SCC 130

25. Sachin Kumar & ors. Vs Delhi Subordinate Service Selection Board & ors., (2021) 4 SCC 631

26. R. Prem Lata & ors. Vs St. of Tamilnadu & ors. being Writ No. 19939 of 2014

27. St. of Rajasthan & ors. Vs Heem Singh, (2021) 12 SCC 569,

28. Moni Shankar Vs U.O.I., (2008) 3 SCC 484

29. M. Siddiq (D) through legal representatives Ram Janm Bhumi Temple Case Vs Mahant Suresh Das & ors., (2020) 1 SCC 1

30. N.G. Dastane Vs S. Dastane, (1975) 2 SCC 326

31. Ram Chandra Singh Vs Savitri Devi & ors.; (2003) 8 SCC 319

32. Chittranjan Das Vs Durgapore Project Ltd.: 1995 (2) Calcutta Law Journal 338

33. St. of Chhatisgarh Vs Dhirojo Kumar Sengar; (2009) 13 SCC 600

34. Badami (Deceased) by her L.R. Vs Bhali: (2012) 11 SCC 574

35. U.P. & ors. Vs Arvind Kumar Srivastava & ors. (2015) 1 SCC 347

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare, Sri Ashish Mishra, Sri Seemant Singh and Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri Namit Srivastava for petitioners, Sri Manish Goyal, learned Senior Advocate assisted by Ms. Anjali Goklani and Ms. Ananya Shukla, learned counsel appearing on behalf of respondent U.P. Jal Nigam, Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Amit Verma, learned Standing Counsel for the State respondents, Sri Sanjay Kumar Om, learned counsel for the U.P. Jal Nigam (Rural) and Sri V.K. Rai and Sri Aditya Bhushan Singhal, learned counsel for U.P. Jal Nigam (Urban), Ms. Meha Rashmi, learned counsel appearing for respondent M/s. Aptech Limited.

2. This bunch of petitions consists of above noted writ petitions that arise out of the same advertisements and selections *qua* posts of Assistant Engineers, Junior Engineers (different trades) and Routine Grade Clerks of same department namely U.P. Jal Nigam and are, therefore, connected. Now this bunch of petitions is being heard and decided.

**FACTS**

3. The erstwhile U.P. Jal Nigam prior to its split into two corporations, namely, U.P. Jal Nigam (Urban) and U.P. Jal Nigam (Rural) issued advertisements on 18th June, 2016, 28th October, 2016 and 29th

November, 2016 inviting applications for making selection and appointments against 335 vacancies of Routine Grade Clerks (including stenographers), 853 vacancies of Junior Engineers in the break-up of 723 for Civil trade, 126 of Mechanical/ Electrical trade and 122 vacancies of Assistant Engineers in the break-up 113 for Civil trade, 5 for Mechanical/ Electrical trade and 4 Computer Science/ Electronic Communication.

4. As against the posts of Assistant Engineers about 34128 candidates in different trades, 61,452 candidates for the posts of Junior Engineers (different trades) and 84,643 candidates against the post Routine Grade Clerk appeared in the Computer Based Test (CBT) that was held for the selection and appointment purposes.

5. The CBT for the post of Assistant Engineers was conducted on 16th December, 2016 in 2 shifts, one for Civil and one shift for other trades, whereas for the post of Junior Engineer, the CBT was held on 6th December, 2016 and 7th December, 2016 in 5 shifts and for the Routine Grade Clerk, the CBT was held from 5th August, 2016 to 7th August, 2016 inclusive.

6. Four set of question papers were prepared for the post of Assistant Engineer consisting of 80 questions each. For the post of Junior Engineers five set of question papers consisting of 80 questions each and for the Routine Grade Clerk nine question papers were prepared consisting of 80 questions each.

7. The CBT results were declared for the posts of Assistant Engineer on 17th December, 2016 for the post of Junior Engineer on 7th December, 2016 and for the Routine Grade Clerk on 9th August, 2016.

8. In the category of Assistant Engineers (Civil) 522 candidates, in the category of Mechanical 22 candidates and Computer Science/ Electronic Communication 20 candidates were shown to have qualified in the CBT.

9. In respect of the Junior Engineers 3961 candidates qualified for civil trade, whereas 699 candidates qualified in the Mechanical/ Electrical trade.

10. In the CBT conducted for Routine Grade Clerks and Stenographers in 2316 candidates were shown to have qualified and out of that only 718 candidates were successful in the typing test, who were ultimately interviewed.

11. In order to conduct interview the corporation proceeded to constitute Boards. 6 Interview Boards were constituted for Assistant Engineers. 10 Interview Boards were constituted for Junior Engineers and 6 Interview Boards were constituted for Routine Grade Clerks.

12. Interview for the post of Assistant Engineers in different trades were held on 30th December, 2016 and 31st December, 2016. For the posts of Junior Engineer in different trades were held from 19th December, 2016 to 7th December, 2016 inclusive and for Routine Grade Clerk interviews were held from 30th November, 2016 to 2nd December, 2016 inclusive.

13. For the post of Assistant Engineer each Board had been assigned 2 slots each day to conduct interview. For Junior Engineer each Board had been assigned only one slot each day for 6 days and so

also 6 Boards were constituted for Routine Grade Clerk that had one slot for 3 days.

14. In the case of Assistant Engineer there were two slots, one for the morning session and the other one for post lunch session, whereas in case of Junior Engineer and Routine Grade Clerk the slots continued from morning to evening.

15. The records reveal as per the reports relied upon by the respondents *to wit*, investigation reports submitted by Special Investigation Team, statements have been made by those who were members of interview board that the time schedule for interview was 10:30 am to 5:30 pm and in some cases 10:00 am to 5:00 pm (as per the statements made by two different members of different board) so approximately 15 candidates in 60 minutes if absentees are also included.

16. The records further reveal that as per the pleadings in the counter affidavit filed in writ petition being Writ – A No.- 7076 of 2021 (Samrah Ahmad v. State of U.P. and others), each Board for the post of Assistant Engineers category had been assigned minimum 18 candidates to maximum 28 candidates to be interviewed in one shift. Likewise for the post of Junior Engineer, each Interview Board was assigned minimum 64 to maximum 86 candidates for each day to be interviewed and for the Routine Grade Clerk each Board had been assigned minimum 29 to maximum 44 candidates to be interviewed each day. The numbers are seen to be in reducing trend looking to the days scheduled for interview both in the case of Junior Engineer and Routine Grade Clerk as the days progressed.

17. The records further reveal that the candidates who had been called for interview for the post of Assistant Engineers, were 564 in number, however, 16 candidates remained absent. In the category of Junior Engineer out of 4660 candidates, 266 candidates were absent in interview.

18. Further the selection for the post of stenographer was cancelled on 16th December, 2016. The final select list for the post of Assistant Engineers was declared on 3rd January, 2017, for the post of Junior Engineers was declared on 2nd January, 2017 and for Routine Grade Clerk select list was declared on 24th December, 2016. The appointment orders for the posts of Assistant Engineers were issued on 3rd January, 2017, for the post of Junior Engineer were issued on 2nd January, 2017 whereas for the post of Routine Grade Clerk appointment orders were issued much before on 24th December, 2016.

19. The entire above selection process was outsourced to M/s Aptech Limited - a private agency, who has been conducting online tests for the purpose of selection and recruitment to various Government departments and other establishments.

20. M/s Aptech Ltd. used a cloud server CtrlS Mumbai to register applications of the candidates online, the digital copy of the admit cards were uploaded to be downloaded by the candidates for CBT to be held at the assigned centres on scheduled dates on online mode.

21. In order to undertake this exhaustive exercise and to ensure transparency and at the same to maintain integrity of online examination data and the result processing by the outsourced agency agreements was entered between the agency and U.P. Jal Nigam for Junior

Engineers on 28.10.2016, for Assistant Engineers on 15.12.2016 and for Routine Grade Clerks on 17.06.2016. One such contract (work order) reached between the agency and the Corporation is reproduced hereunder:

"*WORK CONTRACT*

*This Work Contract (WC) is made at Mumbai on this 17th day of June 2016*

*BETWEEN*

***Uttar Pradesh Jal Nigam**, a Corporation having its Head office at 6, Rana Pratap Marg, Lucknow- 226001 Uttar Pradesh, hereinafter referred to as "U.P. Jal Nigam" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include its successors entitled and permitted assigns) OF THE FIRST PART.*

*AND*

***APTECH LIMITED**, a Company incorporated under the Companies Act., 1956 having its registered office at A-65. Aptech House, MIDC, Marol, Andheri East, Mumbai - 400 093, hereinafter referred to as "APTECH LIMITED/Agency" which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to include its successors in entitled and permitted assigns). OF THE SECOND PART.*

*Where as The State Government Constituted a Corporation by the name of UTTAR PRADESH JAL NIGAM in the year 1975 which came into existence with effect from 18th June 1975, whose area of operation extends to whole of Uttar Pradesh, excluding Cantonment areas under an Act called as Uttar Pradesh Water Supply & Sewerage Act, 1975. The basic objective of creating this corporation is development and regulation of water supply & sewerage services and for connected matters therewith.*

*Whereas APTECH LIMITED and its subsidiaries interalia are engaged in providing testing, training, certification and other allied services and provides various types of survey, assessment & testing services to various clients including individuals, educational institutions, firms, corporate and other enterprises, government undertakings, organizations and departments and others and also provides software, hardware and training support to all such clients.*

*Whereas U. P. Jal Nigam is desirous of awarding work contract to APTECH LIMITED for conduct of computer based exam for recruitment of routine grade clerk & stenographer as per the terms and conditions as also allocation of responsibilities contained herein below:-*

***Salient Features of Recruitment Exam on C.B.T. Mode**:*

*1. Recruitment Examination to be conducted for Routine Grade Clerk (R.G.C.) & Stenographer (Grade-IV).*

*2. There would be following types of examination for above stated recruitments-*

*2.1 C.B.T. Mode test for Routine Grade Clerk (R.G.C.)*

*2.2 C.B.T. Mode test for Stenographer*

*2.3 Computer Type Test for R.G.C.*

*2.4 Stenography Test including Computer Type Test for stenographer3. The candidates' qualification appearing for the entrance exam would be Intermediate (10+2) with prescribed computer knowledge. Both the groups would have to be rendered separate set of 80 questions.*

*4. The exams would be conducted over a period of time in multiple sessions.*

*5. The exam would be of 1 Hour duration. There would be 80 Questions in the exam of MCQ basis.*

*6. All the questions would be of objective type Multiple Choice with 4 options.*

*7. The online C.B.T. exam would be conducted in English and Hindi language, where ever possible.*

*8. After shortlisting of candidates (Count would be provided by UP Jal Nigam based on the vacancies) for Computer Type Test and Stenography Test.*

*9. Based on the accumulating scores, the merit list for selected candidates would be prepared and handed over to UP Jal Nigam.*

***APTECH LIMITED'S RESPONSIBILITIES:***

*1. On-line registration of candidates during the stipulated period.*

*2. In the registration form, provision will be made for choice of five centers in order of preference. Candidate will be allotted a center based on his/her preferred choice depending upon the availability.*

*3. Aptech Limited will provide payment gateway for payment of exam fees by candidates. The gateway will be integrated with U. P. Jal Nigam bank account for this purpose. Transaction fee as applicable, against the fee amount for online/offline payments will be borne by the candidate. Provision for candidates to pay through bank challan, will also be done.*

*4. Aptech Limited would conduct the examination through the C.B.T. mode.*

*5. Aptech Limited, shall provide the testing services through the Test center infrastructure installed at its Aptech Limited Authorized Test Centers (AATCs) for conduct of the online exams at the locations listed in the annexure A. Aptech Limited would designate a Test Center subject to the center holding a minimum of 100 nodes. If number of exams per center is less than 100, Aptech Limited in consultations with U.P. JAL NIGAM would finalize alternate location. U. P. JAL NIGAM would communicate to Aptech Limited at least 30 days in advance about the choice of final locations.*

*6. APTECH LIMITED will ensure that the necessary security controls and measures in respect of the equipment/ infrastructure provided to candidates are maintained. It would be responsibility of Aptech Limited to maintain the integrity and sanctity of the test environment at all centers.*

*7. Aptech Limited would be generating question data bank on the specifications provided by U. P. JAL NIGAM.*

*8. Aptech Limited would provide the Results in 5 working days from conclusion of the last examination. The result would be based on C.B.T. test marks, educational qualification marks & other specified marks. The results would reflect candidate wise and topic wise score.*

*9. Aptech Limited would conduct Hindi/English type test of selected candidates. Stenography test would be conducted for the candidates against stenographer post. Since this test is qualifying in nature, the test result would be in two parts i.e. list of successful & list of unsuccessful candidates.*

*10. Based on merit list against sl. 8 excluding unsuccessful candidates against sl.9, U.P.J.N. would conduct interview of selected candidates. The marks of interview would be made available to Aptech Limited after which result of various category would be prepared & handed over to U.P. Jal Nigam.*

*11. Test centre capacity planning for exam would be for 50000 candidates.*

*12. Aptech Limited would provide 5 seats for helpdesk in Lucknow, so that the coordination would be smooth between UP Jal Nigam. Helpdesk would consist of Toll free, tolled and Email support to resolve candidate queries.*

*13. After Handover of results in soft and duly signed hard copies of each stage Aptech Limited would not retain data for six months. Also the support would be provided to address candidates queries for six months after declaration of result.*

*14. Responsibilities of Security and non-leakage of question papers, accurate evaluation and tabulation of marks will fully rest with Aptech Limited.*

***U. P. JAL NIGAM RESPONSIBILITIES:***

*1. The advertisements regarding examination as needed will be issued by the U. P. Jal Nigam. The cost of these advertisements will be borne by the U. P. Jal Nigam.*

*2. Bank account opening for fee collection purpose would be done by U.P. Jal Nigam. The required details for the same would be shared to Aptech Limited.*

*3. Declaration of results will be the responsibility of U. P. Jal Nigam.*

*4. Interview of selected candidates would be conducted by U.P. Jal Nigam.*

*5. U.P. Jal Nigam undertakes to comply with all the access authorization and access controls as may be prescribed by Agency. U.P. Jal Nigam shall limit the access to Services Environment only to the Authorized Users. U.P. Jal Nigam acknowledges that the Services offered by Agency under this Agreement are not the data processing services but are in the nature of information technology infrastructure and application services for U.P. Jal Nigam's own data processing and business use only and agrees that the U.P. Jal Nigam shall not, in any way, commercially exploit the Services otherwise. UP. Jal Nigam shall only be responsible for activity occurring under its control and shall abide by all applicable laws. U. P. Jal Nigam shall be always vigilant about any unauthorized use of the Services or Services Environment by any person other than authorized user. However, on detection of the same, the U.P. Jal Nigam shall notify Agency immediately of any unauthorized use of the Services of Services Environment and the Agency shall immediately take remedial action. U.P. Jal Nigam undertakes that all UP. Jal Nigam Data will not infringe the intellectual property rights of any third party.*

***COMMERCIAL TERMS:***

*1. The pricing for APTECH LIMITED's services is on a per -candidate per exam basis. Aptech Limited will charge Rs.405/- (service tax extra) per candidate for total no. candidates scheduled booked for the C.B.T. exam for R.G.C. and Stenographer, Rs.120/- (service tax extra) per candidate for total no. candidates scheduled booked for the Typing Test/ Stenography & typing Test. The pricing includes cost for generation of question data bank and compilation of result. U.P. JAL NIGAM will be charged for absent candidates. Service Tax will be applicable on the above price as per prevailing Government of India rules & rates at the time of invoicing.*

*2. Aptech Limited will raise invoice in following manner:*

*a. 25% after generation of admit cards*

*b. 25% after computer based test*

*c. 50% after handing over of final result*

*3. The Bank guarantee amount shall be 10% value of total contract cost with a minimum of Rs. 15.00 lacs. Bank guarantee of Rs. 15.00 lacs would be submitted at the time of agreement and balance amount if any would be deposited immediately after closer of submission of application form. The bank guarantee would be released after three months of handing over of final result.*

***GENERAL TERMS AND CONDITIONS:***

*1. The Contract for conduct of the entrance exam is valid for the current appointment of routine grade clerk & stenographer post, however it may be extended for further appointment after mutual consent as per same terms and conditions.*

*2. The execution, validity and performance of this work contract shall be governed in all respects by the laws of India.*

*3. U.P. JAL NIGAM and Aptech Limited in performance of any contractual obligations shall stand exonerated for such failure due to circumstances beyond their control including force measure conditions.*

*4. The question bank created would remain with Aptech Limited.*

*5. Payment to be released within 30 days of the submission of the invoice.*

*6. Payment to be made by cheque/DD RTGS payable to Aptech Limited, payable at Mumbai.*

*7. The party affected by Force Measure shall notify the other party without delay. In the event that the affected party is delayed in or prevented from performing its obligations under this Agreement by Force Measure, only within the scope of such delay or prevention, the affected party will not be responsible for any damage by reason of such a failure or delay of performance. The affected party shall take appropriate means to minimize or remove the effects of Force Measure and attempt to resume performance of the obligations delayed or prevented by the event of Force Measure. After the event of Force Measure is removed, both parties agree to resume performance of this Agreement with their best efforts.*

*8. The parties shall strive to settle any dispute arising from the interpretation or performance in connection with this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, each party, can submit such matter to the Courts in Lucknow alone.*

*9. The validity, interpretation and implementation of this Agreement shall be governed by the Indian laws.*

*10. Time of completion of this work would be 120 days from date of start. In case of delay a penalty of Rs. 50,000=00 per day would be deposited by Aptech Limited with a maximum of 10% of contract value.*

*11. In case malpractices, willful manipulation is found during the execution of this agreement, the agreement would be rescinded & performance security & other payments would be forfeited.*

***SCOPE OF WORK:***

*a. Design and development of customized ONLINE Application form with facility to upload scanned copy of candidate's photograph, thumb impression, signature and other documents such as proof of Date of Birth, Education qualification, Caste, Dependent of freedom fighter, Ex- serviceman and Physically Handicap certificate, sport experience certificate etc. as applicable to each category of candidate.*

*b. System should have inbuilt validation system to validate the data entered. The system should guide the candidate through pop-up messages, before final submission. Eligibility of the candidates has to be checked/validated with reference to the age, qualification, category and fees, besides relaxation provided to various categories in terms of age & fees, on the basis of data furnished by the candidate in the Application form.*

*c. Candidate should be able to login into the system by using Application number and Password (to be sent to the candidate after registration, through SMS to Registered Mobile Number (RMN) and E-mail ID) to download the Bank-Challan for Off-line payment of Application fees in bank (optional) and download/print the completely filled form, Admit Card (with photo, thumb impression and signature and other details), Instruction sheet and Acknowledgement/ Declaration form.*

*d. Providing and operating VeriSign-quality/security seal, integrate payment gateway, Debit/Credit Card, and manage online/offline payments.*

*e. After validation of Application fee and successful submission of Application form, the system will process the same and generate Application number and password for each candidate. Beside the above the system will generate a Unique ID (Roll No.) for each candidate, which be communicated to him and will be required for login to start the C.B.T.*

*f. Admit card for C.B.T. & type and stenography test and for interview are to be dispatched/informed through E-Mail/SMS to Registered Mobile Number simultaneously.*

*g. Conciliation of Application fees deposited through Challan, ATM cum Debit card /credit card and payment gateways, & validation thereof.*

*h. Generation of attendance sheet with preprinted candidate's photo, thumb impression and signature. The invigilator will enter the node number in the attendance sheet, which will be duly signed by the candidate the invigilator & representative of U. P. Jal Nigam.*

*i. Booking of reputed Examination venues (venues are to be well connected to railway station and bus stand by local transport. Neat and clean secured place with proper ventilation, light & fan, fresh drinking water, seating arrangement, first aid box and other basic amenities).*

*j. Seating arrangement for C.B.T. should be such that no two candidates sit side by side with same set of question paper.*

*k. Alternate source of supply (Generator of sufficient capacity) should be in standby position with operator.*

*l. Design and development of Question Bank in bilingual language (English and Hindi) with multiple choice answers (80 nos.), so as to judge the Hindi Knowledge & Hindi writing aptitude (40 questions), General Knowledge (20 Questions), General aptitude (20 Question).*

*m. The encrypted question paper should be password protected and pushed to the local server before the scheduled time. Password should be given before the start of the C.B.T. It should be ensured that there are no repetitions of question, in different shifts.*

*n. The C.B.T. is to be carried out in a single day/ multiple day based on the candidate count at all centers. Deputing coordinators to test venues, transportation of man and material under full security. Evaluation of C.B.T. and short listing the candidates" branch wise and category wise, on the basis of merit of marks obtained in C.B.T.*

*o. To ensure security, Application number and Unique ID should be bar-coded also.*

*VENUE SELECTION AND SEAT ARRANGEMENT*

*a) Venues for C.B.T. shall be finalized in consultation with U.P. JAL NIGAM. It should be well connected to railway station and bus stand by local means of public transport. For easy handling there should not be more than 1000 examinees in one centre. There should be one invigilator over 30 candidates, two exam coordinators, sufficient waterman and guards required to hold the examination in safe and secure environment. Agency will provide list of Official (in charge of conducting test, venue booking, to & fro transportation of material etc. for each centre venue).*

*b) Neat and clean secured place with proper seating arrangement, light & fan, fresh drinking water, well ventilated, first aid box and other basic amenities.*

*c) Safe and secure place adequately guarded for keeping the examination papers and other related material.*

*d) The seating plan be such that no two candidates with same set of paper and discipline sit side by side.*

*e) Seating plan will be displayed outside the venue place only one hour before the starting time of examination.*

*f) Copy of the booking agreement with the centre should be submitted to U.P. Jal Nigam in advance so that it may be checked beforehand and local administrative authorities are informed in advance.*

*ATTENDANCE SHEET:*

*a) Classroom wise photo, thumb impression and signature attendance sheet for all venues in duplicate.*

*b) Attendance sheet should indicate roll number, name and discipline, against each candidate.*

*c) Biometric impression.*

*DESIGN AND DEVELOPMENT OF QUESTION PAPER:*

*a) The agency will prepare multiple choice objective type question papers in bilingual language (English - Hindi).*

*b) The question paper shall comprise of concerned numerical and logical reasoning questions (25%), general knowledge (25%) and General Hindi (50%).*

*c) Question paper for each discipline should have a balanced mix and match of easy (30%), average (50%) and tough (20%) questions.*

*d) Each set of question paper to have same questions, but randomized question wise, should be ensured in one shift.*

*PRE-EXAMINATION STAGE ACTIVITIES:-*

*a). Online display of advertisement, instructions, and other information related to examination, from time to time.*

*b). Online demo examination with sample questions (mock test).*

*c). Online registration with facilities to upload scanned photograph, thumb impression and signature in the application form and uploading of scanned documents (such as proof of DOB Education Caste Dependant of freedom fighter/Ex-serviceman/Physically Handicap certificate etc. as applicable to each candidate) as annexure. Candidate Validation and screening at the time registration, as per rules and requirements specified.*

*d). Online fee collection through ATM cum Debit/Credit Card and Net-banking.*

*e). Off-line fee collection through Bank Challan. (Challan form to be downloaded).*

*f). After validation of payment and final submission of application form, unique ID to be generated as per requirement.*

*g). Generation of Admit card (with photo, signature, centre address and other details), facility of downloading printing of Admit card, Instructions Acknowledgement Declaration form, if required and dispatching through E-mail.*

*h). Online monitoring and generation of desired report.*

*i) Question bank development and generation of different sets of question paper in randomized order.*

*j) Payment reconciliation and validation.*

*k) No change in application entry to be allowed after the final submission of application form.*

*1) Identification of centers on various infrastructural, operational and security parameters.*

*m) Provisioning of 5 seats helpdesk in Lucknow for resolving candidate's queries. Helpdesk should have Toll free, Tolled Number with email support.*

*EXAMINATION STAGE ACTIVITIES:-*

*a) Conducting Branch discipline-specific (R.G.C./ Stenographer), multiple-choice online examination in different cities across the State.*

*b) At least 10% Buffer nodes to be available at each center of examination so that a candidate does not have any loss of time, in case of any problem.*

*c) System generated random seat arrangement such that no two candidates side by side have same set of paper.*

*d) Manual attendance sheet with photo, thumb impression and signature.*

*e) Randomized questions in each set, delivery in bilingual language (English/Hindi) for each discipline.*

*f) Secured data transmission between exam centers and central server. Provision of primary and secondary server at each center.*

*g) Event record of question paper loading at central server, encrypted paper downloading at centre server, de-cryption time, password entry time and data transmission time from centre to main central server, is to be provided city-wise and center-wise.*

*h) The candidate can only login 15 min. before the scheduled time using the registration and unique ID for Instructions. But the actual set of question paper should open and close strictly at scheduled time only. The clock of the server installed at the center should be in-sync with the central server of the Agency.*

*i) Facility for navigation among the questions.*

*j) Digital clock and photograph of the candidate should be displayed at the right corner of the display unit.*

*k) To address the queries of candidates regarding system operation.*

*1) Examination proctoring.*

*POST-EXAMINATION STAGE ACTIVITIES:-*

*a) Preparing merit list category wise, post wise in U.P. Jal Nigam. The templates for the same would be provided by UP Jal Nigam,*

*b) Other lists as per requirement of the U.P. JAL NIGAM.*

*c) Agency will scrutinize the application forms of the candidates who*

*qualify the C.B.T. and shortlisted for type test post wise and category wise, with the scanned certificate uploaded during the registration by the candidate. U.P. JAL NIGAM may authorize anyone to check the system any time. However confidentiality is to be maintained at all levels.*

*d) Disclosure of any record/marks/merit/status before the declaration of final result will invite cancellation of the Contract Agreement and other administrative action as deemed fit by the U.P. JAL NIGAM.*

***e) Answer key will be displayed for 07 (seven) days after Test or as instructed by UP Jal Nigam Objections Queries received online should be attended and remedial action to be taken.***

*f) Provision of e-call letter for the next stage to candidates who qualify the C.B.T, but the number of candidates called should not exceed 10 times as per instructions from UP Jal Nigam, the vacancy in each category post on merit basis. The above number may increase if, several candidates secure same marks as that of last shortlisted candidate, will also be called for the type test.*

*g) Conducting interview (if any) at the venue to be provided by the U. P. JAL NIGAM at Lucknow only.*

*h) Subject Expert from reputed college, should be invited, and form a part of the panel constituted for conducting the interview. The identity of the experts should not be disclosed. All expenses such as Remunerations, Boarding & Lodging, Transportation of Subject experts to Interview venue and other facilities at the venue will be provided by the UP Jal Nigam.*

***Proprietary Rights:***

***All the rights, title and interests in and to the Agency's Application System, Services Environment and any other material used by Agency in the provision of the Services shall exclusively belong to Agency or its licensors ("Aptech Limited Proprietary Material"). Any and all Intellectual Property Rights with respect to the Services and the Aptech Limited Proprietary Material and all modifications, improvements, enhancements, or derivative works made thereto, shall always belong to Agency or its licensors and U.P. Jal Nigam shall not be entitled to claim any rights therein. All rights, title and interests in the U.P. Jal Nigam Data shall always remain with UP Jal Nigam.*** *However, with prior written permission of M.D. UP. Jal Nigam, the agency shall have the right to use U.P. Jal Nigam's Data only for support, testing and enhancement during the period of the Agreement. U.P. Jal Nigam acknowledges that the provision of the Services hereunder by Agency shall be on a non-exclusive basis and Agency shall be free at all times to provide the services or perform obligations same or similar to the Services and obligations envisaged hereunder to any of its other clients, either existing or future, and nothing herein shall preclude Agency from providing such services or performing such obligations to its other clients.*

***Liability:***

*Neither Party shall be liable to the other for any special, indirect, incidental, consequential (including loss of revenue, data and or profit), exemplary or punitive damages, whether in contract, tort or other theories of law, even if the Party has been advised of the possibility of such damages. The total cumulative liability of either party under this Agreement shall not exceed in aggregate the contracted amount payable to the Agency by the U P. Jal Nigam for the Service that gives rise to such liability during the Agreement period. Aptech Limited shall not be held liable for*

*any delay or failure in its obligations, if and to the extent such delay or failure has resulted from a delay or failure by or on behalf of U.P. Jal Nigam to perform any of Agency's obligations. In such event, Agency shall be (a) allowed additional time as may he required to perform its obligations, and (b) entitled to charge the U.P. Jal Nigam for additional costs incurred, if any, as may be mutually agreed upon between the Parties.*

***Representation and Warranties***

*Aptech Limited warrants that the Services will be provided in a skillful and workman like manner and in conformity with the scope prescribed in the Agreement. Notwithstanding the aforesaid, any Services which are provided by Agency free of charge or are otherwise not chargeable shall be provided on an 'AS IS' basis without any warranties whatsoever. Each Party represents, warrants and covenants to the other that (i) it is duly organized and validly existing and in good standing under the laws of the state of its incorporation or formation; (ii) it has the full right and authority to enter into and that the agreement constitutes a legal, valid and binding obligation; and (iii) its execution, delivery and performance of this Agreement does not and will not conflict with, or constitute a breach or default under, its charter of organization, or any contract or other instrument to which it is a party. EXCEPT AS SET FORTH IN THIS CLAUSE. Aptech Limited MAKES NO WARRANTIES TO U.P. Jal Nigam, EXPRESS OR IMPLIED, WITH RESPECT TO ANY SERVICES OR DELIVERABLES PROVIDED HEREUNDER OR UNDER SCOPE OF WORK. INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY AGENCY.*

***Confidential Information:***

*Each Party (the "Receiving Party") acknowledges and agrees to maintain the confidentiality of Confidential Information (as hereafter defined) provided by the other Party.*

*"Confidential Information" shall mean and include all documents. Courseware/ Training/ Testing/ Assessment Material/ Standard Operating Procedures. Question Bank, Business strategies, pricing lists, information and services catalogues, other products information, and any such demand estimates/ projections/ Promotional Inventory Schemes/ Schemes for the services/ Transaction and Contact Data of Customer and Employees/ Sales Data/ communication/ and such other information provided directly or indirectly and developed by the parties in connection with the execution of this Agreement."*

22. It is also pertinent here to reproduce the data retention policy dated 21st January, 2015 of M/s Aptech Ltd as the same was in force at the time of above agreement:

"**DATA RETENTION POLICY**

| Version | Date | Description | Prepared by | Approved by |
|---|---|---|---|---|
| 1.0 | 21st Jan, 2015 | Data Retention and Backup Policy | Roman Fernandis | Rajiv Bhatnagar |

The critical information shall be protected by suitable and adequate backup system to ensure that all the essential information can be recovered during a disaster or media failure.

2. Backup tasks shall be automated, wherever it is possible.

**3. Automated audit trails shall be generated for the backup activity, wherever it is possible and exceptions shall be reported to the information owner.**

4. Selection of backup media shall take following into considerations –

✓ criticality of the data to be stored;

✓ media shelf life, rotation, etc.;

✓ Ease of usage.

5. A record of the storage of backups (onsite and offsite) shall be maintained in **Backup Register (ISMS-L4-FRM-13)** and shall contain –

✓ date & time of start & completion of backup;

✓ media health checks;

✓ exceptions / errors;

✓ backup status (successful / unsuccessful);

✓ backup size;

6. Backup shall be tested for readability and restorability at regular intervals as per the **Backup & Restoration Plan (ISMS-L4-CHK-02).**

a. Backup & Restoration Plan shall be established to define the schedule / requirement for backup of information, software and systems.

b. Backup & Restoration Plan shall be prepared by the respective information assets owner (operating systems, databases, applications, network components etc), taking into consideration its importance to the Company's business, legal requirements and technology available.

7. The backup media shall be identified and labeled as per the **Asset Management Process (ISMS-L3-OCP-03).**

8. The backup media shall be destroyed /disposed-off in accordance to **Media Handling Policy (ISMS-L2-POL-14).**

9. Backup shall be scheduled before and after the execution of critical points in time such as end of day, end of week, end of month.

**10. <u>Data Retention Policy:</u> All the data shall be stored at TIER IV data center and retained as per the below mentioned guidelines:**

| **Type of Data Center** | **TIER IV Data Center** |
|---|---|
| **Location of Data Center** | **Mumbai** |
| **Duration of data storage at TIER IV DC** | **30 Days** |
| **Till Result Processing** | **Local DB Storage restoration server** |
| **Location of Local DB Storage restoration server** | **Mumbai RO Office** |
| **Data storage location post result processing** | **Secondary Data Center** |
| **Location of Secondary Data Center** | **Noida** |
| **Duration of data storage at Secondary Data Center** | **6 Months** |
| **More than 6 month's old data** | **Data shall be archived post 6 months at storage media (NAS/External** |

| | |
|---|---|
| | **media)** |

11. Whenever there is a change in the system environment (such as application, operating system etc.), it should be ensured that the data backup is compatible with the new system environment.

12. **Safety & Security:**Backup is as critical as original information, thus adequate security (both logical as well as physical) controls shall be enforced to-

a. Ensure limited access to backup data;

b. Backups shall be stored in secure location(s). Backup media shall be stored in an off-site location to prevent the destruction of both the main source and the backup source;

c. Backup media shall be stored in a steel almirah/cabinet under lock & key. For hardcopy (paper) format:

i. Data / information such as original contracts, licenses, system configuration documentation, service continuity plans & strategies, logs / registers / records etc. in paper format are essential to business working. Suitable backup mechanism of such data / information in paper shall be designed and applied.

ii. Originals shall be kept in fire-safe cabinet/almirah under lock and key.

**iii. For data/information needed to be referred frequently, scanned copies or photocopies of original shall be used. This will ensure integrity of paper is not compromised due to mishandling / environmental deterioration.**

d. Inventory of media shall be maintained for-

i. The media used for backups

ii. Unused media (blank)"

(emphasis added)

23. It is also an admitted fact that the position on record was until the appointment orders were issued, neither the agency published the master answer key, the candidates' response sheet, inviting objections, nor even the corporation insisted upon the agency to do the same. It appears that after the corporation received notices under the Right to Information Act, 2005 about the CBT results then it required the M/S Aptech Ltd. to publish online the master answer key.

24. Once the CBT result was declared, it was provided to the Jal Nigam to hold/ conduct interview by constituting the Board and same was done accordingly. After the interview was over, the agency was to prepare the final select list adding the marks of the CBT result of the candidates with marks obtained in the interview.

25.Thus on facts, it is an admitted position that the entire examination was conduced through outsourcing, to which the corporation fully trusted at least till the appointment order were issued and candidates were given joining.

26. It is with the publication of master answer key that objections to certain questions asked in the question papers and answer to certain questions provided in master answer key were raised and this resulted in the controversy leading to the petitions being filed over here and at Allahabad and its Lucknow Bench by some of candidates, according to whom they were wrongly ousted from merit list of C.B.T.

27. The records further reveal that about 53 challenges were made in respect

of the Junior Engineers and 9 questions were challenged in the category of Routine Grade Clerk. In respect of the 53 challenges in the question papers made for Junior Engineer CBT, 6 questions were found incorrect/ wrong and 18 answers were also found incorrect/ wrong out of total 400. In respect of Assistant Engineers question paper of CBT, 7 questions were found to be incorrect/ wrong and 20 answers were found to be incorrect/ wrong out of 320 questions in 4 set of papers. In the case of Routine Grade Clerk only 7 answers were found to be incorrect/ wrong out of total 720 questions asked for in different set up of papers. The revised C.B.T. results accordingly were asked by the corporation from M/s Aptech Ltd. on 25th July, 2017 and 30th July, 2017 and 14th August, 2017 respectively and the agency handed over it to the Jal Nigam on 8th August, 2017, 19th August and 31st August, 2017 in respect of the Routine Grade Clerk, Junior Engineer and Assistant Engineer respectively.

28. With the litigation started at Allahabad High Court and its Lucknow Bench, an issue arose about the correctness of the CBT results published by M/s Aptech Ltd. on the basis of which the candidates were called for interview. Interlocutory orders were passed asking the corporation to do corrections and even orders were passed by the Lucknow Bench to the extent that if need be the question answers may be got verified from institutions like IITs as per the statement made on behalf of the corporation. Afterall when the agency, of course, with concurrence of corporation published the revised result, those who were not called for interview due to alleged irregularity were identified as 479 in number in category of Junior Engineer (Civil & Electrical/ Mechanical) and hence became entitled to be interviewed. This led the corporation to form a *prima facie* view at the initial stage to the effect that there were some serious irregularities committed at the end of the agency in conducting the CBT and preparing its result, which needed investigation and accordingly it held two in-house inquiries by the Chief Engineer (Nagar), who submitted his report on 29th May, 2017 and another report of Chief Engineer Level- II submitted on 7th July, 2017.

29. Taking notice of the findings arrived at in the inquiry reports Corporation decided to annul the entire selection and appointments that had already taken place, vide order on 11th August, 2017 passed by the Chief Engineer. Those who were selected and appointed became aggrieved for the reason that order though was having adverse civil consequences and yet no notice much less a show cause notice was given to any of them and if the order was sustained, it would lead to a serious miscarriage of justice. Accordingly, writ petitions were filed before this Court. Writ petition of Ajit Singh Patel and 10 others v. State of U.P. and 3 others being Writ – A No.- 37143 of 2017 came to be disposed of by this Court along with other connected matters by a detailed judgment and order dated 28th November, 2017.

30. The order impugned was set aside basically on the ground that no exercise was undertaken to distinguish tainted from untainted candidates and had this exercise been undertaken, each individual petitioner would have been entitled to notice to offer at least his/ her explanation. The liberty was given to the respondents to pass reasoned and speaking order afresh after providing opportunity of hearing to the

petitioners and other affected parties on the basis of observations made in the said judgment.

31. Since Corporation had raised pleas to be valid enough in its wisdom, to the effect that neither the posts were sanctioned, nor proper procedures were followed, inasmuch as, the results and appointment orders were issued just a day or two before the notification of the model code of conduct in view of the scheduled Legislative Assembly elections in the State, it questioned the order of Division Bench of this Court before the Supreme Court by filing leave petitions, being SLP (C) No. 5410-5419 of 2018. The only plea taken before the Supreme Court was that the High Court had failed to give opportunity to the Corporation to rework on the merit list in view of the incorrect questions and answers coupled with the argument that factual matrix of the case not required any individual notice.

32. Supreme Court taking notice of the above arguments observed that the plea of reworking of the merit list could not be a ground to set aside the order because this opportunity was always there and the doors of Court were not closed, if the respondents so advised, to approach the High Court for this liberty. It, however, left it to the discretion of the High Court to entertain this plea on its own merit, if raised. The SLP got disposed of by a very short order of the Supreme Court passed on 16.03.2018 without interfering with the findings returned by the Division Bench of this Court under the order assailed before the Supreme Court. The order of the Supreme Court dated 16.03.2018 is reproduced hereunder:

"*Mr. Rakesh Dwivedi, learned senior counsel appearing for the petitioners, points out that the petitioners having found out that there were defective questions and incorrect answer keys, the High Court should have permitted the petitioners to re-work the merit list. He submitted that the High Court has gone wrong in insisting for an individual notice in the factual matrix of this case. In this regard he has also placed reliance on a judgment of this Court in Vikas Pratap Singh and Others v. State of Chhattisgarh and Others, reported in (2013) 14 SCC 494.*

*Mr. Mukul Rohatgi, learned senior counsel appearing for the respondent(s), however, points out that whether the questions were defective or key answers were incorrect are disputed question and, therefore, liberty should be granted to the respondents to participate in the inquiry. He further submits that the decision of this Court referred to by the learned senior counsel for the petitioners may not apply to the facts of this case.*

*Be that as it may, having gone through the impugned judgment, we do not find that the door is yet closed. It is for the petitioners, if they are so advised, to approach the High Court itself for a liberty to re-work the answer sheets on the basis of the corrections, in case the High Court is also of the view that the corrections need to be made.*

*The special leave petitions are, accordingly, disposed of.*

*Pending application(s), if any, shall stand disposed of."*

33. Resultantly, Corporation approached the High Court again by filing a review petition but the Division Bench declined to entertain the same on merits. The bench observed that the respondents had been granted liberty to pass fresh order after providing opportunity to the

petitioners and other effected parties following the exercise of segregation between tainted and untainted candidates but the Corporation failed to do the same. The Court observed that while passing the order fresh, the Corporation was free to look into every aspect of the matter and as such no permission was required from the Court. The Court thus dismissed the review petition on merits finding there to be no error apparent on the face of judgment which may require exercise of power of review.

34. At this stage it is also worth noticing that some complaint was made by an ex Executive Engineer of U.P. Jal Nigam to the State Government on 22.03.2017 and the State Government on 13.07.2017 referred the matter to the Special Investigation Team (SIT). The SIT submitted a preliminary investigation report on 18.03.2018 finding *prima facie* case, it appears against the officials of the Corporation and officials of the outsourcing agency M/s. Aptech Limited and resultantly first information report (FIR) was lodged by it on 25.04.2018 with the approval of the preliminary investigation report by the Principal Secretary (Home), Government of U.P.

35. The Corporation still not satisfied with the judgment, thought it not appropriate to go in for exercise as was mandated in the order of the High Court dated 28.11.2017 affirmed in judgment on review petition order, but to assail the judgment before the Supreme Court again and accordingly filed SLP which later on was converted into Civil Appeal No. 11017 to 11018 of 2018.

36. This time when the matter came up before the Court on 20.08.2018 the Court put a query to the appellants now respondents herein in these above petitions, about status of inquiry or exercise, if any, undertaken to identify tainted candidates so as to segregate them from untainted candidates. The Court required the appellant to furnish status on affidavit. The Corporation since had yet not taken any such exercise now wrote to the Indian Institute of Technology, Kanpur and Indian Institute of Information Technology, Allahabad on 31.08.2020 to furnish information *qua* the possibility to segregate tainted from untainted candidates amongst selected and appointed against posts of Assistant Engineers and pleaded urgency, it appears in view of the fact that 20.09.2018 was fixed in the matter before the Supreme Court.

37. Interestingly, this time the information was sought only in the matter of selection of Assistant Engineers from both the institutes and the information came to be furnished by IIIT, Allahabad and by IIT, Kanpur.

38. During the investigation, the SIT not only looked into the statements so recorded of those officials of Corporation, members of interview board and officials of M/s. Aptech Limited who were in helm of affairs as far as the selection process was concerned but also tried to collect material evidence so as to arrive at a definite conclusion as to alleged irregularities committed in conducting CBT.

39. As a sequel to the above, the agency obtained order from a Judicial Magistrate to seize the computer hard disks that were stationed in the local environment office of M/s. Aptech at Mumbai and this was done on the basis of statements of the officials of Aptech Limited recorded by

SIT. Investigating team arrived at Mumbai and seized the hard disks and prepared seizure memo in three dates i.e. 10.09.2018, 11.09.2018 and 12.09.2018. They obtained also certificates of officials Mr. Roman Fernandes and Mr. Neeraj Mallik *qua factum* of seizure of hard disks from the premises of M/s. Aptech Limited and sent the same to Central Forensic Science Laboratory, Hyderabad on 23.10.2018. Four times reports were sought by the SIT from CFSL and ultimately it relied upon last two reports dated 11.12.2019 and 22.01.2020. SIT also looked into the report submitted by Aptech and ultimately arrived at a conclusion that there were sufficient evidence to indicate those named in the FIR to have committed criminal offence under Sections 409, 420, 201, 467, 468, 471, 123 IPC read with Section 31-A of Prevention of Corruption Act and Section 66 of Information and Technology Act in connection with the FIR in case crime no. 2 of 2018 and the charge sheets filed are numbered as 02 of 2021, 2-A of 2021 and 2-B of 2021 against the 8, 4 and 3 persons respectively.

40. Upon the charge sheet so filed, the Court has already taken cognizance in various dates like 24.05.2021, 12.08.2021 and 20.12.2021 but the Court is informed of a fact that charges have yet not been framed. In respect of one Bhavesh Jain, an officer of M/s. Aptech the Lucknow Bench of this Court has already quashed the charge sheet which of course is a subject matter of challenge before the Supreme Court in a pending SLP.

41. In the second round of litigation before the Supreme Court all those issues raised before the Division Bench of this Court in the first round of litigation resulting in the judgment dated 28.11.2017 affirmed in SLP by the judgment of Supreme Court dated 16.03.2018, were re-agitated during hearing before the Supreme Court at the strength of reports of experts of Institutes of Technology that were available by that time. Emphasis was laid before the Supreme Court upon these reports obtained from IIT, Kanpur and IIIT, Allahabad to take a plea that since original data was deleted from the primary source cloud server of the CtrlS the authenticity of the data downloaded by the Aptech and kept in local environment was questionable, inasmuch as, the report submitted by the CFSL, Hyderabad, confirmed this position of tampering with the data by citing examples of those candidates who had been shown in the data retrieved from the hard disks to have secured lesser marks in CBT. The inflated marks actually provided to them to facilitate their participation in interview to offer them appointments. A plea was also taken before the Supreme Court that M/s. Aptech Limited itself had acknowledged the fact that there has been change in the final results may be on the ground of incorrect/ wrong questions and answers being identified but in the total circumspect of the events that had led the second round of litigation before the Supreme Court, there left no possibility in sight to segregate tainted from untainted.

42. Thus, plea taken before the Supreme Court was that in matters where the selection process was too vitiated to be reckoned with, the individual notices were not required in view of the settled legal position.

43. Considering the arguments advanced on behalf of the rival parties before Supreme Court, the Court held the Corporation to be in serious error in not

complying with the directives of the High Court in its first judgment dated 28.11.2017. The Court held that it was mandatory for the Corporation to have first complied with the order in terms of the observations made in the said judgment but at the same it may take into consideration the reports including the previous reports and such other relevant material and documents that were available to it. However, the Court clarified that it was not dilating in any manner upon the efficacy of the opinions rendered by the Professors of the Institutes of Technology. Supreme Court, therefore, in its second order passed on 15.11.2018 again declined to interfere or dilute its earlier position as was in its earlier order dated 16.03.2018 and commanded the Corporation to do the needful in the matter in letter and spirit of the previous judgment of Division Bench of the High Court. Relevant part of the judgment is reproduced:

"*13. Suffice it to observe that while disposing of the Special Leave Petition filed by the appellants on the earlier occasion vide order dated 16th March, 2018, this Court has neither disturbed the conclusion reached by the High Court in its order dated 28th November, 2017 nor granted liberty to the appellants to challenge the said conclusion in the review application or for that matter, by way of a fresh Special Leave Petition. The relevant conclusion of the High Court in its order dated 28th November, 2017, reads thus:*

"*In view of the above, we are of the considered opinion that the impugned order dated 11.8.2017 has been passed in violation of principles of natural justice without issuing notice and without affording opportunity of hearing to the petitioners, no exercise was undertaken to distinguish the case of tainted and non-tainted candidates to arrive at the conclusion while passing the impugned order as such the impugned order dated 11.8.2017 is not sustainable and is liable to be set aside."*

*14. The limited plea taken before this Court as noted in the first paragraph of order dated 16th March, 2018 was to allow the appellants to re-work the question and answer sheets and revise the merit list and issue fresh, reasoned order after providing opportunity of hearing to the affected candidates. That option has been kept open. It is for the appellants to pursue the same. In other words, the appellants must, in the first place, act upon the decision of the High Court dated 28th November, 2017 whereby the order passed by the Chief Engineer dated 11th August 2017 has been quashed and set aside. The appellants may then proceed in the matter in accordance with law by passing a fresh, reasoned order. Indeed, while doing so, the appellants may take into consideration the previous inquiry reports as also all other relevant material/documents which have become available to them. We make it clear that we have not dilated on the efficacy of the opinion given by the experts of "IIIT Allahabad and IIT Kanpur".*

*15. In view of the above, the challenge to the impugned judgment dated 28th November, 2017 and 25th July, 2018 must fail but with a clarification that the competent authority of Nigam is free to pass a fresh, reasoned order in accordance with law.*

*16. We may not be understood to have expressed any opinion either way on the merits of the course of action open to the appellants against the respondents including against the other appointees under the same selection process. All questions in that behalf are left open.*

*17. The appeals along with all the interlocutory applications are disposed of in the above terms. No order as to costs."*

44. From this direction issued in the second judgment by the Supreme Court, the Corporation drew an inference that it was open for it to consider entire issue afresh and based upon its understanding of facts and the findings in inquiry reports including SIT report, it again proceeded to hold that it was not possible to draw any line between the tainted candidates and untainted candidates for the fraud and conspiracy lying in the root of selection itself. Thus, it concluded that it was not possible to save the selection in support of those candidates who had already been offered appointment and given joining. According to the orders so passed on 20.03.2020, though separately passed but identically framed in respect of Assistant Engineers, Junior Engineers and Routine Grade Clerks, it was in order to ensure public trust maintained in process of selection in public employment as to its sanctity that it became imperative to annul the entire selection process and cancel the appointments. It is these orders that are challenged before this Court in this bunch of petitions filed by 56 Assistant Engineers of different trades, 367 Junior Engineers of different trades and 26 Routine Grade Clerks.

45. I have been informed that identical set of petitions have also been filed by some other candidates who were aggrieved by the orders before Lucknow Bench of this Court at Lucknow.

46. It is again pertinent to mention here at this stage that when the order was passed on 02.03.2020 there was already a contempt petition pending before the Supreme Court being Contempt Petition (Civil) No. 625-26 of 2019 regarding act and conduct of the respondents in not giving joining to those already selected and appointed employees in the three categories pursuant to the judgment of Division Bench of this Court dated 28.11.2017, the Assistant Engineers also filed writ petition before the Supreme Court questioning the order dated 02.03.2020. It appears that since issue of segregation of tainted and untainted candidate was yet not resolved and many facts had intervened due to various reports and the question as to whether segregation was possible or not was yet to be decided and that in the meanwhile the respondents had taken decision that it was not possible, the Court did not find *prima facie* case for contempt to have been made out. However, on the question of legality of the order, since matter was already engaging attention of this Court in various petitions filed here before this Court, Supreme Court directed those writ petitioners in the category of Assistant Engineers to also approach the High Court to get their matter also adjudicated with pending petitions. Thus, the Court disposed of the matter on 03.06.2021 asking the petitioners to approach the High Court and dismissed the contempt petitions pending before it discharging notices. Relevant part of the order is reproduced as under:

*66. The Court had set aside the termination order dated 11.8.2017 issued by the respondents, solely on the ground that it was in violation of principles of natural justice. At the same time, liberty was given to the respondents to pass a fresh order in accordance with law including by undertaking exercise of segregating the tainted from the untainted candidates. Indeed, the Court expected that before taking any precipitative action against the petitioners, the respondents must afford*

*opportunity of hearing to them. This observation is contextual. It would come into play dependent upon the opinion eventually formed by respondents after due consideration of the material collated by them to distinguish the tainted and untainted candidates, was possible or otherwise. Had the respondents concluded that it was possible to segregate tainted from untainted candidates, they would have been obliged to comply with the directions given by the High Court and restated by this Court in order dated 15.11.2018, to afford prior opportunity of hearing to the petitioners and similarly placed persons before passing fresh, reasoned order. However, from the subject termination order dated 2.3.2020, which is a speaking order, it is crystal clear that after due enquiry and taking into consideration all aspects of the matter, in particular the enquiry reports and the opinion of the experts including final report of SIT, the respondents were of the considered opinion that it was not possible to segregate tainted from the untainted candidates for reasons recorded in that order. We are not inclined to go into the correctness of the said reasons, because it is subject matter of challenge in writ petitions pending before the High Court (as pointed out in Annexure R29 of the Supplementary Affidavit), filed not only by Assistant Engineers, but also by Junior Engineers, Routine Grade Clerks and others*

*67. We would, therefore, confine our analysis as to whether the respondents were justified in passing subject termination order dated 2.3.2020 without giving prior opportunity of hearing to the petitioners. In light of the conclusion reached by the respondents in the stated order dated 2.3.2020 — that it was not possible to segregate the tainted from the untainted candidates, in law, it must follow that the respondents could annul the entire selection process and pass the impugned order without giving individual notices to the petitioners and similarly placed persons. We are fortified in taking this view in terms of the exposition in O. Chakradhar 68 and the subsequent decisions of this Court in Joginder Pal69, Veerendra Kumar Gautam 70 and Vikas Pratap Singh & Ors. v. State of Chhattisgarh & Ors. adverted to in paragraph 12 of the judgment dated 15.11.2018 of this Court while disposing of earlier appeals between the parties.*

*68. In other words, since the respondents have concluded that it was not possible to segregate tainted from the untainted candidates because of the reasons noted in the termination order dated 2.3.2020, in law, there was nothing wrong in respondents issuing the said termination order without affording prior opportunity to the petitioners and similarly placed persons. Had it been a case of even tittle of possibility in segregating the tainted from the untainted candidates, which exercise the respondents were permitted to engage in, in terms of the decision of this Court dated 15.11.2018, it would have been a different matter. In that case alone, the petitioners and similarly placed persons could complain of wilful disobedience of the order passed by this Court dated 15.11.2018.*

*69. Having said thus, we must conclude that even the second set of contempt petitions in reference to the subject termination order dated 2.3.2020 being in violation of direction given by this Court to afford opportunity to the petitioners vide order dated 15.11.2018, must fail.*

*70. Considering the fact that multiple writ petitions have been filed by different groups of affected persons before the High Court being similarly placed persons against the subject termination order dated 2.3.2020 and as the same are*

*pending, as aforesaid, to obviate even slightest of prejudice being caused to the petitioners in those cases, who are not before us, we refrain from examining the arguments regarding the justness and validity of the stated order and leave all other contentions open to the parties to be pursued before the High Court in pending proceedings. Consequently, we would dispose of the transfer petition, as well as, the writ petition by relegating the petitioners therein including the applicants in intervention/ impleadment applications, to pursue their grievance in the form of writ petitions before the High Court, which could be heard by the High Court analogously along with all other pending writ petitions involving overlapping issues to obviate any inconsistency and conflicting findings regarding the same subject matter in any manner. Indeed, in the event the High Court agrees with the conclusion recorded by the respondents in the stated order dated 2.3.2020, that it is not possible to segregate the tainted from the untainted candidates, the High Court would be bound by the observations made by us in this judgment. For, in that eventuality, in law, it would not be necessary for the respondents to give prior hearing or afford opportunity to the petitioners and similarly placed persons before annulling the entire selection process and issuing the termination order under challenge.*

*71. Accordingly, while discharging the show cause notices issued in the concerned contempt petitions and disposing of all the contempt petitions, we deem it appropriate to relegate the petitioners in the transfer petition and the writ petition filed in this Court, before the High Court to pursue their remedy under Article 226 of the Constitution to assail the order dated 2.3.2020 with further direction that all petitions involving overlapping issues and referred to in Annexure R29 of the Supplementary Affidavit or any other writ petition pending or to be filed, list whereof be furnished by the parties to the High Court, for being heard analogously. We request the High Court to expeditiously dispose of the writ petitions, leaving all contentions other than decided in this judgment, open to the respective parties to be raised before the High Court. The same be decided on its own merits as per law.*

*72. In view of the above, we pass the following order:*

*(1) Show cause notices issued in the respective contempt petitions stand discharged. Contempt petitions are dismissed;*

*(2) The transfer petition stands rejected, as a result of which the writ petitions referred to therein will now proceed before the High Court in terms of this judgment;*

*(3) The writ petition is disposed of with liberty to the petitioners therein including applicants in intervention/ impleadment applications to pursue their remedy before the High Court by way of writ petition under Article 226 of the Constitution, if so advised. That writ petition be decided on its own merits in accordance with law keeping in mind the observations made in this judgment along with other pending or fresh writ petitions involving similar issues; and*

*(4) We request the High Court to take up all writ petitions involving overlapping issues together for analogous hearing expeditiously. We leave all contentions open except the issues decided in this judgment.*

*73. There shall be no order as to costs. All pending interlocutory applications stand disposed of in terms of this judgment."*

47. Before Mr. Khare, learned Senior Advocate could have led the arguments for petitioners on merits, Mr. Goyal, learned Senior Advocate appearing for the Corporation put a point that in matters of Assistant Engineers, Junior Engineers and that of Routine Grade Clerks should all be separately decided as they were separate writ petitions filed by these category of employees and they involved different set of facts.

48. Meeting the above submission, Mr. Khare took the plea that since reasons assigned in all the three impugned orders are identical touching the selection process which was undertaken by the same outsourced agency M/s. Aptech Limited and the same set of data has been analysed, may be by the CFSL but inquiries and investigations have been held collectively in respect of entire selection process, the legal issues that arise for consideration of this Court are also identical. It was also pleaded before the Court that previous round of litigation either before the High Court or Supreme Court, the controversy remained the same.

49. Upon a pointed query, Mr. Goyal could not dispute these above facts and hence matters are proceeded with to be decided in respect of all the three categories of employees together.

**Arguments raised for petitioners**

50. Assailing the order impugned in this bunch of writ petitions Sri Ashok Khare, learned Senior Advocate raised following arguments:

(i) There was absolutely no genuine exercise undertaken by the respondent Corporation so as to explore possibilities to segregate tainted candidates from untainted candidates as was mandated under the first order of the Division Bench of the High Court dated 28.11.2017 affirmed by Supreme Court twice under its judgment and orders dated 16.03.2018 and 15.11.2018 and therefore, findings arrived at under the orders impugned dated 02.03.2020 were based upon no such material which may justify the decision to annul the entire selection and appointments in question.

(ii) There was no forensic examination of the computer based online examination data collected, within the legal frame work of the Information Technology Act, 2000 by the agencies recognized and approved by an appropriate government and any other opinion obtained may be from Professors or Associate Professors of the Institutes of Technology like in the present case IIT, Kanpur and IIIT, Allahabad, could not be taken as conclusive in law for lack of requisite expertise and requisite authority in law to conduct data verification forensically.

(iii) The opinion reports obtained from the two Institutes of Technology was merely speculative and conjectural in nature and so were not to be treated as a material cogent to form a definite view that sanctity of CBT was lost. Still further, opinions were given on wrong assumptions that courts had accepted the stand of U.P. Jal Nigam that over all selection process was compromised. Thus, reports are not worth reliance.

(iv) The investigation report submitted by the SIT dated 22.01.2020 is a mere police report as contemplated under Section 173(2) erstwhile Cr.P.C., 1973 based upon the statements recorded under Section 161 Cr.P.C. that are not admissible in law under the Indian Evidence Act, 1872 and therefore, the authority absolutely mislead itself in placing reliance upon such

police report to arrive at a conclusion that selection process in question was so much compromised that only option left was to annul the entire selection with consequential cancellation of all the appointments. Even the reports submitted by CFSL is not worth reliance absolutely for want of authenticity of data provided to it for verification by the SIT, and yet the findings were arrived at by SIT as per the reports of CFSL dated 11.12.2019 and 22.01.2020. However, he argued that reports at least got established that data verification was possible and the endeavour of the Corporation ought to have been to provide any authorized forensic expert access to it to get some authentic and lawfully admissible report. In other words as per the arguments raised, the segregation between tainted and untainted candidates was very much possible, provided of course, the efforts were genuinely and sincerely made in a correct direction.

(v) There being no complaint as to the conduct of CBT and no material having surfaced out in the SIT report as to the involvement of any constituent member of the Interview Board or any of the selected candidates for the matter, in any kind of corrupt practice like bribery, nepotism and favouritism, there was no issue as to the outsource agency in any manner manipulating the original CBT data and the tainted and untainted words and expressions were contextual to the challenge laid to the certain questions in question paper and answers to certain questions provided in the master answer key. However, with the SIT report coming after the judgment of the Supreme Court and the two opinions already obtained from the Institutes of Technology, the entire controversy took a somersault and instead exploring for an opportunity of reworking the merit list *qua* CBT, Corporation took the view wholly erroneously that entire selection was vitiated for gross irregularities.

(vi) The Corporation could not have gone into questions as to the availability of vacancies for want of requisite sanction, nor could have gone into the question of there being any selection conducted in hot haste to pronounce the results and give appointments, just a day or two before the notification of model code of conduct on 04.01.2017, because the Division Bench of this Court had in its very first judgment dated 28.11.2017 had rejected the arguments and the said judgment came to be affirmed in SLPs by Supreme Court twice.

51. In support of his first argument, Mr. Khare submitted that in the judgment of Division Bench dated 28.11.2017 it had been very specifically held that *"no exercise was undertaken to distinguish the case of tainted and non tainted candidates to arrive at a conclusion while passing the order impugned"* and so the orders were set aside. Mr. Khare therefore, argues that this should be taken as a mandate contained in the order itself that a wholesome exercise was needed to be undertaken by the respondent Corporation to distinguish the cases of tainted from non tainted candidates. Sri Khare submits that while Special Leave Petition was preferred, the Court had declined to interfere with the order on the ground that nothing contained in the order of Division Bench may have had restrained the U.P. Jal Nigam, Lucknow to rework the merit list on the basis of the corrections brought in the CBT result, provided of course, the High Court had agreed to the same. However, the review petition filed before the Division Bench was rejected and upon second time the SLP being filed, the Court inquired

from the Corporation who were appellants therein, as to what exercise was undertaken pursuant to the order of Division Bench. This order was passed while entertaining the SLP on 20.08.2018, according to Mr. Khare, indicated very well that the Supreme Court wanted an exercise to be undertaken by the respondents and it was thereafter only that the respondent Corporation proceeded to obtain opinion from the technical Institutes like Institutes of Technology. Mr. Khare has submitted that even the letter dated 31.08.2018 written to two IITs clearly stipulated that opinion was sought for only to clarify as to whether it was possible to segregate tainted from untainted candidates and interestingly this opinion was sought by making a declaration that original data was deleted from the primary source server by the Aptech Limited. According to Mr. Khare this statement of fact was made with a deliberate intention to mislead IITs otherwise the letter would have simply asked for a fair opinion upon the data contained in CDs supplied and if need be to connect to the Aptech limited through Corporation. Mr. Khare has submitted that since Supreme Court had fixed 20.09.2018 in the SLP by which time the Corporation was to furnish the status report and since by 20.08.2018, Corporation had not undertaken any exercise, it proceeded in a hot haste to somehow get an opinion so that it might not be held guilt for non compliance of the judgment of this Court despite its affirmation by the Supreme Court, previously. Even the IITs were not given sufficient time to form a view, inasmuch as, the experts were merely Associate Professors who were entrusted with the task to exercise the material and render their opinion on the basis of data made available by the Corporation in the form of CDs.

52. Mr. Khare further submitted that the opinion was sought only in respect of the examination conducted, result prepared, *qua* vacancies of Assistant Engineers only. Mr. Khare submitted that even the data that was recovered by the SIT which was sent for examination to the CFSL was not made available to the IITs by seeking permission from the court if it was at all *custodia legis*.

53. Besides above, Mr. Khare has further argued that Aptech Limited itself has taken a stand in the counter affidavit vide its paragraph nos. 7, 8 & 9 in the matter of writ petition of Ambrish Kumar Pandey that the original data base was kept secured by the Aptech Limited. Thus, according to Mr. Khare as was mandated in the judgment of High Court affirmed by Supreme Court, it required the Corporation to have undertaken an exhaustive exercise to get the original hard disks examined by the forensic experts before furnishing any report to the Supreme Court and it would have also helped the Corporation to have confirmed opinion as to whether the data seized and recovered from Aptech agency from its local environment, was a mirror image of the original data earlier available on the primary source cloud server or not.

54. Mr. Khare has further reiterated his earlier stand that the Professors of IIT and IIITs were required to give their opinion only to the extent whether segregation was possible or not on the basis of data base provided by the Aptech Limited. Mr. Khare has submitted that manner in which letter was drafted and addressed to the IITs that original data was deleted from the cloud server, it was something like giving a clue to the experts that nothing remained to be verified about as all the data available was a secondary data. So according to Mr. Khare, there was

a limited query made to the IITs which were replied and possibly no expert would have taken a different view or could have expressed different opinion as was expressed by the Associate Professors of IITs for the format of letter and accompanied material placed before them.

55. In support of his second argument, Mr. Khare has drawn the attention of the Court to the relevant provisions as contained in the Information and Technology Act, 2000 (for short IT Act) which vide its Chapter XII-A provides for examination of electronic evidence. Mr. Khare has placed emphasis upon Section 9-A of the Act that provided for the authority to specify vide notification in the Official Gazette any department,body or agency of the Central Govt. or State Govt. for examination of electronic evidence. According to Mr. Khare the Ministry of Electronics and Information Technology has already notified on 29.08.2022 agencies like Forensic Wing Lab and Defence Cyber Agency (DCA), Rajaji Marg, New Delhi as examiner of electronic evidence within India. He has submitted that under Section 45-A of the erstwhile Indian Evidence Act, 1872 and corresponding Section 39(2) of new Bhartiya Sakshya Adhiniyam, such electronic devices are admissible in law as electronic evidence and so the reports are liable to be proved by registered and approved forensic experts in a court of law proceedings. In this regard, Mr. Khare has also taken the court to the provisions framed by the Delhi High Court under its rules as to admissibility of such electronic evidence.

56. In support of his third argument Mr. Khare submitted that Associate Professor of IIIT, Allahabad in his final report clarifies that observations are subject to conditions that all documents and data shared with the undersigned had a verified provinence and responses provided by the personnel made available for interaction with the undersigned on the relevant dates.

57. He has further argued that before arriving at a conclusion the experts proceeded on an assumption that U.P. Jal Nigam believed that over all testing process had been compromised and since the Court had asked the Corporation to segregate the tainted from untainted candidates, it implied that court had accepted the assertions of U.P. Jal Nigam to the effect that over all recruitment process had been compromised. According to Mr. Khare the opinion proceeded since on these very misplaced assumptions, it easily formed a view that in the absence of any hash value and checksum information as to students' response being provided *qua* the CD given to it for verification, no definite opinion could have been expressed about the data integrity *qua* selection process. In the circumstances, the original hard disks ought to have been provided or Corporation should have organized meeting of Aptech Limited with Professors of IITs. The entire conclusion according to Mr. Khare therefore, in the reports are just speculative and conjectural and no prudent man would have any doubt about that after going through the opinions expressed by the Associate Professor of IIIT, Allahabad.

58. Mr. Khare has argued that on similar lines the IIT, Kanpur had also submitted its report and having got encouraged by these two reports obtained in respect of Assistant Engineers CBT and the selection held, the Corporation proceeded to obtain opinion *qua* CBT conducted in respect of Junior Engineers and identical opinions similar reports were also given *qua* Junior Engineers and RGCs.

59. Mr. Khare submitted in support of his third argument that except for technical opinions expressed by the Associate Professors, there was no other material available with the Corporation to examine the sanctity of the examination nor was there any genuine effort made in that direction to get verified data integrity though experts agencies approved by appropriate government under Information Technology Act, 2000.

60. On the point of checksum information and hash value which remained wanting for the experts of IITs, Mr. Khare has referred to certain literature in that regard. According to Mr. Khare, hash value is a digital finger print provided to decode encrypted data. It is a digital key to unlock a data which is provided in encrypted form but it depends uopn which kind of data is supplied. If the data has been created and downloaded from the main source server then it creates a hash value so that the data integrity may be verified at a later stage by applying the same. For a set of data, a particular hash value is provided and any modification of data would change the hash value but this would arise only in the event secured data is provided with a hash value. Mr. Ashok Khare, learned Senior Advocate has relied upon the work and literature namely digital fingerprint for investigation and cases involving electronic evidence by the Ovie Carroll and a treatise in the name of Electronic Evidence, old edition by Steaphon Mezon and Denial Sen which refers to hash value as a kind of digital fingerprint which is required to be put to forensic examination for the reason that a professional understands what the tool to be used to unlock the device perform the relevant task and also manner and method in which a computer device is required to be examined forensically so as to return a finding as to data integrity. Since the result processing data was there provided by the Aptech to the U.P. Jal Nigam which in turn was forwarded to the Professors for verification and examination, then in that event, if the checksum information and the hash value is lacking, the proper course would have been for the Corporation to have asked for it from the Aptech itself or to have brought the Aptech in touch with the Professors of IITs. Still further as Mr. Khare argues, once the data was seized from the local environment of the Aptech Limited then best course was to provide the Professors access to this data but the Corporation having not done so, committed manifest illegality and in such circumstances a mere expressed opinion by the Professors of the IITs for want of requisite material cannot be itself a ground to annul the entire selection and appointments made.

61. In respect of fourth argument regarding SIT report, much emphasis was laid upon which in the orders impugned, Mr. Khare submits that police report is only limited to the extent of taking cognizance by a Court of law. A Court may take cognizance upon it or may not, but for mere cognizance taken upon the such police report, the police report does not acquire an evidenciary value and even the statements recorded by the police tracing its power to Section 161 of Cr.P.C., are not admissible in evidence. Mr. Khare submitted that although these reports could have been taken on their face value so as to arrive at some conclusion on the principle of preponderance of probability as to the allegation made regarding conduct of CBT, these reports cannot conclusively form basis, nor can be treated to be conclusive proof of charge. He therefore, argues that the Corporation having relied heavily upon the SIT report in arriving at a conclusion that the

entire selection process was marked by gross irregularity and illegality, has manifestly erred in law.

62. On CFSL report, Mr. Khare has argued that when the Corporation itself doubted the integrity of data whether seized by the police or provided by the Aptech Limited, it should not be acceptable. Whatever material was placed before the Forensic Lab had been examined by it but the manner in which the 4th time report was called by the Investigating Team proved itself that the forensic lab itself was not sure about the data to furnish the information as required by the SIT.

63. According to him, even though 169 candidates have been shown in the CFSL report to have been awarded inflated marks so as to make them qualify for interview but the data integrity being questionable, it cannot be said that these 169 candidates were really tainted. Mr. Khare further argued that only point was whether any process was undertaken to segregate tainted from untainted candidates or not and if independent of the SIT report, there was no exercise undertaken and in the face of the fact that only opinion was sought which was rendered as such clarifying their own stand by experts for limited material supplied, the order impugned cannot be sustained in law.

64. In support of his 5th argument Mr. Khare submitted that there was no charge found established either against the constituent members of the interview Board or against any of the candidates as far as SIT report is concerned. Mr. Khare argues that except for the police investigation, there was no independent investigation or inquiry as such from any individual constituent member of interview board so as to elicit from them whether they were under pressure or undue influence to award marks to particular category of candidates, particular caste of candidates or candidates belonging to a particular religion, nor there is any charge sheet filed against any of the constituent members of the board. Even none of the candidates to whom it could have been said that they having indulged in corrupt practice made the selection process questionable, has been charge sheeted. According to him, had there been any remote possibility of involvement of any candidate in the corrupt practice so as to take undue advantage for belonging to a particular caste, group or religion, the police must have laid its hand upon such candidates at least those who have been selected and given appointment, but the SIT report gives a complete clean chit on this score by neither chargesheeting any member of interview board, nor any of the candidates who had been selected and appointed. Thus, on this count also the decision taken by the Corporation cannot be sustained.

65. In support of his last argument, Mr. Khare has submitted that issues to the effect that in absence of prior sanction from the Government by the Board of U.P. Jal Nigam to fill up the vacancies in question or that there was non availability of vacancies that have been filled up by holding selection and giving appointments, were no more open for the Corporation as in the first judgment of the Division Bench all these arguments were negatived and that judgment came to be upheld by the Supreme Court in its first judgment dated 16.03.2018 and then again judgment of Supreme Court in the second round of litigation. Both the judgments if conjointly read, give a decent burial to these issues. Even the issue of offering appointment a day or two before the notification of the

model code of conduct, according to Mr. Khare remained no more alive for the Corporation to give any consideration much less a thoughtful consideration while passing the order impugned.

66. To sum up the arguments and the submissions advanced by Mr. Khare on behalf of the petitioners before this Court, according to him, the Corporation failed to undertake any exercise worth a genuine exercise to segregate tainted from untainted candidates. Having based its decision upon mere reports obtained from the Associate Professors of IITs having no accredition to conduct forensic examination of electronic/ computer data based records under the Information Technology Act, 2000 and police investigation report, it misdirected itself in arriving at a conclusion that there was no possibility to segregate tainted from untainted candidates and hence no notices were required to be issued to selected and appointed candidates, for cancelling their respective appointments.

67. Mr. Khare further submits that these appointments were made in 2017 and they have continued for 3 years time and during entire their service period except for the fact that SIT investigation was going on and some in-house inquiries were previously conducted, there was no evidence that could be said to have surfaced out regarding involvement of such employees in the selection process to get appointment orders.

68. Taking the plea of innocence on principle of equity further Mr. Khare has submitted that defective questions answers were in such a miniscule that those defective questions or answers could not have been taken to be sufficient enough to form a definite view that selection process was vitiated for any serious irregularity. According to him, whether it is a case of Assistant Engineer or a case of Junior Engineer or even Routine Grade Clerk, such defective questions and answers count to be 2 to 3% only.

69. In support of all his above submissions upon different arguments raised and noted above, Mr. Khare has relied upon following authorities:

(i). In the case of Preet Singh Karola and others v. State of Punjab and others, (2006) 11 SCC 356.

(ii). Jogender Pal and others v. State of Punjab and others, (2014) 6 SCC 644.

(iii). Sachin Kumar and others v. Delhi, Sub-ordinate Service Selection Board (DSSSB) and others (2021) 4 SCC 631.

(iv). Vanshika Yadav v. Union of India and others, 2024 SCC Online SC 1870.

(v). Akash Yadav v. State of U.P. and others (Special Appeal Defective No.-127 of 2023 and other connected matters).

70. Mr. Ashish Mishra, learned Advocate who is appearing in a number of writ petitions filed on behalf of Junior Engineers and Routine Grade Clerks both hear at Allahabad and its Lucknow Bench, has though adopted the arguments of Mr. Khare but has further added following more arguments:

(i) The process of recruitment was absolutely as per the advertisement issued which very exhaustively laid down the process to take place and procedures to be followed sequentially, and since the publication of answer key was not provided for under the procedure laid down in

advertisements, non publication thereof itself could not have amounted to any serious irregularity.

(ii) The CFSL report itself is sufficient to identify tainted candidates and further verification, if was needed, could have been got done by the Corporation from material provided by the CFSL, Hyderabad in DVD with a hash value to decode it. There arises no question to doubt the data integrity because one of the hard disks seized was a mirror image of data taken from primary cloud server CtrlS, Mumbai, an agency which was hired by M/s. Aptech Limited.

(iii) The opinions expressed by Institutes of Technology at Allahabad and Kanpur were contextual to the issue of segregation of two categories namely tainted and untainted and are not conclusive to form any view as to the integrity of computer based online CBT data being ever interfered with or modified.

(iv) For wrong questions framed and wrong options assigned as answers to few questions in the master answer key, itself cannot be a ground to hold the entire CBT was bad for any gross procedural irregularity or illegality for malice.

(v) Yet another argument has been advanced that since these appointments had taken place and the appointees had joined the establishment and worked for about three years, whereas, the probation period was of 2 years, in the absence of any material cogent and sound enough to draw a conclusion that the appointments were obtained by fraud or mischief committed by these employees, such appointees did deserve at least a notice prior to cancellation of their appointments.

71. In support of his first submission Mr. Ashish Mishra, learned counsel appearing for the petitioners has taken the Court to the advertisement issued on 28th October, 2016 for the post of Junior Engineer (Civil) brought on record as Annexure- 2 to the writ petition being Writ – A No.- 4572 of 2020, which laid down exhaustive guidelines not only for the purposes of filling up the application form, submission of fee, eligibility criteria but also the mode of selection. He submits that vide clause 8 and 9 of the advertisement it provided that on the basis of CBT result the interview shall be held. In the first leg, CBT test will be held on multiple choice option format with 80 questions, each question shall have one mark and it is on the basis of CBT test that merit list shall be prepared for candidates to be called for interview accordingly and in the second leg, the interview shall be held which would be of 20 marks for Assistant Engineer & Junior Engineer and 25 marks for Routine Grade Clerk and the final merit list/ select list will be prepared by adding marks obtained in the interview with those marks obtained in the written examination and this, according to him, does not refer to any such procedure which may be said to have made it compulsory for the examination conducting body to upload master answer key or response sheet of the candidates. He further submits that even earlier in the year 2013-2015 when selection was held by U.P. Jal Nigam itself on posts of Assistant Engineer and Junior Engineer on the basis of online CBT, no master answer key was uploaded.

72. Taking the argument further Mr. Mishra has argued that this selection in question was held in the year 2016 and in those days even the master answers keys were not ordinarily published what to say about the response sheet. He submits that even the agreement signed between the

corporation and M/s Aptech Ltd. clearly demonstrated that answer key would be published but the M/s Aptech would act ultimately in accordance with the instructions received from the corporation and nothing is coming out from the pleadings raised in the counter affidavit of corporation that before declaration of final select list, any correspondence took place between the corporation and M/s Aptech Ltd. to publish the master answer key. He submits that an exhaustive procedure was provided under the advertisement to hold selection step by step and so notes contained therein and the guidelines prescribed, amounted to complete brochure itself in respect of the selection and appointments and the corporation cannot be permitted to raise an argument that the advertisement did not provide the procedure exhaustively to be followed in holding the selection for the post in question.

73. Referring to the CFSL report Mr. Ashish Mishra submitted that the report itself evidences that original data seized in the hard-disks from the local environment office of the M/s Aptech Ltd. consisted of one hard-disk with mirror image data of CtrlS, whereas back up file was in one hard-disk and four hard-disk were relating to processing data. According to him, the report itself discloses that this data related to all the candidates, who had participated in the CBT conducted in respect of different posts in the categories Assistant Engineer, Junior Engineer and Routine Grade Clerk and which all was analized by retrieving through the Data Recovery Tools.

74. He submits that report has very immaculately been drawn as to the data retrieved, analysed after due comparative study with the data provided by the SIT in respect of the candidates, who were called for interview and then it was all compressed and saved in the folder name 'CBT Comparison' in the DVD that was duly marked by the laboratory.

75. Mr. Mishra further submits that once entire data was retrieved and then was kept in folder in a DVD which was also provided with a 'hash value' and also contained a scanned copy of the documents provided by the SIT for the purposes of comparison, then it does not lie in the mouth of the corporation to suggest even that sufficient data was not available or the data was not worth trust for want of due verification.

76. Mr. Mishra strenuously argued that it would have been a different case in the event this data analysed by CFSL was further forwarded to the forensic experts under the Information Technology Act, 2000 for further examination but as the the records reveal, according to him, this data compressed in DVD remained in the custody of SIT and the corporation never endeavoured to get it from SIT to accompany the CD/ DVD obtained from M/s Aptech even to the Institutes of Technology, Kanpur and Institutes of Information Technology, Allahabad.

77. Thus, according to Mr. Mishra, the proper analysis of the data retrieved from the hard-disk, one of which was a mirror image of the data of primary cloud server of the CtrlS, Mumbai, the original source server, had been put to rigorous analysis by a forensic lab and the report prepared by it was never put to challenge, this should have been taken as sufficient material itself to be discussed in the order impugned so as to draw a conclusion as to whether tainted candidates could have been segregated from untainted or not.

78. Mr. Mishra submits that 169 candidates, who had been shown in the documents provided by the SIT to have obtained marks which upon verification by CFSL were found to be given more than the original marks contained in the data base, clearly established that these 169 candidates did not deserve to be called for interview as per the CBT merit list of M/s Aptech Ltd. and these candidates, therefore, can very well be placed in the category of tainted candidates. A further verification could have been done by the corporation to cross check it but this having not been done, the corporation could have proceeded to delist these 169 candidates and in lieu thereof candidates who deserved to be called for interview as per the merit list/ revised list ought to have been given opportunity. According to Mr. Mishra a decision to arrive at a conclusion that there was no possibility to segregate the tainted from untainted candidates as per the mandate of Division Bench of this Court, a misplaced judgment seeing the material available with the corporation and hence the findings so returned in the order impugned are perverse and unsustainable.

79. Mr. Mishra further submits that these candidates who were in merit but fell in untainted category but were offered appointments and have worked for 3 years with the establishment and there being no complaint as such regarding their work and conduct and since the rules applicable to the employees of the corporation provided for a period of probation of two years and there was no such order passed by the competent authority of corporation extending probation period, such employee should be taken to have acquired permanent status and could not have been removed except for a disciplinary proceeding. But this is not a case in hand, all that has come up against them is that they have been axed only for a finding returned and that too based upon no such substantive material to hold that their selection itself vitiated for gross irregularities committed in the selection process.

80. Mr. Mishra cite cases where appointments have been offered to a candidate after selection, a different parameter and yardsticks was to be applied than in those cases where though selection had taken place but no appointment orders was issued. He argues that the legal position is well settled that no one even placed in the merit list has a vested right to get an appointment but once candidate gets an appointment order after selection then he gets at least a vested right to be heard before he is fired and that too on the ground that appointments have been made for gross irregularity and illegality in the selection process.

81. In support of all above submissions, Mr. Mishra, learned counsel for the petitioner has placed reliance upon following authorities in addition to the authorities already cited by Mr. Khare:

(i). Anamica Mishra and others v. U.P. Public Service Commission, Allahabad and others, 1990 (Supp) SCC 692.

(ii) Ranvijay Singh and others v. State of U.P. and others, (2018) 2 SCC 357.

(iii) Kapil Kumar and others v. State of U.P. and others (2023) SCC Online All 4024.

82. Mr. Mishra has also placed reliance upon the judgment in the case of Prem Lata v. State of Tamilnadu of Madras High Court in Writ Petition No.- 19939 of

2014 decided on 17th November, 2022 (Paragraph 89)

83. Citing the judgment of Division Bench of this Court in the case of Kapil Kumar (*supra*), taking the plea that if the candidates upon revision of the result in view of the decision upon challenge to questions answers in the CBT examination are found meritorious in the order, such candidates who have already been selected may not be disturbed and adjustment can be made of the candidates of the revised list in accordance with the merit upon other existing available vacancies. He has placed reliance upon the paragraph 30 and 31 of the judgment.

84. Mr. Seemant Singh, learned Advocate appearing for some of the petitioners has also adopted the arguments advanced by Sri Khare and Sri Mishra above and only added this much; in the face of a fact that CFSL report has remained unquestioned till date, this itself was a sufficient material available with the Corporation to arrive at a conclusion as to who are the tainted candidates who could be segregated and taken out of the select list.

85. Mr. Seemant Singh has also emphasised upon the report of Aptech Limited which itself has identified a large number of candidates who did not deserve to be called for interview and yet were called and those who deserved to be called but were not called and this could have been sufficient to rework the merit list of CBT.

86. One more submission has been advanced by Sri Seemant Singh, learned counsel appearing for some of the petitioners that corporation in fact either did not supply the correct data to the institutes of Technology while seeking their opinion regarding Junior Engineer, nor the learned Associate Professors, who were to render opinion did not make sincere attempt to verify the data by asking the corporation to hold consultation with M/s Aptech Limited while giving before enquiry report. He submits that report itself is untenable for the simple reason that it proceeds upon the data concerning Routine Grade Clerks and not Junior Engineers and yet the opinions have come in respect of the CBT of Junior Engineers.

87. Sri Seemant Singh in this regard has taken the Court to the report submitted by Associate Professor of Indian Institute of Technology, Kanpur Nagar dated 3rd January, 2019.

88. Sri Seemant Singh has also argued that in view of the order initially passed on 18th February, 2020 in the matter of Ambarish Kumar Pandey (Writ – A No.- 5912 of 2020)**,** FSL report ought to have been given weightage. It is argued that FSL report since was approved by the Government itself as SIT report based upon the CFSL report was approved, the respondent corporation while considering the matter ought to have given absolute weightage to the CFSL report by discussing the same for identifying and segregating tainted from untainted candidates, which is quite lacking in the order impugned.

89. Placing reliance upon the authority of Supreme Court in the case of **Ashok Kumar Yadav v. State of Haryana and others, 1997 AIR SC 454**, Sri Seemant Singh has submitted that merely for someone has scored better marks in interview than in written examination or *vise versa*, this itself cannot be a ground to

hold that selection process was vitiated for any kind of vested human intervention with an intention to give benefit to a particular caste, creed and religion as has come to be alleged in the counter affidavit. It is submitted that the fact that a candidate obtained marks in a particular written examination and in interview marks appeared to be beyond proportion, unless and until there is intrinsic material available as to any kind of interpolation or tempering of records or any kind of influence being ever exercised upon the interview Board, its constituent members, cannot itself be a ground to hold that selection process stand compromised.

90. Thus, according to Sri Seemant Singh in the event Corporation was not sure about the data, then Corporation ought to have trusted its examination conducting agency in the absence of there being any iota of evidence leading to the charge of corrupt practice at its end in relation to the conduct of CBT in question. He thus, also questions the decision taken by the Corporation to annul the entire selection and appointments.

91. Lastly appearing on behalf of a number of petitioners learned Senior Advocate Mr. Radha Kant Ojha assisted by Mr. Namit Srivastava has argued that once the Aptech Limited had taken a stand that the data was preserved in his Archive NAS at its NOIDA office and it was hundred percent sure of its authenticity and integrity and in the face of the fact that the opinions expressed by the IIT, Kanpur and IIIT, Allahabad, as has been argued by his other colleagues, to be speculative and conjectural, the Archival data should be directed to be examined afresh by the forensic experts so as to rule out any doubt as to sanctity of selection process regarding conduct of the examination of which much hype was created by the Corporation without any basis.

92. Mr. Ojha submits that a number of candidates have already became over aged to apply for selection in any of Government service and in the face of the fact that a large number of candidates deserved to be called for interview if the revised result of the Aptech was accepted and if the FSL report is to be accepted which has not been doubted even by the Corporation till date by challenging it, it would be in the interest of justice that the entire merit list is reworked after the forensic examination is completed. According to him, this will be a correct approach taking holistic view of the matter. In any case, Mr. Ojha has also assailed the order impugned in these petitions for want of proper material to justify the stand taken by the Corporation.

93. There are other learned Advocates appearing for different petitioners in different petitions who have also adopted the arguments already advanced by their senior colleagues at the bar on behalf of the petitioners.

94. Mr. Radha Kant Ojha, learned Senior Advocate assisted by Mr. Namit Srivastava appearing for seven of the petitioners has relied upon the judgments and authorities cited by Mr. Khare and Mr. Mishra. Additionally he has of course, submitted that many of the Assistant Engineers, who have been selected and appointed have gone over-aged for any selection in any other establishment and since they have made it to the merit list and there is no charge against them has come up either in the SIT report or any other inquiry reports, they should not be held responsible for any such alleged irregularity in the selection process. He,

however, still submits that in the face of the fact that M/s Aptech Ltd. has come up with the stand that original data still continues to be saved on its archive server NAS, NOIDA place, the same may be directed to be analysed by agency that is approved by appropriate Government under the Information and Technology Act, 2000 and that according to Mr. Ojha would given a complete quietus to the controversy.

**Arguments raised for the Corporation**

95. Meeting the arguments as advanced above by learned Advocates appearing for the petitioners, Mr. Manish Goyal learned Senior Advocate, appearing for the corporation defended the orders impugned in these petitions claiming them to be based upon valid findings arrived at after thorough examination of material available and reasonable appreciation thereof by the concerned authority.

96. According to him, procedure for conducting CBT out by M/s Aptech Limited was adopted against the written agreements reached between the corporation and outsourced agency separately for three sets of examination, i.e. for Routine Grade Clerks on 17.06.2016, for Junior Engineer 28th August, 2016 and for Assistant Engineer on 15th December, 2016 and this breach committed by Corporation *qua* the agreements has eroded the trust reposed in the agency as to the sanctity of CBT process and integrity of data thereof stored by it.

97. Mr. Goyal submitted that data retention policy much talked about, if ran contrary to the agreements recorded between Corporation and M/s Aptech Ltd., it were the agreements to prevail. Mr. Goyal submitted that Institutes of technology were in these circumstances left with no other alternative in the face of the fact that original data was deleted from the primary source cloud server, but to express their inability to give certificate of authenticity to the data supplied by the agency. According to Mr Goyal, in these circumstances, no definite opinion could have been forward by Institutes of technology as to the correctness of answer sheets not being manipulated and the truthfulness data of result processing not being tempered with. He has placed much emphasis upon the checksum information and 'hash value' digital fingerprints as key to unlock/ access original data and since M/s Aptech Limited failed to provide checksum information and and requisite hash value of the data, no tracking could be made to verify the correctness of candidates' response data to questions, recorded by it. Mr Goyal submitted that it was duty of the service provider to have provided the relevant checksum information and hash value. For the absence of checksum information as to the original response data of the candidate in the examination hall, and in the absence of hash value, it was impossible to verify the records and still further, it became difficult to know as to whether the data provided was the modified one or copy of original one.

98. Mr. Goyal submitted that 'hash value' created once the data is transmitted from original server to a secondary server by the original service provided and this hash value continues to remain constant to decode the original data provided in an encrypted form. Any attempt to have access to the data without information about the 'hash value', would certainly corrupt the original data and any

fresh 'hash value' means data is already modified. The hash value is a digital signature put to a data to access it. Mr Goyal submitted that service provider since did not provide the 'hash value', it remained illusive data as to its authenticity and integrity upon transfer to a local environment device. A data Security is always marked by digital fingerprint of the digital signature, as was done by CFSL, Hyderabad consolidating the data retrieved from the original hard disks into a DVD marked as"CAH – 75– 2018 – DVD,"

99. Mr. Goyal has also argued that it is relevant to refer to the reports of the Associate Professors of IIIT, Allahabad and IIT Kanpur in respect of Assistant Engineers and Junior Engineers. He has argued that from the report submitted by Associate professors, it is clear that they were unable to express any definite opinion/view with regard to the issue of segregation of tainted candidates from the untainted candidates. Mr Goyal also took the Court through the CFSL report, which, according to Mr. Goyal shows that no 'hash value' information was available to the data contained in hard disks that were six in number.

100. Mr. Goyal has put emphasis upon the CFSL report to demonstrate that hard disks that were recovered from the local environment of office of the M/s Aptech Ltd. under the order of the Special Magistrate, Anti-corruption/ Central Bureau of Investigation, Lucknow, with search warrant, were are all sent to Hyderabad on 23rd of October 2018 for forensic examination. He submitted that SIT report, made it clear that these hard disks were though recovered from the office of the Aptech premises, but none of the hard disks contained the 'hash value'. According to Mr. Goyal, if 'hash value' had been assigned to the original data, then while showing certificate at the time of preparation of seizure memo, the officials of the M/s Aptech Ltd. would have given the information regarding hash value, but no such information was given *qua* the hard disks that contained according to the certificate by Official of the M/s Aptech Ltd, a mirror image of the original data downloaded from the primary source cloud server CtrlS is stored, nor the hard disks had the system logs.

101. Elaborating further the definition of 'hash value', Mr Goyal submitted that hash value or checksum information is provided to decode the data contained in the hard disk or such other device. He has referred to a famous treatise, namely, Electronic Evidence: Disclosure, Discovery & Admissibility, First Edition by Stephen Mason, in which vide paragraph of 3.16, the details are given for preserving digital data evidence. The relevant paragraph runs as under

"*3.16 Validating digital evidence*

*Digital evidence in particular needs to be validated if it is to have any probative value. A digital evidence specialist will invariably copy the contents of a number of disks or storage devices, in both criminal and civil matters. To prove the digital evidence has not been altered, it is necessary to put in place checks and balances to prove the duplicate evidence in digital format has not been altered since it was copied. An electronic fingerprint is used to prove the integrity of data at the time the evidence was collected. The electronic fingerprint uses a cryptographic technique that is capable of being associated with a single file, a floppy disk*

*or the entire contents of a hard drive. As digital evidence is copied, a digital evidence specialist will use software tools that are relevant to the task. program that causes a checksum operation, called a 'hash function' to be applied to the file or disk that is being copied. The result of applying a hash function to digital data is called a hash value. The hash value has been calculated against the content of the data. This is a one-way function, containing the mathematical equivalent of a secret trapdoor. For the purposes of understanding the concept,, this algorithm is easy to compute in one direction and difficult to compute in the opposite direction, unless you know the secret. The hash function is used to verify that a file, or the copy of a file, has not changed. If the file has been altered in any way, the hash value will not be the same and the investigator will be alerted to the discrepancy. A digital signature can also be used in this way, by combining the hash value against some additional information, such as the time."*

Mr. Goyal has also referred to paragraph 3.34, which runs as under under.

"*3.34 Logs, files and printing*

*In addition, when a user uses their computer they leave traces of th actions across a range of data logs and files. A data log is capable containing any type of data, depending on what the system is programmed to capture . For instance, if a file is downloaded from the Internet, a date and time stamp will be added to the file to demonstrate when the file was downloaded on to the computer. When the file is moved, opened or modified, the time and date stamps will be altered to reflect these changes. In addition, the metadata can also help provide more information about the file, such as the location to which it was stored on the disk, the printer and the original time and date the file was created. When a file is printed, the computer tends to store the print job in a temporary file and then sends the file to the printer when the printer has the capacity to print the document. Once the command to print has been passed to the temporary store the user can continue to work with the application, for instance they can continue to type a new document whilst the previous document is waiting to be printed. The temporary print store retains valuable information, such as the name of the file to be printed, the type of application used, the name of the printer, the name of the person whose file is to be printed, and the data itself. In addition, there is a date and time stamp added to these files to show when the file was printed. It should be noted, however, that the date and time stamp can be altered, which means it is important to ensure the time and date stamp is corroborated by other methods."*

102. In view of the above, Mr Goyal has argued that material evidence would have been collected from the electronic device or computer device provided the hash value information or checksum information was provided by the custodian of data which in the present case was certainly M/s Aptech Ltd.

103. Mr. Goyal submitted that according to the data retention policy brought on record by M/s Aptech Ltd., it was clear that Mr. Fernandes was in the helm of affairs and when he was issuing certificate regarding hard disks seized by the police from the local environment, he must have been in possession of this necessary information as well. According to Mr.Goyal any prudent man in these given facts and circumstances, while material is being seized from his possession, would have certainly known

that police would send these materials collected or seized for forensic examination to present this as crucial electronic evidence in a court of law proceeding, and therefore, in all fairness the officials of the M/s Aptech Ltd. should have also shared necessary checksum information and 'hash value' of the data retrieved or downloaded from the original cloud server. Thus, according to Mr. Goyal, this crucial information was deliberately withheld by M/s Aptech Ltd. to cover up its misdeeds committed in the matter of selection in question, may be in connivance and conspiracy with certain officials of the Corporation who facilitated tampering of final results before entry in computer's modified data. It is thus tampering with original select list of the CBT that facilitated, according to Mr. Goyal, undeserving candidates to participate in interview showing exit door to the deserving candidates. Mr. Goyal, thus emphatically argued that entire selection process was undoubtedly compromised to select and then offer appointments on pick and chose basis.

104. Referring to the report of the Chief Engineer dated 29.05.2017, Mr. Goyal has taken the court to the finding part of it that records that appointments were required to be made by the State Government and not by the corporations because sanction to the post was to be accorded only by the State Government and not Managing Director of the UP Jal Nigam, until and unless the regulations were amended. According to Mr Goyal, Corporation had no authority to advertise the posts to undertake any recruitment drive. Mr Goyal has further taken the Court to clause 11 of the report that takes out extract from the merit appended as annexure 15 and as per extracts, it included 22 such candidates who, according to the report were though called for interview, but were given highly excessive marks by the interview board. The example of, Mohammed Shams has been cited, who in the eligibility column could only score 3 out of 4 marks but towards technical knowledge, personality and power of expression, he was awarded full marks. So was also the case cited of another candidate Gaurav Kumar Verma, who was though not selected, was also awarded only three marks towards eligibility but was awarded full marks towards technical knowledge and personality and capacity of expression. These are the two instances only as per the records made available by the Aptech itself and Mr Goyal submits that this clearly showed how nepotism and bias vitiated the selection process.

105. Referring to another report of the Chief Engineer, level II dated 14, July 2017, Mr Goyal has submitted that 15 objections were received out of 80 questions from the question paper of online examination for the post of Assistant Engineer, Civil and as per the Aptech's own version, 11 objections were correct. Similar was a case in the second inning of the Assistant Engineer, Civil examination in which out of 80 questions, 16 objections were received as per the version of Aptech's, objections were found to be valid. Mr Goyal however, submits that report also recorded that objections regarding seven questions out of same to be correct. Thus, according to the report as Mr Goyal argued, that objection should have been invited to resolve them in the first instance, and thereafter only CBT select list should have been published/notified. Mr. Goyal further argued that according to the report, the defect in framing of questions and preparation of answer key and its

assessment was at the level of M/s Aptech Ltd only.

106. According to Mr. Goyal it was indeed a defective way of admitting the select list without publishing the master answer key to invite objections from the candidates. Master Answer Key for the post of Assistant Engineer and Junior Engineer was published only after two months of the declaration of result as results were declared on 03.01.2017, whereas, the master key answer were published on 28.02.2017. Likewise in the case of Routine Grade Clerk the result declared on 24.12.2016 but the master answer key was published on 27.03.2017 and in the case of Junior Engineers the result was declared on 01.01.2017 and the master answer key was published on 14.02.2017. Mr. Goyal submitted that it has never been a practice, nor it should be taken as a healthy practice to first draw the select list on the basis of CBT merit, to hold interview and offer appointments and thereafter only publish the master answer key. It appeared, according to Mr. Goyal, too urgent for certain officials of respondent Corporation who were in the helm of affairs and in conspiracy with the officials of M/s. Aptech Limited to conclude the recruitment drive in a shortest span of time and in any case before the notification of model code of conduct. This is the reason why, Mr. Goyal argues, that within 28 hours to 48 hours of the declaration of final merit list the appointment orders were issued. Mr. Goyal submitted that the hush hush manner in which the entire recruitment driver was expedited to be concluded was all aimed at clearing appointments of preferred candidates of particular caste, religious group before any intervention of law could have taken place. Citing the report of SIT Mr. Goyal submitted that report carries weight in the light of observations made by Division Bench in Special Appeal No. 625 of 2019. Division Bench, according to Mr. Goyal, had very clearly observed that *"the Jal Nigam being appointing authority is competent and it is well within its domain to find out whether examination clearly and transparent manner and subject to report of SIT, analysis of Forensic Laboratory and any other material that may be placed before the Jal Nigam to take decision".* Mr. Goyal further referred to another observation *"it goes without saying that some decision is to be taken in accordance with law for the purpose of finding out possibility of segregation between the tainted and untainted candidates the report of the SIT acquires significance."* Now taking the Court to the SIT report, Mr. Goyal submitted that certain statements of officials of M/s. Aptech Limited are very crucial. According to him, the statement of Vishwajeet Singh, Technical and Delivery Head of M/s. Aptech Limited is important as according to him the said Vishwajeet Singh had worked with M/s. Aptech Limited in August 2016 and admitted before the SIT that main task of M/s. Aptech Limited was to prepare questions papers, conduct examinations, the assessment of answer sheets and then final declaration of merit list of CBT. From the SIT report Mr. Goyal has placed before the Court certain questions put to the said Vishwajeet Singh in the matter of Routine Grade Clerks, Junior Engineers and Assistant Engineers. He has also taken the Court to certain queries made regarding placement of server, main server of M/s. Aptech Limited and it was admitted in his statement that M/s. Aptech Limited was working with separate data centre providers namely CtrlS and Net Magic in whose control the data was and they were located in Mumbai. M/s. Aptech Limited according

to the statements uses this cloud data. Mr. Goyal submitted that this statement very clearly established that online examination data was consolidated at the cloud server which was later on drawn offline into the local environment server and the result was declared. Entire data though was to be kept for one year as per the agreements which also included online registration data / attendance, biometric data of the candidates, candidates' response data, original question paper and original answer key and also revised answer key. The other data after the revision of answer key was separately to be saved because it interfered with the original data available on the cloud server by way of result processing. These facts directly fell from the mouth of officials of M/s. Aptech Limited and therefore, Mr. Goyal submitted that this should be clearly conceded by M/s. Aptech Limited. Mr. Goyal has also taken the court to the statement of Ajay Kumar Yadav, General Manager of Aptech Limited posted in its office at Lucknow where the question was raised about the process undertaken by the Aptech Limited for declaring result of the candidates and answer given was that the computer based result was provided to Sri P.K. Ashudani, the then Managing Director which was password protected and this data trailed to marks obtained by the candidate. This data was on excel format and thereafter, Mr. Ashudani with the help of one Hemant and Santosh Rastogi who being officers of M/s. Aptech Limited also had access to the password accused it and prepared result and sent it to the Aptech on the basis of which the candidates were invited for interview marks. It was also stated by said Ajay Kumar Yadav that after the interview marks was also obtained in hard copy from Jal Nigam and then adding the marks in computer based results a final select list was prepared. On the question as to whether the result sheet which was provided by Jal Nigam, was ever matched with original primary data available with the Aptech or not, Mr. Ajay Kumar Yadav admitted that it was not matched with the marks present in original data base. Upon another query as to when original data had been deleted from the primary source cloud server then was it not possible that the result provided by the U.P. Jal Nigam might only have been available upon server because M/s. Aptech Limited followed instructions of officers of U.P. Jal Nigam only and contract was not followed, the reply was that since it was multiple department work activity, the departments worked independently and so it was not possible. Upon another query, if U.P. Jal Nigam might have changed the results because the result provided by U.P. Jal Nigam to M/s. Aptech Limited was not matched with the result available in its data base, in reply it was admitted that it could have been possible. On the question of fixing responsibility Mr. Ajay Yadav clearly admitted before SIT that it was the duty of the Aptech to upload the answer key as per the agreement and if it was not done, it was a mistake on the part of the Aptech. Thus, according to Mr. Goyal, from the statements it is clear that Aptech Limited provided the password protected result to the Managing Director who gave access to the others also which should not have been done. The original data of CBT result was completely got tampered with and was provided in the hard copy as well to the Aptech Limited to be uploaded and it was then the candidates were called for interview on that basis. Resultantly those who secured lesser marks were called for interview for inflated marks and those who had secured higher marks were denied the opportunity.

107.In support of his above submission Mr. Goyal has cited the report

of Central Forensic Science Laboratory, Hyderabad which is now part of the SIT report. As per the report submitted by the Laboratory, 30 candidates of Assistant Engineer (Civil), 3 candidates of Assistant Engineer (Computer Science), 4 candidates of Assistant Engineer (Electrical & Mechanical), 58 candidates in the category of Junior Engineer (Mechanical) and 53 candidates of Routine Grade Clerk totalling to 169 candidates where such whose CBT result in the original data base was found to be with less marks than in the list provided by the SIT and this led to the only conclusion that the recruitment and selection process was badly compromised. Further the original data was not provided by the Aptech limited even though it was aware of the controversy going on in Court and also subject to enquiry at the level of the Government and the Corporation.

108. Mr. Goyal also refers to the report of M/s. Aptech Limited dated 19.08.2017 brought on record as Annexure No. C.A.-5 to the writ petition of Mr. Surendra Singh being Writ – A No. 4572 of 2020 (relevant para 55) wherein M/s. Aptech Limited itself admitted that certain facts that went to the root of the matter. The report contains a list of 331 candidates of Junior Engineer (Civil) and 148 of Junior Engineer (Electrical/ Mechanical) totalling 475 who were not selected for interview though they deserved after that revised result by M/s. Aptech Limited. According to the report of M/s. Aptech Limited, 656 candidates of different streams of Junior Engineers were wrongly called for interview though they were ineligible to be placed in the CBT merit list and thus they ousted a large number of candidates from the zone of consideration for not being placed in that list. It is though contended by Mr. Goyal that the entire team of M/s. Aptech Limited in conspiracy with its officials of Corporation were neck deep in corruption in the matter of selection *qua* public employment. The manner and method in which the entire plan was designed to accomplish the task and the manner and method in which a particular section of candidates were awarded deliberately higher marks in interview even though they had scored lesser marks in the examination, it showed that it was all done to somehow facilitate entry of such candidates in interview. These corrupt practices had really adversely affected the opportunities of the genuine candidates who would have acquired placement in the merit list, had the selection been fair. According to Mr. Goyal, all this could not have been rectified and only option was therefore, available to annul the entire selection process. Not one or two but in all six reports besides SIT report, according to Mr. Goyal are there that are indicative of the fact that the entire selection process was unduly influenced by those who were in the helm of affairs as they abused their authority to influence those who interview+ as well as M/s. Aptech Limited.

109. Mr. Goyal emphasises on the point that in the event of systemic fraud in selection process in any competitive examination where applications are invited from open market, it is always necessary to annul the entire selection process in order to restore confidence of people in the system of recruitment. In this regard, he has cited the latest judgment of Supreme Court on the point in the matter of **Gohil Deshraj Anubhai and Others v. State of Gujarat & Others, (2017) 13 SCC 621, para 21 & 22** and **State of Tamilnadu and Others v. Kalaimuni & Others, (2021) 16 SCC 217, para 14**.

110.The assisting counsel to Ms Goyal, Ms. Anjali Goklani, learned

Advocate, has placed the relevant paragraph nos. 35, 36, 37, 38, 55 and 56 of the judgment before the Court to canvas the correct legal position in the above regard. Mr. Goyal submitted that the Court dealt with fundamental issue *qua* process of examination getting vitiated to what extent and submits that the Supreme Court has held that if the irregularities in the process is found to be at systemic level questioning the credibility and legitimacy of the selection process, then such irregularities will be taken to have pervaded the entire domain of selection. Mr. Goyal submitted that in such circumstances notice to candidates individually looses its significance.

111. Mr. Goyal submitted that the Supreme Court considered all these aspects in its celebrated judgment cited above i.e. Gohil Deshraj (supra) and State of Tamilnadu (supra) the above. In the case of State of Tamilnadu and others the Court held that the decision of the board to cancel entire selection process in order to instil confidence in people *qua* integrity of selection process was justifiable. He emphasised upon principle of judicial review by the High Court and argued that sufficiency of material will not fall within the purview of judicial review. Mr. Goyal vehemently urged that High Court is to only look into the decision making process and if it was not found to be flawed one, the Court will not go into the question of appreciation of material as it stood already examined by the authority concerned. He has submitted that in the judgment of Gohil Deshraj *(supra)* the principle of primary judicial review has been discussed in extenso and argued that when the action challenged is arbitrary by putting it on the testing anvil of Article 14 of the Constitution, the Court performs a primary review to test the correctness as to the discrimination meted out if any and as to whether it is excessive or it has a nexus with the object sought to be achieved by the Administrator. On the other hand question of proportionality therefore, will arrive between the charge and the action taken by the Administrator. The rationale behind the order and reasonableness could be put to test but the court would then confine itself to secondary role in judicial review as it will only look as to whether an Administrator has done the primary role or not. If the Administrator is found to have accomplished the primary role in arriving at a conclusion considering the relevant factors, then consideration accorded will not fall within the domain of judicial review to raise a question as to sufficiency of material.

112. Mr. Goyal also relied upon another judgment of **M/s. Aptech Limited v. U.P. Power Corporation and another, 2019 SCC OnLine All 4906**, a judgment of Division Bench of which I was also a member. In order to emphasise a point that where the examination conducting body is a party to the agreement, it was to ensure conduct of examination procedurally as per terms of agreement to ensure confidentiality of its secured data and if it failed procedurally making investigation *qua* entire selection process as to whether it exposed its hardware and software to human intervention then in such a case it would be inevitably judicious to cancel the entire selection. In the said case, the Division Bench had upheld the order of blacklisting passed against the same service provider Agency. He further submitted that the decision in that case was taken by the State Government relying upon the inquiry report submitted by the STF which had indicted the service provider for deliberate

negligence. Reiterating the principle of Wednsebury Reasonableness Mr. Goyal submitted that where the confidence of public is shaken for selection process getting adversely affected for human intervention resulting in irregularities at large affecting a large number of candidates as they lose their chance of success only for manipulations no prudent man would allow such selection to stay. Mr. Goyal placed before the Court para 20, 21, 23, 25, 28 and 30 of the said judgment. Mr. Goyal also cited the judgment in the case of **Puneet Bhardwaj v. Delhi State Government** being **Writ – C No. 15270 of 2022** and the connected matter decided by Delhi High Court on 15.09.2023 and placed paragraph nos. 5, 6, 25, 27, 28, 29, 30 & 31 of the judgment. Mr. Goyal argues that in the above case, two points were raised before the Court:

(i) Petitioner had no vested right of being considered for appointment on the post of Junior Engineer/ Assistant Engineer upon being selected by Delhi State Electricity University; and

(ii) Notices issued, impugned in the writ petition, involved violation of principles of natural justice as opportunity to be heard was not afforded to the petitioners who were selected.

113. The Court rejected both these arguments on the ground that the entire selection process was surrounded by malpractice and irregularities and so there was nothing wrong in cancelling the entire selection process. It is held that in such circumstances it becomes difficult for the agencies conducting such examination to identify as to how many candidates were engaged in such malpractice and such irregularities.

114. Meeting the point that once the candidates have been selected and given appointments pursuant to which they had submitted their joining and so there should be no cancellation of all the appointments by one stroke of pen without giving them individual notice, Mr. Goyal cited the authority of Madras High Court in the case of **R. Premlata and Others vs. State of Tamilnadu and others** decided on 17.11.2022 being Writ Petition No. 19939 of 2014. He has placed reliance upon paragraph nos. 69, 79, 80, 81, 82, 83, 84 & 87 of the said judgment.

115. Mr. Goyal submitted, firstly in the said case a retired Judge of Delhi High Court was entrusted with the enquiry in the matter of selection and 152 candidates who were found to be tainted and a finding was returned to the effect that allotment of marks with less experience drastically changed the entire complexion of the selection exercise. Mr. Goyal submits that the findings were that act and conduct of selectors prejudiced the rights and interest of a large number of meritorious candidates who had participated in the selection process and, therefore, these candidates stood deprived of equal opportunity in the matter of selection and appointment as enshrined under the Constitution. Thus, according to Mr. Goyal where it is established that there was a deep rooted corrupt practice leading to manipulations resulting in irregularity in awarding marks to the candidates, it would not affect the non tainted candidates as they would have still a fair chance to compete in future.

116. Giving the example of the present case where 656 undeserving candidates were called for interview as per the own stand of M/s. Aptech Limited who should not have been intervened, Mr. Goyal

submits, it goes without saying that a large number of candidates were virtually deprived of their opportunity to participate in interview in getting finally selected. He submits that if total number of vacancies were 800 and plus these 600 and plus candidates would have certainly affected the entire merit list substantially. Mr. Goyal submitted further that as per the CFSL's own report if 169 candidates have taken to be wrongly favoured and hence tainted then it is only one instance where the data was examined by the CFSL and if the entire data was got verified available at primary source server which was a cloud server, the merit list would have been absolutely different but opportunity was not there for data being deleted for primary source cloud server.

117. Thus, according to Mr. Goyal it is an established case of fraud played in the process of selection which has vitiated the entire exercise *qua* recruitment and the SIT having found the officials of M/s. Aptech Limited to have conspired with the officials of the Corporation, they have all been named in the report which was finally submitted on 22.01.2020 and the court has taken cognizance thereupon under criminal law.

118. Yet another argument was raised on behalf of the Corporation by Mr. Goyal, learned Senior Advocate *qua* the doctrine of impossibility as would be attracted in the given facts and circumstances of the case. He has argued that select list was so much manipulated in respect of a large number of candidates to be specific post of Junior Engineers, Assistant Engineers and Routine Grade Clerks that it had became impossible for the Corporation to draw a line between selected on merits and the selected fraudulently and those deprived of opportunity.

119. In support of the above doctrine, Ms. Ananya Shukla, learned assisting counsel to Mr. Goyal has placed paragraph nos. 39 and 40 of the authority of Supreme Court in the case of State of **Madhya Pradesh v. Narmada Bachao Andolan & others and the connected matters, (2011) 7 SCC 3639** and read out paragraph nos. 39 & 40 of the judgment. It is argued that if for inevitable disability to perform mandatory part of law, in other words performance of formalities prescribed by statute if rendered impossible by the circumstances over which the person entrusted with the task has no control, then non performance of such duty is a valid excuse. It is stated to be the law of natural equity which has been applied down the ages. Yet another judgment of Constitution Bench of Supreme Court in the case of Election Commission, **IN Re: Special Reference No. 1, (2002) 8 SCC 237** has been cited which arose out of an election dispute and petition had got rendered infructuous for the reason that tenure of elected person had expired. Ms. Shukla placed paragraph no. 151 of the said judgment in which it was held that "*where the law creates a duty or charge and party is doubted to perform it without default in him and has no remedy over it there, the law in general excuse him"* this mandatory character of law, it is argued looses its binding effect for there being supervising impossibility caused by an act of God.

120. Applying this principle to the facts of the present case Mr. Goyal submitted, the report of SIT showed that favour was given to a particular caste and

religion for the reasons known to the then Minister of Urban Development who happened to be the Chairman of the Board and the officials of U.P. Jal Nigam who all acted in conspiracy and connivance with the service provider agency and this resulted in a large number of candidates getting selected fraudulently and this was all so deeply rooted that right from CBT result to interview and then final preparation of merit list all stood manipulated. Taking the Court to the relevant facts and figures as have been reduced in writing under the SIT report *qua* category of Assistant Engineer, there were 42 candidates out of 122 selected candidates who were awarded more than 17 and above marks in interview 27 of them belonged to a particular religion and 22 of them found place in the final select list. Similarly a particular caste candidate who were 8 in numbers were awarded 17 and above marks found place in the final select list. In the category of post of Junior Engineer, Mr. Goyal presented the figure according to which total 219 candidates who were awarded 17 and above marks out of 20 in interview, 74 of them belonged to particular religion and 57 of them found place in the merit list and so also the 66 candidates of particular caste out of 219 candidates in total found place in the select list. Again in the category of Routine Grade Clerks 49 candidates were awarded 20 and above marks out of total 25 in interview and 26 candidates out of total selected 52 candidates of particular religion who were awarded 20 marks and above found place in final select list. Similarly 25 candidates of a particular caste out of 49 selected candidates were also awarded 20 and above marks in interview out of 25 were placed in final select list. Mr. Goyal submitted that looking to the time factor involved in conducting the interview of candidates by each board it was clear that the interview board had not much time to assess the total personality of a candidate participating in the interview and hence awarded marks only on pick and chose basis. Mr. Goyal submitted that at least figures speak themselves. In support of his submissions Mr. Goyal has taken the Court to the statement of Mr. Anand Murti Srivastava, the then Superintending Engineer and Sri Chandra Dhar Dubey, the then Superintending Engineer recorded on 31.01.2018 and 01.07.2018 respectively. These statements have been placed before the court only to demonstrate that only time schedule for statement was stated but nothing had been stated as to what time was actually consumed in interview each day or shift.

121. Thus, according to Mr. Goyal, the authority while passing the order has fully appreciated all the reports available to it and has valid justified reasons on facts to cancel the entire selection process. In the decision making process, according to Mr. Goyal, the factors like findings in inquiry reports, the own admission of Aptech in revising the result, not uploading the original master answer key before the select list inviting objections, deleting the date from primary source cloud server, not providing the digital signatures as to the data provided in CDs by Aptech Limited so as to explore the possibility of verifying the data integrity and non compliance of the agreement in selection process by the M/s. Aptech Limited, have all weighed the decision of the authority of the Corporation to conclude that it became absolutely impossible to segregate tainted candidates from untainted candidates.

122. According to Mr. Goyal, the entire selection got so circumstanced by

motivated actions of selectors to serve their vested interests that it became impossible to take against out of choff by rewarding the merit and therefore, upon the principle of law laid down by the Supreme Court in the case of **Union of India v. O. Chakradhar, (2002) 3 SCC 146**, the entire selection and appointments deserved to be cancelled and no notice to candidates individually.

123. Mr. Goyal has taken to the details of the report of Institutes of Technology summarised in the counter affidavit vide para 85 in Writ Petition No. 4572 of 2020, Surendra Singh & Another vs. State of U.P. & Others.

124. Mr. Sanjay Kumar Om, learned counsel appearing for the U.P. Jal Nigam (Rural) has adopted the arguments advanced by Mr. Manish Goyal, learned Senior Advocate. Additionally he has submitted that corporation undertook a very exhaustive exercise in going through various reports that were available to it and examined the same very minutely to arrive at a conclusion, genuinely drawn, that entire selection process was too vitiated to be reckoned with. According to him, the illegalities and irregularities in selection process were so deeply rooted that it became impossible to form separate buckets of tainted and unstained candidates as was directed by Division Bench of this Court in its earlier judgment dated 28th November, 2017.

125. Thus, according to him, the judgment of the authority of the corporation to annul the entire selection process and consequently the appointments do not suffer from vice of flow in the decision making process and hence this Court may not exercise its power of judicial review to interfere with orders impugned in these petitions.

126. Mr. Aditya Bhushan Singhal and Mr. Vimlesh Kumar Rai, learned Advocates appearing for U.P. Jal Nigam (Urban) are assisting counsel to Mr. Goyal and adopted all his arguments.

**Arguments raised for the State of Uttar Pradesh**

127. Leading the arguments on behalf of State of U.P. Mr. Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Amit Verma, learned Standing Counsel argued that there was no direction taken from the Finance Department to hold selection and appointment against the post in question in the U.P. Jal Nigam. According to him, the power lay with the Board and not the Chairman as per Section 7(3) and 8 of U.P. Water Supply and Sewerage Act, 1975. According to him the Board which was empowered to take decision being competent authority recognized under the statute, had never taken a decision to make selection and appointment. He submitted further that the then Minister being in the capacity of ex officio Chairman of the Board of U.P. Jal Nigam proceeded to hold selection and appointment at his own discretion.

128. Upon a pointed query being made as to why the original data was not collected from the archives NAS NOIDA placed office of Aptech Limited while the SIT was conducting investigation and even the service provider agency had written to it regarding the same, Mr. Singh submitted that it was the duty of SIT to have conducted investigation further in the light of letter, if any written by M/s.Aptech

Limited and he cannot make any submission regarding stand of SIT to confine itself to recovery of the hard disk from the local environment office Mumbai of M/s. Aptech Limited. However, he supported the findings arrived at by the SIT during the investigation regarding gross irregularity and illegality committed in the selection process and so resultant appointments offered to less meritorious candidates. He thus, sought to defend the orders impugned here in these petitions.

129. On other legal aspects involved in the case Mr. Singh has adopted the arguments advanced by learned Senior Advocate appearing for the Corporation Mr. Goyal. Additionally, of course, he put up a point that the seizure memos that were prepared by the SIT may also taken into consideration.

**Arguments advanced on behalf of M/s Aptech Limited**

130. Ms. Meha Rashmi, learned Advocate appearing on behalf of the service provider M/s. Aptech Limited has basically argued following three points:

(i) As per the agreement reached between M/s. Aptech Limited and the Corporation, the agency was to live objection tracker by uploading the answer key for 7 days after conclusion of CBT but M/S. Aptech Limited was also to honor the directions/ instructions issued from time to time by the senior officials of the Corporation with whom the agency was coordinating as per the agreement.

131. In support of her submissions, she cited clause 'e' of the Post Examination Stage Activities, as prescribed under the work order which clearly provided *"answer key will be displayed for 7 (days) after the test or as requested by U.P. Jal Nigam objections/ queries received online should be attended and remedial action should be taken"*. She has placed emphasis upon the words and expression *"as instructed by U.P. Jal Nigam"* to demonstrate that even though the work order carried this directive in black and white but alternatively it also provided that the agency would be working as per the instructions received from U.P. Jal Nigam. She submitted that the first phase of examination was held on 08.08.2016 *qua* Routine Grade Clerk and M/s. Aptech Limited informed the Managing Director of U.P. Jal Nigam on 09.08.2016 that as per the departmental instructions and discussions held with the officials of the Corporation it had been decided not to go ahead for the procedure of inviting objections to questions and answers from the candidates and instead, results were to be processed immediately.

132. Likewise, she submitted, after the CBT was conducted in respect of Junior Engineers post in all categories and concluded finally on 07.12.2016, the Managing Director held discussion with M/s. Aptech Limited to process the result instead of inviting objections to the questions and answers. Again a further letter was written on 17.12.2016 in respect of the CBT held for the post of Assistant Engineers which had concluded on 16.12.2016. All these letters have been brought on record by M/s. Aptech Limited through the counter affidavit filed in its behalf in the matter of Ambrish Kumar Pandey vs. State of U.P. and others being Writ – A No. 5912 of 2020. It is thus, sought to be urged by Ms. Meha Rashmi, learned Advocate that it was not M/s. Aptech Limited which was to be blamed for not uploading the answer keys, rather

U.P. Jal Nigam which insisted for the announcement of results of CBT, was to be blamed. According to her, there was no clause clearly providing that in all circumstances publication of master answer key was to take place before final declaration of CBT result and thus whatever was provided under the work order was complied with in its letter and spirit. She argued that M/s. Aptech Limited was the only examination conducting agency and at every stage of selection process it was having consultation with the officials of U.P. Jal Nigam. Likewise the Managing Director and its authorized officers of the Corporation would be holding discussions and consultations with the officials of Aptech Limited in their office and giving guidelines.

133. On the point of deleting the data from the primary source cloud server Ms. Rashmi submitted that online examination whenever is held there are three servers that are working side by side. One server at a centre where the examination is conducted for transmitting all the minute details, they can be termed as audit trail in respect of the candidates attempting questions and giving answers; another server is available in the office of service provider agency where online applications registered etc. are processed and all these details are finally transmitted to the online cloud server which is a hired space provided to the agency by another service provider. According to her, when the data are collected and final result is declared, the entire matter comes to a close. In such circumstances, therefore, the data is transmitted from the cloud server to the local environment and further sent to the other storage device at assigned places of service provider and as per Aptech's data restoration policy after the expiry of six months it is sent to archive storage NSA placed at its Noida Office.

134. In support of her above submissions, she led the Court through the data retention policy of service provider agency and submitted that these documents were also supplied to SIT to have a look as to how the date retention policy has been framed and what exactly the Aptech Limited does in respect of such online examinations. Ms. Rashmi submitted further that on 18.09.2018 M/s. Aptech Limited had written a letter to the Managing Director, U.P. Jal Nigam in the above regard and she has drawn attention of the court towards Annexure No. 22 of the counter affidavit filed by it in the matter of Ambrish Kumar Pandey, which clearly provided that the data Centre at Mumbai retained the data on the cloud server only for 30 days.

135. Thus, according to Ms. Rashmi as per the terms and agreement of the service provider agency reached with M/s. Aptech Limited, the cloud server space which was used for the purposes of live program like registration online of the candidates, holding online examination, was only for a limited duration. She further submitted that the data was there stored in the local environment only for the purposes of processing the result so as to prepare the final select list as a result of CBT. This, according to Ms. Rashmi was not the main secured data and related to the examination/ CBT only. All these informations regarding candidates attempting the question etc. was transferred through the software 'audit trail' which was used by service provider agency namely M/s. Aptech Limited. Thus, according to her, the hard disks which were claimed to have been seized and were six in numbers,

from the local environment office of M/s. Aptech Limited were in fact nothing but storage of the result processing data. She argued that the CDs/ DVDs that were claimed by the Corporation to have been provided to it and which were forwarded to the Institutes of Technology both at Kanpur and Allahabad for verification of data integrity, were not the primary source data. CDs/ DVDs are always secondary source and had the corporation been sincere to conduct forensic examination of the material relating to the examination held online by the service provider agency, it should have looked into the data retention policy and accordingly should have asked M/s. Aptech Limited to provide access to its original data preserved in archive storage.

136. She further argued that M/s Aptech Ltd. itself had submitted a report to the effect that after objection to the certain questions and answers were solved revising the result and handed it over to the Corporation vide letter dated 24th July, 2017 in respect of Routine Grade Clerks, on 14th August, 2017 in respect of Junior Engineers and 22nd July, 2017 in respect of Assistant Engineers, but Corporation miserably failed for the reasons best known to it, to proceed to revise final select list of the CBT results. She further submitted that in view of the order passed by the Court in Service Single No. 7640 of 2020 dated 17.09.2020, the data stored in the Archive could not be exposed to anyone as it became *custodia legis*. According to her whenever a record or property is put on hold under the orders of the Court, in principle, these properties and records become c*ustodia legis.*

137 Meeting the arguments earlier advanced on behalf of U.P. Jal Nigam that no checksum information or 'hash value' was made available by M/s Aptech Ltd. so as to enable the experts of IITs to arrive at a definite conclusion that original data was not interfered with and further to arrive at a conclusion as to whether tainted and untainted candidates could be segregated or not, Ms. Rashmi, learned Advocate, submitted that original data is still saved in the Archive storage of Aptech named as NSA at it NOIDA based office and Corporation could have asked any expert to have access to that and this could have been also done for IIT experts. She reiterated the stand of M/s Aptech Ltd. that whatever DVDs and CDs were provided by M/s Aptech Ltd. to the Corporation containing data was a to processed data consisting of results of CBT on excel format. She further argued that when CFSL report was already there in place and the SIT submitted a final report sometimes in January, 2020, it was still open for the State or for that matter Corporation to have access to the CFSL data comprised in DVDs with 'hash value' for the purposes of verification of data integrity. She submitted that this could have been done also by taking leave of the concerned court.

138. She vehemently urged that original primary source cloud server data which was downloaded to the secondary server and finally kept in Archive storage of the Company was in fact as per the protocol.

139. Dealing with academic point as to purpose and the characteristic of software tools like 'checksum', 'hash value' and 'audit trail', Ms. Rashmi submitted that these are only software tools to verify integrity of original data. She submitted that data transmitted from main cloud server to the storage server is automatically done without human intervention and 'audit trail' is the

software tool that was in fact used by M/s Aptech Ltd. This software tool verify the original data like the one respondents wanted *qua* Click of the mouse at the relevant point of time at a particular centre of a particular a candidate while attempting questions. These details are embedded in data and can only be verified by experts of the field so as to come to a definite conclusion whether data continued to be stored in its original form or had further been modified. The audit trial according to Ms. Rashmi provides a complete chain of events date-wise and time-wise and if forensic expert is put to a task to examine it, then such an expert he would immediately come to arrest a case if date and time of chain is broken at any particular stage. Once chain is found to be broken then data accessed would have to be taken to have already been modified. Similarly, she argued that checksum and hash value and other software tools do the same but on different formats they work and are applied to. She submits that she was surprised as to why the Corporation did not seek opportunity to verify the data by requesting M/s Aptech Ltd. to provide access to experts of IITs to its archival data.

140. Meeting the arguments advanced by counsel appearing for the Corporation that original result was prepared on excel sheet but was supplied on HTML format and this was indicative of some interpolation or tampering, she submitted that it was highly misplaced an argument. According to her M/s Aptech Ltd. worked on Excel format and processed data was reproduced on excel format. She argued that original data from the cloud server when downloaded in local environment it continued on .txt and the same way was stored in the Archive Storage Server, but once it was worked upon or processed for that matter, then it got transformed on the format which is applied like in the present case excel format. This is the reason according to her, how the data was provided on excel format placed and this is the reason as she argues that data recovered/retrieved from the hard disk was a result processing data.

141. Any investigation report on the basis of result processing data, she argues, cannot be taken to be a conclusive report *qua* data integrity so as to hold that selection process was compromised. She argued that service provider agency as a matter of fact conducted entire CBT in coordination with officials of the Corporation at every stage and there has been no complaint from the Corporation's side at any point of time until informations were sought under the Right to Information Act from the Corporation and it insisted for publication of master answer key and response sheet. She argued that even entire investigation report has discussed CFSL report to arrive at a conclusion that sufficient evidence were available to hold that named accused persons were guilty of the offences but in respect of a senior official of the M/s Aptech Ltd. Namely, Sri Bhawesh Jain, charge-sheet has already been quashed by Lucknow Bench of this Court vide judgment and order dated 02.06.2022 in matter under Section 482 of Cr.P.C. being no. 2235 of 2022. Thus, according to her, itself is indicative of the fact there was nothing intrinsic was there available in the investigation report to hold the accused persons guilty of the charge. Thus, according to her, both Police investigation report and enquiry reports are based upon no material indicating any systematic fraud in selection procedure at the level of M/s Aptech Ltd.

142. Ms. Rashmi further reiterated the stand of M/s Aptech that once it intimated the special investigation team vide mail

written to it on its official mail ID on 7th September, 2018 admitting a fact that original data continued to be stored in its Archive storage NAS NOIDA, SIT ought to have visited the Noida office of the M/s Aptech to lay its hand over the data stored there. This, according to Ms. Rashmi, could have done justice to the candidates who had fairly and genuinely participated in the open selection process and had fairly made it to the merit list. Thus it was serious lapse on the part of the SIT, in not approaching the M/s Aptech Ltd. at its office at Noida for the said purpose and instead continued to depend upon that hard-disks that were seized from the local environment office at Mumbai.

143. The submission regarding 65-B of the Evidence Act, 1872 certificate *qua* hard-disks recovered, particularly hard-disk No.- 6 which contained the image data of primary source Cloud server CtrlS and that neither Mr. Neeraj Malik, nor Mr. Roman Fernandes could have given it and instead, it was required to be given only by an officials of the company CtrlS, whose hard-disk it was and had the image data of cloud server. According to Mr. Meha Rashmi, learned counsel M/s Aptech Ltd. had no control over the data transmission from the original cloud server to the hard-disk of the CtrlS company and, therefore, the officials could not have known the nature of material which was claimed to be image data of the Cloud server in absence of the certificate by the officials of concerned CtrlS company. The certificates issued by Mr. Neeraj Malik and Mr. Roman Fernandes, therefore, cannot be treated to be valid certificate within the meaning of Section 65-B of the Indian Evidence Act, 1872.

144. Mr. Goyal has also relied upon the judgment in the matter of **M/s. Aptech Limited v. Union of India, 2021 (1) High Court Cases Del. 580** in which vide para 7 the Court has referred to the judgment of the Division Bench of this Court in the case of M/s. Aptech Limited v. U.P. Power Corporation as already referred to herein above. The Court referred to the findings returned in para 30 of the Division Bench judgment of this Court. The Court did not approve the conduct of M/s. Aptech Limited for having concealed this fact that a High Court had earlier approved the order of blacklisting. Mr. Goyal has referred to para 47 of the judgment on the principle of judicial restraint in matters of administrative action, in the event the decision making process was found to be not flawed one.

**Reply to the arguments of M/s Aptech by Corporation**

145. Replying to the arguments advanced on behalf of M/s Aptech Ltd., Mr. Manish Goyal, learned Senior Advocate appearing for the corporation submitted that the principle of *custodia legis* is not applicable to the case in hand because its records, as claimed by the Aptech Ltd. in its archive storage NAS, Noida office, was not in custody of any court of law, nor the court had placed it in custody of a third person or authority in its behalf. In this connection he has placed reliance upon the judgment of Supreme Court in the case **Bank of India v. Vijay Transport and others (2000) 8 SCC 512**.

146. On perusal of the mail sent on 7th September, 2018 to the SIT by Aptech as was claimed in the counter affidavit, Mr. Manish Goyal submitted that authenticity of the letter is doubted, firstly for the reason that mail ID could not be said to be of the SIT and secondly the

signature of the official is also questionable as the covering letter does not match these or subsequent correspondences that took place between the Corporation and the SIT and between the Corporation and the M/s Aptech Ltd inasmuch as format of letters was different.

**Arguments in Rejoinder on behalf of petitioners**

147. Meeting the points raised by Mr. Manish Goyal, Mr. Khare, learned Senior Advocate in his rejoinder has emphasized basically on three points:

*Firstly*, that only inquiry that was to be conducted by the respondent Corporation was to be aimed at how to segregate tainted candidates from untainted candidates in the light of the judgment of the High Court dated 27th November, 2017 as there was no issue with regard to sanctity of selection *qua* its procedure adopted by the M/s Aptech Ltd. Thus, according to Mr. Khare, the inquiry has been beyond proportion and crossing the limits fixed by the judicial pronouncements previously made in that regard;

*Secondly*, in view of the master answer key uploaded by the corporation/ Jal Nigam to invite objections from the candidates, the controversy was limited to the extent of a revised result to be prepared after resolving the issue of disputed questions and answers by referring to the same to the experts and, therefore, the expression tainted and untainted was contextual to that only and, therefore, the inquiry ought to have been limited to that extent only; and

*Thirdly*, principle of 'hash value' has wrongly been interpreted and applied to the case in hand and the opinion of the experts were absolutely on a misplaced instructions provided by the U.P. Jal Nigam while asking for their opinion.

148. On the point of short time or negligible time given by the Interview Boards to the candidates in different categories while interviewing them, Mr. Khare submitted that chart that has been appended along with supplementary affidavit that was filed before the Supreme Court and has been brought on record through counter affidavit in the writ petition of Samrah Ahmad, clearly establishes that considering the number of candidates and interview board constituted, sufficient time was provided. He has further argued that there cannot be a uniform fixed time formula to interview a candidate as a candidate may not respond properly, so the interview may end in a minutes' time, whereas in case if a candidate responds very positively, the interaction may go for a longer time. He submitted that looking to the statements of the members of interview board made before the SIT it is clear that no undue influence or pressure was ever exercised upon them, nor name of any candidate had been taken by them who might have pressurised them before or during the interview. Thus, according to Mr. Khare, this argument is highly misplaced that the candidates were not properly interviewed and marks were allotted whimsically and those who had not been able to score better in CBT, were given higher marks in interview deleberately to make them qualify for final select list.

149. Mr. Ashish Mishra, learned counsel for the petitioners replying to the arguments advanced by Mr. Manish Goyal on behalf of the corporation in rejoinder,

submitted that mere wrong answers and wrong questions in a MCQ pattern CBT cannot itself be a ground to upset the entire selection because those, who had genuinely qualified and found place in the select list deserved appointment. If the error is rectified in respect of those very candidates, who should have been called for interview but were not called, there would be no need to annul the appointments of those who have already been working with the respondent corporation after selection. Those who if finally succeed after revised result, can be adjusted in accordance with their merit upon the available vacancies. However, Mr. Mishra would not hesitate in submitting in his usual fairness that CFSL report if taken to be an ultimate evidence available to identify the tainted and unstained candidates, then those very 169 candidates that were found by CFSL to have been called for interview on the basis of inflated marks, their merit can be arrested in the matter of selection and they may be placed out of zone of consideration and their appointments would then certainly go.

150. On the point of timings spent by the interview board in interviewing the candidates Mr. Mishra submitted that about 266 candidates in the category of Junior Engineers did not appear before the Interview Board and thus this could have further been taken to have enlarged time span in respect of those candidates who were interviewed. Likewise there were absentees in Assistant Engineer category and there may have been absentees in respect of Routine Grade Clerk category as well.

151. Looking to the chart appended with affidavit filed before the Supreme Court Mr. Mishra reiterated that time spent in interview from morning till evening with 10 Board in case of Junior Engineers, it cannot be said that the number of candidates were so much high or rather too much that it left hardly sufficient time for the members of interview board to evaluate and assess the merit of the candidates more so when 266 candidates did not turn up for interview in Junior Engineer category and 16 candidates did not turn up in Assistant Engineer category but unfortunately the SIT while analysing these facts in it its report has overlooked this very aspect of the matter absolutely.

152. Mr. Mishra took the Court through the statement of Mr. Ram Prakash Gangawar, who was a member of the Interview Board and upon interrogation by SIT, he stated that interview was duly held and no pressure at any point of time was exercised upon him for giving special marks to any candidate particularly.

153. Similar statement, according to Mr. Mishra, is also of Mr. Vipin Kumar Tripathi, Director of the Government Engineering College, Bijnor, who was also member of the Interview Board, wherein he also stated that nobody had exercised any kind of influence upon him, nor made any recommendation in respect of any particular candidate. Similarly, Mr. Mishra submitted, Sri Prasad Shukla, Director of Government Engineering College, Banda, member of another Interview Board very clearly stated to the investigating officer that no such pressure was exercised upon him. Mr. Mishra submitted that similar were the statements of Mr. Virendra Pathak, Mr. Kayde Azam Lari and Mr. Sunil Kumar, Mr. Pradeep Kumar and so the other members of Interview Boards, who were interrogated by the SIT.

154. Thus, according to Mr. Mishra, the argument raised on the principle of average of time as drawn, by Mr. Manish

Goyal, the Additional Advocate General and learned Senior Advocate, cannot be made basis to form a view that the finding arrived at by SIT is based upon cogent and intrinsic material that entire process of selection was compromised.

155. On the point of model code of conduct Mr. Mishra has argued in the rejoinder that this will apply only in matters where adhoc or temporary appointments are to be made. In the event selection process had already been initiated then selecting authority was not in any manner restrained by any notification of model code of conduct, from declaring result of selection for making appointments.

156. Mr. Mishra would argue that these are the statutory bodies that are governed by the Statutes to conduct the recruitment drive and, therefore, they are governed by the rules framed in that regard. Once the procedure prescribed is codified in law then a mere notification by the Election Commission, say a model code of conduct notification in view of the parliamentary or State Legislative Assembly election will not certainly restrain or put a bar upon such a statutory body or such institutions from declaring results of selection and offering appointments in respect of substantive vacancies advertised. What may affect would be a new recruitment drive as a policy decision in immediately drawn just at the notification of model code of conduct to influence voters in election.

157. In respect of an argument by Mr. Goyal that report of M/s Aptech Ltd. identifying 656 candidates such candidates, who were called for interview, though did not deserve and this itself could be a ground to hold that selection process was compromised, Mr. Mishra contended that out of 656 candidates except for two candidates, namely, Sri Abhishek Srivastava, Junior Engineer (Civil) and Mohd. Tahseeb Khan, Junior Engineer (Mechanical/ Electronics), the remaining 654 candidates were not selected at all.

158. Similarly, 479 candidates, who were found to have not been called for interview though they ought to have been called for interview after the revised list was published, he submits that these candidates would find place in the lowest order of merit list, otherwise the candidates, who were already there in the merit list were called for interview on their own merit and there is no such finding arrived at that those who were called for interview and were selected, did not deserve to be called for interview except for 169 candidates who have been found by CFSL, *to wit*, tainted candidates.

159. Thus, according to Mr. Mishra, the entire select list cannot be upset only on the ground that 479 candidates in fact deserved to be called for interview on the basis of the revised result prepared by M/s Aptech Ltd. but for the act of corporation were not called for interview.

160. Meeting the argument of Mr. Goyal that there could have been much more number of candidates than 169 identified by the CFSL and who could have been characterised as of tainted category and *qua* number since was not known therefore, it could not be definitely said that the findings to that count arrived at was correct one, Mr. Ashish Mishra submitted that SIT report and CFSL report both are silent in respect of any further candidate to have been found with inflated marks. In fact SIT also indicted the accused persons

on the basis of CFSL report having found 169 candidates only to have marched to interview board with inflated marks. It is submitted that once the SIT report had been accepted by Additional Chief Secretary (Home) and no challenge was laid to it, nor any further investigation was ordered, it would be taken, whatever the CFSL report was placed reliance upon, was worth merit reliance for identifying the candidates, who fall in the tainted category and segregating such candidates from those, who fall in the untainted category for being selected and placed in merit list genuinely.

161. Mr. Mishra replying to the arguments of Ms. Meha Rashmi, learned counsel for the 5th respondent in Writ – A No.- 5912 of 2020, submitted that 6th hard-disk was the mirror image file of the cloud server data stationed/ placed in local environment office of M/s Aptech Ltd and not of the CtrlS company and since it was recovered from the local environment office of the M/s Aptech Ltd, Aptech Ltd. at Mumbai, it should not have shied away from admitting that it was the hard-disk recovered from its possession and that certificate issued by Mr. Roman Fernandes was worth a certificate admissible in law.

162. It is equally important to notice here the argument advanced by Mr. Mishra, learned Advocate appearing for the petitioners who also relied upon para 89 of the judgment in R. Prem Lata (supra) where the Court had held that while terminating the services of appointed candidates compliance of three principles at the hands of the State was imperative; firstly, with regard to sufficiency of material collected to arrive at a satisfaction that the selection process was tainted, secondly to determine the question that illegality committed goes to the root of the matter and this satisfaction and sufficiency of material is required to be achieved through investigation in fair and transparent manner, and thirdly the sufficient material present has enabled the State to arrive at a satisfaction that officers in majority have been found to be part of fraudulent act rendering the system itself to be corrupt. Mr. Mishra submitted that looking to the facts, investigation report of SIT and the opinion reports of the Associate Professors of Institutes of Technology, it does not lead in any manner to conclude that there was any deep rooted corrupt practice which had been adopted either by those who were selectors or those who were candidates so as to benefit only a few to the prejudice of majority

**ISSUE FOR DETERMINATION**

163. Having heard rival submissions advanced by learned Advocates appearing for the respective parties and having gone through the records, more especially enquiry reports, police report of SIT and the report submitted by the Associate Professors of the IIT, Kanpur and IIIT, Allahabad discussed in the order impugned, I am of the view that following issue emerges for consideration of this Court :

"***whether the material discussed in the orders impugned were cogent enough to reach out to a conclusion that entire selection process in respect of vacancies of AE/JE/RGC in question was so much compromised that there left no possibility to segregate tainted from untainted candidates, and therefore, taking a holistic view of the matter, it became imperative to cancel entire selections and appointments made in respect of those very posts"***

**DISCUSSION UPON ARGUMENTS AND MATERIALS**

164. In order to appreciate the material discussed in the orders impugned here in these petitions, first point that is required to be thrashed out, is as to what the High Court and Supreme Court meant by words and expression 'tainted and untainted'. It is, therefore, pertinent here to look first into two in-house enquiry reports of the officials of the Corporation dated 29.05.2017 and 7.7.2017 (Annexure CA-4 and CA-5 in Writ Petition No. 7076 of 2021). These two enquiries as a matter of fact were for the order passed by the Lucknow Bench of this Court, first in Writ Petition bearing No. 9794 (SB) of 2017, Gaurav Kumar Verma v. State of U.P. and Others dated 8.5.2017 and the order dated 15.5.2017 in Writ Petition No. 15948 of 2017 (Utkarsh Singh v. State of U.P. and Others.

**First Departmental Enquiry Report dated 29.5.2017**

165. The first enquiry report, which was submitted by Anup Kumar Saxena, Chief Engineer (Urban) concluded as under:

(I). The entire selection process was outsourced to M/s Aptech Ltd. and the records available do not indicate that any effort was made to get selection conducted by any established and reputed institution like IIT or Government Engineering College or a recognized university.

(ii) The then department of Urban Development had directed the Managing Director , U.P. Jal Nigam to carry out recruitment drive in respect of 113 posts of Assistant Engineers, (Civil) and 9 posts of Assistant Engineers (Mechanical/Electrical) on 16.11.2016.

(iii) Uttar Pradesh Jal Nigam Engineer (Public Health Branch) Service Regulations - 1978 vide its Regulation 10, part IV provided that post of Assistant Engineer (Electrical/ Mechanical) shall be filled up by a candidate with bachelor degree of a recognized institute or University with Mechanical and Electrical Trade or has qualified part-A & part- B examinations in Electrical and Mechanical trade from a recognized institute, and whereas no amendments were made to Rules and yet only upon mere approval of the Managing Director, 4 posts out of 9 posts of Electronic and Mechanical Trades were assigned to Computer Science/Electronic Communication upon which appointments were made on 3rd January, 2017, and the U.P. Jal Nigam Board accorded its approval subsequently vide resolution dated 6th January, 2017, however, the requisite approval of appropriate Government was not taken.

(iv). Considering the pleadings raised in matter of Gaurav Kumar Verma (*supra*), a finding came to be returned that allotment of higher marks to the candidates who were four in interview, even though they had obtained much less marks in CBT and this proved that entire selection process stood vitiated and deserved annulment.

(v). Placing reliance further upon pleadings of irregularities in allotment of marks and 4 candidates attempting questions identically and looking to a fact that 4 in serial numbers were selected, it could not be assumed to be just a coincidence and thus it raised a question mark *qua* conduct of selection by the outsourced agency.

(vi). Manner in which entire selection process was hurriedly conducted and the processing of results and its declaration and appointment orders issued in close proximity to avoid effect of notification of Model Code of Conduct, this all in itself was indicative of an act and

conduct, enough to establish that the entire selection process had stood compromised.

(vii). Out of 19 candidates in the category of Civil, two candidates in the category of Mechanical/Electrical, 3 candidates in the category of Computer Science and Electronic Communication, totalling to 24 candidates had raised objection as to 42 questions in respect of which answers assigned were questionable/ doubtful and M/s Aptech Ltd. and report dated 25.5.2017 having found 26 questions in Civil, 19 questions in Electrical/Mechanical and 2 in Computer Science to be incorrect, the sanctity of the examination was lost.

**Second Departmental Enquiry Report dated 07.07.2017**

166. In the second inquiry report dated 07.07.2017 submitted by Sri Rajiv Nigam, Chief Engineer (Level-II) following findings have been arrived:

(i) There was no effort made to get the selection conducted by any established prestigious institute like Government Engineering College/ Institute.

(ii) The Urban Development Department accorded approval on 16.11.2016 asking the U.P. Jal Nigam to go ahead with the recruitment driver in respect of 113 posts of Assistant Engineer (Civil) and 9 posts of Assistant Engineer (Electrical and Mechanical);

(iii) The Urban Development Department of the Government of U.P. had sanctioned 300 crore rupees as interest free loan to U.P. Jal Nigam in which vide clause 4 it was specifically provided that appointments shall be made against the existing vacancies with the prior approval of the Finance Department only and yet before issuing the appointment order on 03.01.2017 these directives were not followed at all.

(iv) Referring to the writ petitions of Utkarsh Singh (supra) and Sri Mukesh Kumar Patel (Writ Petition No. 15948 of 2017) the inquiry officer concluded that these two candidates having secured only 50 and 49 marks each were not called for interview because the last cut off for the written CBT in the OBC category was 54;

(v) The candidates for the post of Assistant Engineer (Civil, Computer Science, Electronics, Communication and Electrical), 522, 22 and 20 candidates were called for interview even though no master answer key was published inviting objections.

167. Upon information being sought under the Right to Information Act, 2005 when the letter was written to M/s. Aptech Limited, they uploaded the entire result on 14.02.2017 and the answer key was published online on 28.02.2017. In respect of first shift examination of Assistant Engineer (Civil) 15 questions in respect of second shift, 16 questions were objected too and in respect of Assistant Engineer (Electronic/ Mechanical) out of 80 questions, objections were raised to two questions and in respect of Assistant Engineer (Computer Science/ Electronic) with regard to 11 questions objections were raised. These objections were sent to M/s. Aptech Limited for solutions and in its letter dated 25.05.2017 M/s. Aptech Limited admitted that 11 questions out of 15 questions in respect of which objections were raised in the first shift examination of Assistant Engineer (Civil/ Mechanical) were correct as the answers were wrong and in respect of second shift out of 16, 6 questions were wrong or there was some doubt. In respect of Assistant Engineer (Computer Science), out of 11 questions,

answers to 10 questions were found to be wrong. The procedure was to first upload the master answer key in respect of online examination inviting objections and to resolve them first and thereafter, only the select list was to be published. This procedure having not been followed gross irregularity was committed by M/s. Aptech Limited. Looking to the number of wrong answers to the questions, the findings returned was that gross irregularity got committed at the end of the Aptech Limited because it was Aptech Limited who had this onerous task of drafting the question papers and providing correct answers to the questions asked in the model/ master answer key.

168. Referring to the petition of Shubham Sachan being writ petition no. 19413 of 2017 who had applied for the post of Assistant Engineer (Mechanical) in the OBC category, it is stated that he had obtained 60 marks out of 80 and yet in interview he was awarded only 12.8 marks and so, he could secured on 72 marks. Had the answer key been published earlier inviting objections resolving the same, such exercise would have facilitated his plant in CBT merit list to qualify for interview.

169. Shubham Sachan's writ petition since pleaded that question no. 29 was correctly answered and the objections raised by him had been found to be valid by M/s. Aptech Limited, wrong assessment was made as correct in respect of a wrong answer.

170. Thus, in view of these gross illegalities/ irregularities committed by the outsourced agency/ service provider who had conducted CBT of the candidates online, many undeserving candidates were made to march to the interview board and many deserving candidates were left out.

171. On the point of *mala fides*, the inquiry officer expressed his view that 5500 candidates had participated in the selection process of Assistant Engineers so upon a mere perusal of documents this could not be concluded that there was any act of malice or act vitiated for *mala fide* in the conduct of CBT but this could be claimed with authority only after putting the data to the Forensic Expert examination and getting a report confirming such malicious exercise.

172. From the above two reports, three things emerge out to be admitted position on facts (prior to the intervention by this Court under its order dated 28.11.2017):

(i) The entire controversy upto this stage was only limited to the conduct of selection of only Assistant Engineer in different trades as there was no issue at least available on record to demonstrate anything relating to the conduct of selection of Junior Engineer and Routine Grade Clerk. It is based upon these above findings that Chief Engineer, U.P. Jal Nigam passed an order on 11.08.2017 holding that the entire selection was *void ab initio* and therefore, the entire consequential action got rendered *non est*. The appointment orders accordingly issued on 03.01.2017 were held to be void ab initio and consequentially cancelled w.e.f. 03.01.2017 itself. However, the salary paid to the employees who had been working pursuant to the appointment orders were made irrecoverable.

(ii) Though the department of Urban Development had authorized the Managing Director, U.P. Jal Nigam to go ahead with the recruitment drive but neither the financial sanction was taken from the Finance Department, nor the relevant rules even mandated to confer power upon the

Corporation through its board to carry out recruitment exercise against the posts, more especially in respect of those that were assigned to the trade of computer science and electronic communication.

(iii) The entire findings have come to be returned regarding selection process to have been compared on the basis that wrong answers assigned in the master answer key to the questions in respect of which objections were raised, were not resolved prior to publishing the final merit list/ select list and issuance of consequential appointment orders.

173. The inquiry officer on the basis of pleadings raised by those very petitioners in whose petitions and the orders passed in first leg of litigation, thus came to conclude that if master answer key had been published prior to publication of merit list, the select list would have been different and it would have ensured transparency on one hand and trust in the conduct of selection in public employment on the other.

174. While dealing with the challenge laid to the order passed by the competent authority of the corporation annulling the entire selection and appointments, petitioners confronted by these very findings had raised a number of arguments before the Court and the Court exhaustively dealt with all those arguments and then having appreciated the pleadings raised and documents produced, concluded that the vacancies were duly sanctioned and were permanent in nature and, therefore, there was no issue either of impropriety on the part of the corporation in going ahead with the recruitment drive, nor there was any issue with regard to the contract given to a private agency to undertake selection process.

175. The Court held that entire selection process was undertaken as per the procedure prescribed stage by stage and, therefore, once the appointment orders were issued pursuant to the selection process undertaken as prescribed for under the advertisement, the candidates who were offered appointments and had been given joining, deserved a notice before cancellation of appointment orders.

176. The Division Bench rejected the arguments of the corporation that the very fact that some of the defective questions and incorrect answers found to be incorporated, it led to an impression as genuine one that undeserving candidates got entry into the select list and, therefore, the entire selection stood vitiated. The Court held that there were certain complaints with regard to the selection proceedings and it was incumbent upon the State Government to have held an inquiry to find out as to who were candidates not suitable for appointment so as to cancel their appointments, but no such exercise was undertaken by the respondents to distinguish cases of tainted from untainted ones.

177. Looking to the factual background of the case untill this judgment was passed the inquiry reports upon which the order dated 11th August, 2017 was passed impugned in that writ petition, I find that epicentre of the controversy to be only non publication of the master answer key before the declaration of the final select list, which upon its publication led to genuine objections raised to certain questions and answers and, therefore, the candidates, who attempted wrong answers might have been placed in the select list and those who did not attempt or may have attempted questions to which the answers

were doubtful got an exit door. The Division Bench, therefore, in these circumstances, had found the impugned order cancelling the appointments to be bad for want of exercise to segregate tainted from untainted candidates. The matter, therefore, got remitted for decision afresh in the light of the observations so made.

178. Thus, the words and expressions 'tainted and untainted' as has come to be referred in the judgment dated 28th November, 2017 is only contextual to this fact based controversy as I have already discussed above in the two inquiry reports and so I have no reason to doubt that until the two inquiry reports and even judgment of Division Bench later on, there was no issue with regard to any kind of gross illegality in the conduct of the examination except the propriety issue *qua* appointments to 4 posts of Assistant Engineer in the trade of Computer Science/ Electronic Communication stream.

179. Having dealt with the words and expressions 'tainted and untainted', now I proceed to examine the reports submitted by the IIT Kanpur and IIIT Allahabad made upon a call of corporation vide its letter dated 31st August, 2018.

180. Before coming to the reports I would like here to refer to the two letters written to these institutes of technology by the corporation on 31st August, 2018. In these letters specifically reports were called for in respect of online examination for the post of 122 Assistant Engineers only.

181. What is interesting to notice here is that corporation requiring for an independent report from IITs put a remark in the letter itself that *on the directions of the Honb'le Court inquiries were conducted which established commitment of gross illegalities and irregularities in the examination*. On the basis of findings entire examination process was rendered "*void ab initio"* "*and recruitment was cancelled on 11th August, 2017*" and then the letter also records that examination conducting body M/s Aptech Ltd. submitted that data *qua* selection had been deleted from the primary source cloud server and, therefore, the question was whether "*it was possible to segregate tainted from non tainted candidates and whether the data provided in CDs by M/s Aptech would be an authentic data in the context of deletion of data from primary source cloud server*". With this letter in hand the Associate Professors of IIIT, Allahabad and IIT Kanpur submitted their respective reports making certain key observations.

**Report of IIIT Allahabad [1st Report (Assistant Engineer)]**

Key Observations:

*1. There is no record available of any checksum (MD5/SHA-1/SHA-2 etc.) of the candidates response being computed immediately after the closure of the exam session for each candidate. Neither was any checksum computed/provided for the response database (which would inevitably have been created as the candidates responses were recorded) nor were these checksum (of the candidate responses/overall response database) if computed shared by the service provider with the office of UP Jal Nigam (UPJN).*

*2. Concurrent to the terms and conditions of the contract between UPJN and the service provider, the service provider was responsible for generating the question data bank for the online computer based test. This is enumerated vide item number 7 (seven) on page 3 of the contract documents.*

*3. There is no record available from the service provider that it provided the information listed in the contract document item "h" under the "Exam Operations".*

*4. The service provider has also communicated that it has deleted all the data pertaining to the computer based test from the original server (Cloud Server).*

*5. The Service provider has submitted the examination data on three compact discs (CDs) to UPJN.*

*6. None of the files on these CDs have the checksum corporated/ provided with them.*

*7. All the candidate response files presented in HTML seem to have been modified on 27th February 2017, which is a most two months after the appointment letters to the successful candidates were sent out.*

*8. All the HTML candidate response files that were provided on the CDs contain structured links to images of questions that were presented to candidate along with the response of the candidate the test "Question not answered", followed by correct answer and its explanation.*

*9. The service provider, in their letter dated 25.05.2017 have stated that twenty six (26) questions, across all the three disciplines were flawed.*

*10. Following directions from the Honorable High Court dated 01.05.2017 an enquiry into the issue of flawed questions was undertaken by UPJN and its findings dated 07.07.2018 revealed that twenty-nine (29) objections raised in connection with the validity of the questions of the computer based test hold merit.*

182. Examining the CDs provided by the corporation minutely, according to the report, in the absence of any checksum information not being provided by the service provider, identification of tainted candidates was impossible and also the authenticity of the data provided could not be verified for want of crucial information and for the reason that the candidates' response files that were preserved in HTML got modified on 27th February, 2017.

183. It assigns reason that candidates' response file as submitted by the service provider were created rather hurriedly and certainly as not expected and in the absence of any validating information, there is very possibility that these candidates' response data file might have been distorted.

184. Further before arriving at conclusion to offer its final opinion, interestingly the Associate Professor observed that the scope of enquiry being limited to the technical aspects of the testing process and the rigour with which tests were conducted, he proceeded to presume as under:

(a). It was established opinion of U.P. Jal Nigam that testing process by service provider was compromised as per its letter and the implication was that testing process for other two posts was also compromised;

(b) Since the Court asked U.P. Jal Nigam to identify tainted and untainted candidates, it implied that Court accepted the stand of U.P. Jal Nigam that overall recruitment process got compromised.

185. Based upon the above, final opinion expressed is:

(I). Standard operating procedure of publishing master key before, declaration of CBT based select list, having

been violated and recruitment process being further progressed and culminated in appointment orders resulted in denial of a fair opportunity in the overall selection process.

(ii). The mismatch in gender data for want of proper verification by service provider Courts doubt on the diligence exhibited by the service provider.

(iii). There existed no robust audit trail mechanism to verify whether an applicant's test record is untempered. The sanctity of testing data could not be implicitly assumed for want of relevant checksum information.

(iv). In the absence of checksum information outsourcing data cannot be accepted.

186. The above opinion was subject to a condition that all the documents and data shared with the technical expert of IIIT had a verified provenance and responses provided by the person made available on 13th and 14th December, 2018 at the U.P. Jal Nigam Head Office.

**Report of IIT, Kanpur [1st Report (Assistant Engineer)]**

187. After examining the CDs that were provided by the corporation the expert of IIT, Kanpur concluded as under:

(I). In the matter of online examination the response data of the candidate is uploaded on the main server like in the present case cloud server immediately after the completion of the examination and thus response of each candidate becomes secured and cannot be tempered or interfered with. However, in the case in hand since the file was modified on 27th February, 2017 it raised strong doubt about tempering with the data which could not be ruled out and, therefore, it became difficult to independently confirm that response sheet of the candidates in CDs made available were the responses made by the candidates on the date of examination.

Since the primary data had been deleted from the cloud server, it was difficult for the expert to corroborate the date provided in the CDs to be an exact copy of the original data.

(ii). No audit trail containing the mouse click and the time spent in the choices made by the students were provided in CDs as audit trail would have made it easier to corroborate that answers given by the students in the examination was the same as the answers that were created later but in the absence of any audit trail discrepancies if had happened in the examination, could be detected and corroborated by way of confirmation that no such discrepancies had ever taken place.

(iii). The grading of the answer sheet is done only after the objections are invited or even rebuttals from the candidates to consolidate the responses and freezing of the answer key. This protocol having not been followed in the present case it raises apprehension that response sheets of individual candidate might have been tampered with.

188. Two above reports proceed to examine the data which was provided in CD form by the corporation to them with this note that this was the data provided by the M/s Aptech and that in the domestic inquiry a finding had already come to be returned that entire selection process was compromised.

189. The original data having been deleted from the cloud server admittedly upon expiry of 30 days, the same was not

available and, therefore, the task left for the experts to give information as to whether the data provided was a genuine enough to demarcate a line between tainted and untainted candidates. However, the experts have expressed their inability to come to a definite conclusion and hence proceeded to hold that since the CD contained data which stood modified on 27th February, 2017, nothing could be said with surety as to whether the selection process stood compromised or not for any kind of tempering with the original answer sheets of the candidates.

190. There is therefore, no definite view expressed in the absence of checksum information and hash value *qua* the data provided by the outsourced agency. Thus authenticity of the data could not be verified.

191. In order to appreciate the opinion of experts in the background of non availability of checksum information and hash value and even the audit trail details as has been opined by the experts of IIIT, Allahabad and IIT Kanpur, it is now necessary to at least throw some light upon hash value, checksum and audit trail like software tools.

**2nd Opinion Report, IIIT Allahabad**

192. It is apt here also to refer to the other reports furnished by the experts of the IIT Kanpur and IIIT Allahabad in respect of conduct of CBT *qua* Junior Engineers and Routine Grade Clerks, if third report in sequence and second report by IIIT Allahabad dated 19th December, 2018 proceeds to record its consequences after noting key observations that are enumerated in the report itself. These key observations relate to non publication of master answer key immediately after conclusion of CBT by the service provider. 7 wrong questions in the RGC CBT and 18 wrong questions in Junior Engineer CBT raised serious questions to the validity of the question papers formulated by service provider for computer based test. Two appointment orders issued to male candidates against reserved vacancy of female candidates in the category of Junior Engineers, non availability of checksum information so as to analyse the candidates response data if recorded, not supplied to the U.P. Jal Nigam, in respect of typing proficiency test held for RGC recruitment as well, breach of contract by the service provider, non furnishing of data pertaining to the computer based test and computer based multiple choice test that might have been available on the original server. Thee CDs provided indicated that data stood modified on 27th February, 2017 after the appointment orders were issued and the candidate's response file for that RGC CBT presented on HTML format stood modified on 08th March, 2017, the scope of investigation being limited to the technical aspect of the testing process.

193. With these key observations regarding testing process and rigor with which recruitment tests were held, the report records two assertions made by the U.P. Jal Nigam while seeking opinion of the experts: firstly, that Assistant Engineers testing process by the service provider was compromised, and therefore, there was tacit implication of Jal Nigam that overall testing process of other two tests must have also been compromised; and secondly since the Court had asked for segregation between tainted and untainted candidates in respect of recruitment drive conducted by the Corporation with the help of

outsourced agency, it means that the Court accepted the assertion of Jal Nigam that overall recruitment process had been compromised.

194. On the above premises, the expert of the IIIT Allahabad came to following conclusions with the rider that documents and data shared with expert had a verified prominence and response provided by personnel made available for interaction with undersigned on 13 and 14th December, 2018 at the U.P. Jal Nigam Office, Lucknow:

"*Prior to any conclusions being drawn from these observations it is necessary to establish scope and context of this evaluation. While the scope is being limited to the technical aspects the testing process and the rigor with which both the recruitment tests were conducted, the text is established by way of the following two assertions.*

*(a) UPJN is of the opinion that the testing process for the post of Assistant Engineers, conducted by the same service provider was compromised (as mentioned in the letter 120/Mu A(A-3) -(1019-18). This leads to the tacit implication that UPJN believes that the overall testing process for the other two posts has also been compromised*

*(b) Referring to the letter 120/Mu A(A-3) -(1019-18), Honourable High Court has instructed UPJN to identify tainted and non-tainted candidates. This implies that the honourable court has accepted the assertion of UPJN that the overall recruitment process could have been compromised.*

*Conclusions:*

*A. Considering that generation of a question bank is a human task, there is always room for errors in the questions. This is especially true in cases where a testing question bank is generated by an external agency - which then, possibly outsources this task to individuals who may not be subject matter experts. Therefore, per observations I and 2, the standard operating procedure of, posting the answer key of the tests for perusal by the candidates to enable them to share their concerns and observations about the correctness of the questions before even preparing any list of qualified candidates, was violated in both the exams. This problem was further exacerbated by proceeding with the recruitment process and issuing appointment letters. This led to several candidates being denied a fair opportunity in the overall selection process.*

*B. Observation 3 highlights a particularly egregious oversight in the testing process Under a fair assumption that the two candidates made a genuine error while submitting their applications online, both these candidates would have been (as per observations 6 and 7) subjected to verification and scrutiny during their CBT and then subsequent interview stages. It is inconceivable that a mismatch in the gender data was not identifiable in BOTH these stages for both these candidates. Therefore, it definitely casts doubt on the diligence exhibited by the service provider and the sanctity of the candidate's identities at least at these two testing centers and by a reasonable and logical extension, all the testing centers.*

*C. Ensuring due provenance of applicant testing data is vital. In other words, in the event that an audit is required to verify whether applicant test record is untampered, their must exist a robust audit trail mechanism. To perform this assessment, the original response data of the candidates (captured immediately at the*

*closure of the examination window) along with relevant checksum information is required. This reference (checksum) information, as per observation 4 above, was neither received by the service provider nor communicated to UPJN. Therefore, the sanctity of the testing data cannot be implicitly assumed.*

*D. In the absence of information (as per observation 4) and by noting observations 9-11, the authenticity of the data as and in the form provided (observations 13) cannot be accepted and/or verified.*

*E. The sanctity of both the recruitment processes seems vitiated in view of observations made above.*

*Final notes*

*All the above observations are based on the implicit condition that all the documents and data shared with the undersigned have a verified provenance, and responses provided by the personnel made available for interaction with the undersigned on 13th and 14th December, 2018 at the UPJN head office in Lucknow, are true. Additionally - This report uses two technical terms which are being explained below for your convenience.*

*Checksum: A small block of digital data generated by a checksum algorithm such as MD5.*

*(Message Digest 5), SHA-1 (Secure Hash 1), SHA-2, etc. when it operates on a given source data (file). This small block of digital data generated is like a digital fingerprint and is unique to the file it was generated for. In the event that the source file changes or is modified in any form, its checksum will change.*

*• HTML: HyperText Markup Language is the basic computer language, used to create web pages.*

*I hope that this report, addresses the request, raised in your letter 120/Mu A (A-3)-(1019-18) dated 27.11.2018 to your satisfaction."*

**2nd Opinion Report (IIT Kanpur)**

195. The second report of expert of IIT Kanpur that was fourth in series of report from Allahabad and Kanpur, appears to be in respect of Routine Grade Clerk test held because it records chronology of events that relate to RGC. The report records that no file in CDs provided by M/s Aptech Ltd. with the last modification data equivalent to the day of examination and since experts were informed that the original data from the cloud server had been deleted, they found it difficult to corroborate that data provided in the CD to be the exact original data that was available immediately upon completion of test. Further opinion recorded by the expert is that no Audit Trail containing individual mouse clicks and time stamps of the choices made by the student has been provided in the CDs and hence in absence of Audit Trail, it was not possible to corroborate and confirm that there happened no discrepancy between the candidates actual response and those which were used for grading. The expert of the IIT, Kanpur finally opined that in absence of primary data being provided by M/s Aptech Ltd., it was not possible to confirm the authenticity of date provided in CDs independently and hence segregation of tainted and untainted candidates was not possible.

**Hash Value/ Checksum/Audit Trail**

196. Having discussed above four reports submitted by experts of the institute of technology to appreciate the same in the light of arguments advanced on behalf of rival

parties to the litigation, it is necessary to first understand as to what are the software tools, which are often referred to as 'hash value', 'checksum information' and 'audit trail'.

197. Having gone through the literature on the subject matter provided by learned Senior Advocate Mr. Ashok Khare appearing for the petitioners as well as those provided by Mr. Manish Goyal, learned Senior Advocate and Additional Advocate General appearing for the respondents , in my view, hash value is a digital fingerprint or digital signature created for data security and is passed on to log in to the data. Any attempt to access data will be secured by such digital signature, would corrupt the data itself if hash value code is not applied.

198. Yet another crucial aspect is that this digital signature is while key to have access to the data but it has also a constant value so long as data is not changed or modified. Any change or modification if attempted to the original data, it will change the hash value. In other words, hash value is applied to access the original data in its secured form, and therefore, hash value is provided /fixed to ensure data integrity. Thus hash value is a fixed string or a number generated from input data of any signs using hash function and it, therefore, represents data in a constant form. Hashing is often used for encrypted data integrity verification and efficient data record. Thus hash value has a characteristic of being a fixed sign determinative thereby to ensure that the same input will always be produced with same hash value. In other words different inputs will produce different hash values and so minimizing the collisions and irreversibility. Likewise the checksum is a value derived from block data is to detect the errors or corruption in the data during stage of transmission. It is basically used for data integrity verification by comparing checksum calculated before transmission with checksum recalculated at the destination.

199. Thus both the hash value and checksum are aimed at ensuring data integrity and difference is that checksum algorithm are simple and fast for quick integrity checks but checksums are not designed to be collision-resistant or secure. They only detect accidental errors.

200. The audit trail is a chronological record that documents sequence of activities or events related to specific transaction, system or process. It is used to track changes, monitor system usage and verify the integrity of actions and decisions made. It is claimed that records in audit trail are typically designed to be tamper proof. This tool traces changes in the entire path of data created, its transmission, and its final delivery. It is commonly used in financial transaction cybersecurity etc. and it helps organizations to detect fraud, manipulations and transactions so as to check the credibility and after-all to ensure transparency in operations.

201. In the reports of the experts of the institutes of technology as have come to be referred to herein above and quoted *qua* their opinions expressed in respect of the data provided in all the four reports, the experts have categorically expressed their opinion that in the absence of checksum information, hash value to the data provided in CD and there being no audit trail traceable so as to find out as to whether the attempt through a mouse click by a candidate to a question with correct answer as recorded is an authentic data as to the time, date and place when the event held or subsequently modified to match the results. No confirmed opinion, therefore was expressed.

202. The experts' report express the opinion unequivocally that since the original data was claimed to have been deleted from the cloud server and the Court had directed for segregating the tainted candidates from untainted candidates nothing could be stated finally but in the background of the questions raised as to the integrity of the selection process for the reason that Court virtually held that the selection process had stood compromised, it concluded that it would have happened. So the opinion expressed by the experts of the IITs, if drawn up in a nutshell was not a confirmed opinion and was only based upon the input provided by the corporation in its letter seeking information. There was all the more reason to reach out to this conclusion on the basis of analysis by these experts as CDs provided to it contained data that stood modified on 27th February, 2027 (For AE), 24th & 25th February, 2018 (For JE) and 5th March, 2018 (For RGC). The experts are referring to the CDs and not the original hard-disks. Learned Additional Advocate General while arguing the matter was confronted with the query by the Court as to whether this CD contained any data obtained from CFSL, he very clearly stated that this CD contained the data that was provided by M/s Aptech and not by the CFSL. It is to be noticed here that learned counsel appearing for M/s Aptech had clearly argued before the Court that CDs contained was asked for by the corporation, result date after the original data was processed to prepare the result. So, it was a data in secondary form not in its original form.

203. It was also argued on behalf of M/s Aptech Ltd. and not disputed by the corporation that CDs were provided to the corporation by M/s Aptech Ltd. on 28th February, 2017 in response to the letter of corporation dated 14th February, 2017 *qua* examination related details of AE, JE, RGC & Stenographer Grade IV and further soft copy of answer key and response sheet of those very candidates on 28th February, 2017 in response to letter dated 7th February, 2017. Obviously data taken from original data base does amount to providing data in secondary source i.e. CD or DVD.

204. However, these observations at this stage are yet to be tested on the basis of the arguments advanced by the rival parties and further while I analyse their arguments relating to the various reports discussed above and the findings arrived at in the orders impugned because still I have not considered the SIT report and the one submitted by Central Forensic Science Laboratory, which has been heavily relied upon by the SIT in its ultimate final report submitted in the matter of criminal investigation.

**Central Forensic Science Laboratory, Hyderabad Report (CFSL)**

205. This CFSL report dated 11th December, 2019 analyses the data retrieved from the hard-disks supplied to it by the special investigation team for the purposes of comparative study with the documents supplied by the SIT relating to the marks of the candidates in the CBT who were called for interview. After the retrieving the original data from the hard-disk by applying two tools namely, MSSQL management Studio version 2008, Microsoft Access 2016 and Steller Phoenix, SQL Data Recovery version 8.00 in respect of the data base files relating to Assistant Engineers in all trades, Junior Engineers in all trades, Stenographer and Routine Grade Clerk, it says that data provided by the SIT were compared with the original computer based test score present in the computer data base recovered from hard-

disks as well as the backup files and after comparison it concluded that marks of some of the participants in all the above categories were increased. There names were provided in various annexures it consisted of 169 candidates belonging to different trades of Assistant Engineers, Junior Engineers and of course Routine Grade Clerk cum Stenographer who were otherwise unsuccessful candidates.

206. The data upon comparative chart being prepared by the CFSL, was provided both in the hardcopies and soft copies to the SIT and the softcopy was provided in the folder named 'CBT Comparison' in a DVD marked as CAH-75-2018-DVD.

207. The entire data retrieved from data base relating to the various posts of Assistant Engineers, Junior Engineers, Routine Grade Clerks and Stenographers Grade IV pertaining to the participants who appeared in the CBT was provided also in the folder called 'All participants data' in the same DVD.

208. The CFSL also provided a specific data in respect of the petitioner Ambarish Kumar Pandey in one of the petitions bearing Roll No.- 1112075512 which records when the examination started for U.P. Jal Nigam Electrical and Mechanical for which he was appearing and total score of the question paper, the attempted questions and wrong attempts made. It is here pertinent to recall the arguments of Mr. Ashish Mishra, who had referred to this data to emphasise that there was a complete audit trail as to the time and place of the examination questions attempted by a candidate. If the entire data had been analysed by any other forensic expert or recognized and approved by agency then it would have become very clear that data provided in the hard-disks that were seized was the correct data. There is no quarrel amongst the learned Advocates appearing for the rival parties that 169 candidates are those candidates who had been given inflated marks to participate in interview though Mr. Khare had raised a point of doubt about the correctness of data provided to the CFSL in view of the allegations made by the M/s Aptech itself that the hard-disk seized from the local environment of the M/s Aptech office at Mumbai consisted of only processed data.

**SIT (Police) Investigation Report**

209. Even though Mr. Khare had raised objection as to the evidenciary value of the police report submitted under Section 173(2) Cr.P.C. but since the Corporation has taken notice of the same and in the matter of administrative law, an authority can look into those reports so as to arrive at a conclusion on the principle of preponderance of probability, that irregularity has taken place to the extent of impunity, I find it necessary and imperative to go through the details of this report as well.

210. Now I proceed to discuss the last report which was submitted by the SIT in the matter of criminal investigation pursuant to the FIR registered vide Case Crime No. 2 of 2018. This report was submitted on 31.01.2020, obviously after the two judgments, both of the High Court and Supreme Court. The reference to this last report becomes necessary also for the reason that in paragraph no. 41 of the counter affidavit filed by the Corporation in the matter of Samrah Ahmad v. State of U.P. & Others (supra) it has been averred that the Division Bench (Special Appeal

Defective No. 625 of 2019) in its order dated 31.07.2019 had directed to take a decision in the matter of recruitment process but the same will be subject to the report of SIT and CFSL.

211. The Special Investigation Team that was entrusted with task to carry out investigation into the selection process undertaken by the service provider M/s Aptech Ltd. including the interview procedure adopted by the U.P. Jal Nigam . The investigating team through its officers interrogated as many as 59 persons, who were either complainant, police officers, retired and serving officers of the U.P. Jal Nigam, officials of M/s Aptech Ltd. and the members of the different interview boards that had conducted interview of the selected candidates. The investigating team also examined the documents, which were supplied to it or otherwise it gathered from different sources and this list of documents consisted of 43 items, which included even hard disks seized from the local environment office of the M/s Aptech Ltd. at Mumbai and also 4 forensic lab reports submitted by Central Forensic Science Laboratory situate at Hyderabad. On the principles of preponderance of probability as I have already observed, it becomes necessary to go through the SIT report even though this is only a police report submitted under Section 173(2) of erstwhile Cr.P.C. but statements of various persons recorded after interrogation by the police in the report become relevant to the controversy in hand and so also the analysis by the investigating agency as well as findings returned thereupon by it.

212. About 59 persons who were interrogated by the investigating agency, statements of Vishwajeet Singh, Roman Fernandes, Ajay Kumar Yadav, Niraj Malik, officials of the M/s Aptech Ltd. and that of Mr. Prem Kumar Ashudani, former Managing Director of U.P. Jal Nigam, Mr. Anup Kumar Saxena, the then Chief Engineer, Urban, U.P. Jal Nigam who had submitted first inhouse enquiry as on 29.5.2017, Rakesh Prasad Sinha, the Chief Engineer Level- II who had also submitted report of in-house enquiry and Sri Syed Afaq Ahmad, Officer on Special Duty, Ministry of Urban Development are relevant to the contrary in the present case.

213. In the matter of CBT held for the post of Routine Grade Clerks and Stenographers the statement of various officials who were there in the system, have been recorded. Upon question being put to Sri Ram Sewak Shukla during interrogation by the SIT, he had admitted to have made complaint to Chief Minister on 22.03.2017. He stated that during period in question the then Minister Mr. Azam Khan indulged in corrupt practice and adopted a very calculated tactics to ensure that maximum person of his community were appointed. He claimed that in matter of selection and appointment upon 1300 posts and used the then Minister did a lot of fraudulent activity with the help of Mr. Prem Kumar Ashudani, the then Managing Director, U.P. Jal Nigam and the then Chief Engineer Anil Kumar Khare.

214. Sri Arvind Kumar Rakesh who retired from the post of Chief Engineer,Level-I, Allahabad, had been in interview board for Assistant Engineers and denied any irregularity in his board or in awarding marks, nor favour was shown to any candidate for his caste or religion.

215. Sri Chandra Dev Singh Yadav who retired from the post of Chief Engineer (Mechanical and Electrical) on 31.07.2018

did not give any impression during the interrogation that any undue influence was ever exercised upon him or any kind of request was made to award higher marks to any candidate on the basis of caste, creed or region.

216. Sri Ved Prakash Mishra, Chief Engineer, Ganga Pollution Control, Varanasi Circle, Varanasi was also member of the Interview Board for the post of Junior Engineers claimed that the interview was held in two shifts, one at 10.00 a.m. and the second at 2.00 p.m. and after the interview was conducted, each candidate was awarded marks on the basis of average marks calculated out of the marks allotted by each member of interview board. Upon the cutting on the marks/ tabulation sheet prepared in the interview, he only claimed that it was because of mistake in writing. He also did not give any impression that he was approached by anyone to award any candidate higher marks on the basis of caste, creed or religion.

217. Sri Chandra Dhar Dubey who retired from the post of Superintending Engineer from Gonda denied that list that was provided to interview board contained any CBT marks. He stated that only roll number and the name of the candidate was provided. He denied to be involved in any manner in any other exercise during the recruitment driver except conducting interview.

218. Sri Anand Murti Srivastava who retired from the post of Superintending Engineer, U.P. Jal Nigam, Lucknow upon interrogation by the police gave a statement regarding allocation of marks in interview which was of 20 marks in total. On the question of knowledge of CBT marks to the members of interview board, he denied to have had any such knowledge because no such information used to be given. He also denied any influence ever to have been exercised upon him or that he was approached by anyone for awarding higher marks to any particular candidate or category of candidates.

219. Sri Avanindra Kumar Singh who had retired from the post of Superintending Engineer, U.P. Jal Nigam, Lucknow gave almost similar statement. Sri Ashwani Kumar Tyagi who had retired from the post of Chief Engineer, U.P. Jal Nigam, Lucknow and was also member of Interview Board upon being asked about the parameters upon which the marks had been awarded, he did not give any impression that he was approached by anyone to award higher marks to a candidate of particular caste, creed or religion. According to him parameters laid for overall assessment of candidates were strictly adhered to

220. Sri Alok Kumar, the Executive Engineer posted at Lucknow was also a member of Interview Board and made a categorical statement that no influence was exercised upon him, nor any pressure was exercised upon him, nor was he approached by anyone to award higher marks to a particular candidate. Regarding a particular question as to whether he was ever approached to change the result sheet, he denied.

221. Sri Ram Prakash Gangwar, member of an Interview Board working as Lecturer in Government Polytechnic College, Hardoi also made similar statement so was also the statement made by one Vipin Kumar Tripathi, Director, Government Engineering College, Bijnor who was also a member of Interview

Board. Sri Shiv Prasad Shukla who was Director of Government Engineering College, Banda and member of Interview Board also denied to have ever been approached or pressurised by anyone to award higher marks to any particular category of candidate. Sri Virendra Pathak, Sri Kayde Azam Lari, Retired Chief Engineer (PWD), Sri Sunil Kumar, Lecturer, HBTU, Kanpur, Sri Pradeep Kumar, Lecturer, HBTU, Kanpur, Sri Shailendra Pratap Singh, Lecturer, Government College, Lucknow, Sri Dipti Parmar, Lecturer, HBTU, Kanpur, Sri Zubair Ahmad, Chief Engineer, U.P. Jal Nigam, Sri Amit Kumar, Lecturer Architecture, Government Polytechnic Lucknow, Sri Usha Kiran, Lecturer, Mechanical Engineering, Government Polytechnic, Lucknow, Mohd. Kasim Ali, Lecturer Architecture, Government Polytechnic, Lucknow who were all members of different boards, have all given similar statements.

222. The SIT during interrogation of a large number of persons though had put up a number of twisted questions as is reflected from its report but the reply given conveys this impression only that the interviews were conducted as per the norms, marks were allotted by boards as per the parameters laid and the interview board members were neither approached by the candidates, nor were unduly influenced or coerced by anyone to award higher marks or particular marks to a particular candidate belonging to particular caste, creed or religion.

223. Mr. Vishwajeet Singh during his entire interrogation regarding conduct of selection in the matter of Routine Grade Clerk, Junior Engineer and Assistant Engineer, clearly stated to the SIT that right from stage of drafting of the question paper till assessment of answer-sheet and declaration of CBT result, was entirely the duty cast upon service provider. He stated to the SIT about number of question papers, number of questions asked, the date and shifts in which CBTs were held. He also stated that if there was anything wrong found to be detected in framing a question and assigning answer to a question in master answer key, it was also a responsibility to be shouldered by the service provider. He also stated in reply to a query made to him regarding publication of master answer key, that in view of discussion held between M/s Aptech Ltd, and the Corporation, officials of the Corporation wanted result to be published first in respect of the CBT held for all the three categories of posts. He reiterated Clause 'e' of the work order/contract, according to which the answer key was required to be published immediately after examination held for seven days or as per instructions received from the Corporation and so Aptech followed the instructions of Corporation in publishing the result first. He blamed the Corporation also for publishing the answer key quite late as on 28th February, 2017 and also blamed the Corporation for holding interview first and for not permitting master answer key to be displayed on the website.

224. Regarding selection of M/s Aptech Ltd. to undertake selection process, Mr. Vishwajeet Singh stated that team members of the officials of Aptech had taken proposal to the office of U.P. Jal Nigam and after perusing the same, Managing Director of the Corporation, Mr. P.K.Ashudani, the Chief Engineer Sri A.K.Khare, Senior Technician Sri R.P.Sinha and also Sri Syed Afaq Ahmad, Officer on Special Duty attached with the

Chairman of U.P. Jal Nigam appreciated the proposals and accordingly accepted M/s Aptech Ltd, to undertake selection in question. Upon another pointed querry being made as to whether any of the officials of the M/s Aptech Ltd. was related to the officers of the Corporation, he denied.

225. Regarding placement of server or the storage of the data in respect of the selection process, which consisted of online registration of application, issuance of admit card, examination and also declaration of result etc. it is stated that M/s Aptech Ltd. was working with two separate data Center Provider, namely Control S (Ctrl S) and another NTT Net Magic Control S and both severs were at Mumbai. Aptech used public cloud area space of Net Magic (Control S) regarding data security and saving of the original data after final results were prepared and published. It was stated that as per Clause 12 of the Aptech Ltd. responsibilities in the work order and soft-copy and hard copy of the result was made available to the U.P. Jal Nigam and the remaining data which was to be preserved for period of one year as per contract. Mr. Vishwajeeti Singh very clearly stated that entire data relating to online registration, attendance biometric, candidates' original response, original questions and original answers and revised answer key were all preserved. He stated that after the examination the data which was collected at the cloud server was later on downloaded in the local environment server. This statement being very crucial to the controversy regarding deletion of data, which has been reason assigned for the opinions by the experts of institutes of technology and which played crucial role in decision making of the Corporation, is reproduced hereunder:

*"**प्रश्न-** सेन्टर से आन लाइन परीक्षा का डेटा जो आपके कथनानुसार क्लाउड के सरवर पर कन्सीलीडेट किया गया। जहाँ से आप द्वारा पूरे डेटा को आफ लाइन मोड (अपनी हार्ड डिस्क) लोकल इनवायरमेंट पर लाया गया तथा आपके कथनानुसार कस्टमर (उ०प्र० जल निगम) की रिक्वायरमेंट के अनुसार रिजल्ट बनाया गया। क्लाउड के सर्वर पर जो ओरिजिनल डेटा कन्सीलीडेट किया गया, क्या आपके द्वारा संरक्षित रखा गया है, यदि नही तो क्यों? उसको संरक्षित रखने की अवधि क्या है?*

***उत्तर-** अनुबंध के अनुसार Aptech limited Responsbilities के अन्तर्गत बिन्दु-12 पर अंकित है, कि रिजल्ट की साफ्ट और हार्ड कापी उ०प्र० जल निगम को उपलब्ध कराने के पश्चात परीक्षा से सम्बंधित समस्त डेटा को कम से कम 01 वर्ष तक संरक्षित रखने हेतु अनुबंध किया गया है। अनुबंध के अनुसार समस्त डेटा जैसे कि अभ्यर्थी के आन लाइन रजिस्ट्रेशन का डेटा, उपस्थिति का डेटा, वायोमेट्रिक का डेटा, अभ्यर्थी का मूल रिस्पांस, मूल प्रश्न तथा उसके मूल उत्तर तथा रिवाइज्ड उत्तर-की (अगर कोई है तो) संरक्षित रखा गया है। परीक्षा के उपरान्त डेटा को क्लाउड पर एकत्रित किया जाता है, जो एक माह तक क्लाउड पर संरक्षित रहता है, उसके बाद डेटा को क्लाउड से डाउन लोड कर लोकल इनवायरमेंट पर रखा जाता है।*

***प्रश्न-*** *परीक्षा सम्बंधी डेटा क्लाउड से अपने लोकल इनवायरमेंट (डेटा लेस) में डाउन लोड किया था, क्या उसका सिस्टम आपके पास उपलब्ध?*

***उत्तर-*** *सिस्टम उपलब्ध है, आवश्यकतानुसार प्रदान किया जा सकता है।*

***प्रश्न-*** *आपके कथनानुसार आपने उ०प्र० जल निगम की रिक्वायरमेंट के अनुसार क्वेरीज रन की थी। वह क्वेरीज क्या थी, उसका आपके पास क्या प्रमाण है?*

***उत्तर-*** *उ०प्र० जल निगम द्वारा प्रकाशित किये गये विज्ञापन तथा विभिन्न पत्रों द्वारा रिजल्ट बनवाने हेतु श्रेणीवार अभ्यर्थियों की संख्या का चार्ट प्रदान किया गया जिसके आधार पर रिजल्ट बनाने की क्वेरीज (कम्प्यूटर, प्रोग्राम) बनाया गया। यह क्वेरीज (कम्प्यूटर प्रोग्राम) वर्तमान समय में उपलब्ध नही है, परन्तु इन क्वेरीज को चार्ट के अनुसार दुबारा बनाकर उपलब्ध कराया जा सकता है।"*

"*Question: The online examination data from the center, as stated by you, was consolidated on the cloud server. From there, the entire data was downloaded to your local environment (hard disk) in offline mode, and according to your statement, the results were generated as per the requirements of the customer (U.P. Jal Nigam). Is the original data consolidated on the cloud server is preserved by you? If not, why? What is the duration for which it is preserved?*

*Answer: According to the contract, under Aptech Limited's responsibilities, it is mentioned in point 12 that after providing both soft and hard copies of the results to U.P. Jal Nigam, all examination-related data will be preserved for at least one year. As per the contract, all data such as the candidates' online registration data, attendance data, biometric data, original responses from candidates, original questions, and their original answers, as well as revised answer keys (if any), are preserved. After the examination, the data is collected on the cloud, where it remains for one month; afterward, it is downloaded from the cloud and stored in the local environment.*

*Question: Was the system for downloading examination-related data from the cloud to your local environment (data-less) available with you?*

*Answer: The system is available and can be provided as required.*

*Question: According to your statement, you ran queries based on the requirements of U.P. Jal Nigam. What were those queries, and what proof do you have of them?*

*Answer: The queries for generating results were based on the chart provided by U.P. Jal Nigam through the published advertisement and various documents regarding the number of candidates in each category. This computer program for generating results is not currently available, but these queries can be recreated and provided according to the chart."*

(Translated by the Court)

226. Regarding question as to whether server of U.P. Jal Nigam was ever utilized by M/s Aptech Ltd., Mr. Vishwajeet Singh denied. Regarding any query as to why answer key were not uploaded, he stated that there was clear direction from the

Corporation that results would be published first. In this regard, he referred to correspondence that took place with the official of the Corporation in respect of all three categories of posts dated 09.8.2016, 7.12.2016 and 17.12.2016. Regarding any data online or offline ever made available to the Managing Director Corporation, Mr. Vishwajeet Singh clearly stated that original marks obtained by the candidates after appearing in online examination were provided to Corporation online via F.T.P. of which IP Address was 103, 8, 127,108.

227. Regarding four candidates bearing roll no. 5201211717, 5301211969, 6201212371, 5201211587 whose login ID was changed, which showed that M/s Aptech Ltd. manipulated original documents in connivance and conspiracy with officials of the Corporation, Mr. Vishwajeet Singh replied that candidates with from roll number, namely, Adarsh Kumar Pandey, Arun Saroj, Chandra Prakash Pandey, Jyoti Gupta, were given to the U.P. Jal Nigam, in which login Id of the M/s Aptech Ltd. was not given to U.P. Jal Nigam. These were finally selected and there assigned login id was never changed. This shows appointments to be ill tainted.

228. Mr. Roman Anthony Fernandes, who was then General Manager (Technical) in M/s Aptech Ltd., upon a pointed query being made towards interrogation by the SIT officials stated that the question papers for CBT in all the three categories of RGC, JE and AE were got prepared by the subject experts and it were those very experts who prepared master answer key and so, if there was any wrong questions and wrong answers given, the responsibility was of those experts only.

229. Upon an another query being made as to why the objections were not invited by publishing the master answer key, he stated that officials of U.P. Jal Nigam of finalizing the result before the publication of answer key upon instructions of officials of Jal Nigam. He however admitted that one of the clauses under the agreement was that the answer key would be published after completion of CBT.

230. On the point of undeserving candidates getting selected, he put the blame upon the corporation for asking the M/s Aptech to first process and publish the result. Upon a specific query being made as to who were officials who forced M/s Aptech Ltd. to process and publish the result first before inviting objections by publishing master answer key, he stated that after CBT was conducted meeting was held with the officials of the corporation in respect of the RGC in the first week of August, 2016, in respect of Junior Engineer in the first week of December, 2016 and in respect of Assistant Engineer in the second week of December, 2016 and in all three meetings the then Managing Director Mr. P.K. Ashudani, Chief Engineer Mr. A.K. Khare, and Senior Engineer Sri R.P. Sinha, remained present and so also the officials of M/s Aptech, namely senior Manager Mr. Santosh Rastogi and Assistant Manager Mr. Hemant Nagpal.

231. He further stated that in the meeting Aptech officials had asked for publication of the answer key but the officials of corporation directed Aptech officials to first process the result as model code of conduct for elections in the State would be notified soon. He stated that when corporation asked to give this instruction in writing, the official refused but in this regard M/s Aptech Ltd. had

written letters to the corporation on 9th August, 2016 (RGC), 7th December, 2016 (JE) and 17th December, 2016 (AE) addressed to Managing Director, U.P. Jal Nigam. Regarding another query about the cloud server and the data downloaded from there consolidated in the local server, he stated that after giving soft and hard copy of the result as per the responsibilities of M/s Aptech the contract was that entire data would be for one year. He stated that after the texts the data was accumulated at the cloud server and was retained there for one month and thereafter the data was downloaded from cloud server to the local environment and its other servers.

232. Regarding another query about the retention and availability of downloaded data to the local environment, it was stated that data was available and if needed it could be provided. He stated that online data of examination never remained protected on the cloud server system and that was why it was always downloaded to the local environment and this entire data was available.

233. Regarding the question related utilization of server of U.P. Jal Nigam it was replied that it all depended upon the requirements, however, M/s Aptech Ltd. did not use the server and website of the corporation.

234. Mr. Roman Fernandes, the then General Manager of M/s Aptech Ltd. upon being interrogated, stated that question papers were drafted with the aid of experts of the subject matter and those experts, who had drafted the papers had the duty to provide answers to the master answer key. This statement was in respect of all three categories of posts for which the selections were held.

235. Regarding post examination stage activities like publishing the master answer key and the response sheet of the candidates so as to invite their objections regarding correctness of any question or correctness of answer and resolution thereof from subject experts of the fields, Mr. Fernandes reiterated the stand taken by the earlier officials, namely, Mr. Vishwajeet Singh and contended that, had the corporation not asked for supply of the CBT result and had it not directed the service provider agency to first carry out the selection process, the service provider agency would have in all circumstances published the master answer key for inviting objections from the candidates as per clause of contract.

236. Regarding data retention policy, he stated to the SIT that there was one year agreement to retain the data that consisted of registration data, attendance date, biometrics data, candidates' original response data, the original question papers and the original master answer key and these were all preserved as taken from cloud server into the local environment server.

237. Mr. Ajay Kumar Yadav, upon being interrogatted by the SIT, took the same stand as was taken by other two officials of M/s Aptech Ltd. Further upon a pointed query being made regarding primary data of cloud server whether it was securely preserved with him or not, he denied. According to him, the data was taken from the cloud server to local server and further securing it by applying a code No.- 513.

238. Regarding non publication of master answer key before declaration of results of CBT, he stated that the technical team of Bombay had provided the result of CBT to Mr. P.K. Ashudani in a

downloadable format which was protected with a password and this document consisted of the entire CBT result. This result was given on an Excel format with password protecting to the Managing Director Mr. P.K. Ashudani who with the help of officials of M/s Aptech submitted list of the candidates to M/s Aptech to publish it for the purposes of interview and after the interview was held final results were prepared adding the marks of interview provided by U.P. Jal Nigam.

239. Regarding matching of the list provided by Jal Nigam in a hardcopy as far as the CBT marks are concerned with the original data, Mr. Fernandes denied to have conducted any such verification or comparison further.

240. Regarding a very crucial query; since original data was deleted from the cloud server so it did make possible to change the original result available at your server because at every stage the terms and conditions of the contract were not followed and only the wish of the officials of the corporation was taken care of, Mr. Yadav very clearly stated in his reply that in a system of multiple department activity they all work independently and, therefore, it was not possible.

241. To another crucial query that corporation might have changed the results at its own stage and remaining results were kept intact because the results containing marks provided by the corporation were not compared with that available on the server of M/s Aptech Ltd., Mr. Yadav replied that it was possible.

242. Regarding non publication of the master answer key in time, in reply by Mr. Yadav stated it to be a mistake. The crucial questions asked by the SIT official from Mr. Yadav a crucial witness in the case representing M/s Aptech Ltd. as referred to herein above and his replies to the question are reproduced here under

*"(10) श्री अजय कुमार यादव पुत्र श्री रामचन्द्र यादव निवासी–521/231 बड़ा चांदगंज, अलीगंज, महानगर, लखनऊ, उम्र करीब 39 वर्ष मो0नं0–9235501192 ने कथन किया कि उ0प्र0, जल निगम में भर्तियों के दौरान वह ऐपटेक लि0 में जनरल मैनेजर के पद पर लखनऊ कार्यालय में नियुक्त था। भर्तियों में सेल्स और ग्राउन्ड ऑपरेशन की जिम्मेदारी उसकी थी यदि इसमें कोई अनियमितता पायी गयी हो तो उसकी जिम्मेदारी होगी।*

*प्रश्न–क्या प्राइमरी डाटा (क्लाउड) आपके पास सुरक्षित है ?*

*उत्तर–नहीं। टेक्निकल टीम ने क्लाउड से कम्पनी के लोकल सर्वर पर 513 नम्बर कोड कर सुरक्षित रखा था।*

*प्रश्न–सीबीटी परीक्षा के बाद जल निगम ने अभ्यार्थियों का परिणाम उपलब्ध कराने की आपकी क्या प्रकिया थी ?*

*उत्तर– बाम्बे टेक्निकल टीम से कम्प्यूटर बेस्ड टेस्ट (सी.बी.टी.) परीक्षा परिणाम जल निगम के एम.डी., पी.के. आशुदानी को डाउनलोडेबल फार्मेट में जो कि पासवर्ड प्रोटेक्टेड था उपलब्ध कराया गया था परिणाम सीबीटी के अंको के साथ सभी अभ्यार्थियों का दिया गया था। यह परिणाम एक्सेल फार्म में था तत्पश्चात जल निगम के एम.डी.पी.के. आसूदानी से ऐपटेक के हेमन्त वह संतोष रस्तोगी द्वारा परिणाम/पासवर्ड लाया गया था व साक्षात्कार हेतु सार्ट लिस्टिंग कर लिस्ट तैयार कर पुनः परिणाम जल निगम को भेज दिया गया था। जल निगम द्वारा मांगे गये फार्मेट में साक्षात्कार के बाद साक्षात्कार के अंक जल निगम से हार्ड कापी में प्राप्त कर सी.बी.टी. और साक्षात्कार के अंक जोड़कर फाइनल मेरिट लिस्ट तैयार कर जल निगम को उसकी टीम द्वारा दिया गया था।*

*प्रश्न–क्या जल निगम द्वारा उपलब्ध करायी गयी रिजल्ट को आपने एपटेक के पास पहले से मौजूद प्राइमरी रिजल्ट (डेटा) से मैच कराया था या जल निगम उपलब्ध कराये गये रिजल्ट से ही साक्षात्कार हेतु सूची तैयार कर जल निगमू को दी थी जबकि सूची एक्सेल फार्म में थी यानी किसी भी स्तर पर परिणाम में फेर बदल सम्भव था ?*

*उत्तर–नहीं। उसके द्वारा उनकी व जल निगम की सूची को मैच नही कराया गया था।*

*प्रश्न–आपने बताया कि क्लाउड सर्वर डिलीट हो चुका हैं ? तो क्या यह सम्भव नही है कि*

*जल निगम द्वारा प्रदान किया गया परिणाम ही आपके सर्वर पर ही हो क्योंकि हर स्तर पर अनुबंध नियमों को पालन न करते हुए आपने केवल जल निगम की इच्छा पर ध्यान अधिक दिया था ?*

*उत्तर–चूंकि मल्टिपल डिपार्टमेंट स्वतंत्र रूप से कार्य करता है। तो यह प्रथम दृष्टया सम्भव नहीं है।*

*प्रश्न–क्या यह सम्भव नहीं है कि जल निगम उस परिणाम में अपने स्तर से चेंज कर लिया हो और बाकी परिणाम उसी आधार पर बने क्योंकि आपका कथन है कि उस परिणाम को एपटेक के परिणाम से मैच नहीं किया गया था।*

*उत्तर–हॉ। यह सम्भव है।*

*प्रश्न–दोनों परिणामों को मैच न करने की जिम्मेदारी किसकी बनती है ?*

*उत्तर–यह जिम्मेदारी इनकी बनती है।*

*प्रश्न–आन्सर–की एपटेक द्वारा क्यों समय से अपलोड नहीं किया गया ?*

*उत्तर–यह एपटेक की तरफ से मिस हुआ है।"*

"*(10) Shri Ajay Kumar Yadav son of Shri Ramchandra Yadav resident-521/231 Bada Chandganj, Aliganj, Mahanagar, Lucknow, age about 39 years, mobile no.-9235501192 stated that during the recruitment in UP, Jal Nigam, he was posted in Aptech Ltd. Lucknow office on the post of General Manager. He was responsible for sales and ground operation in the recruitment, if any irregularity is found in it, then it will be his responsibility.*

*Question-Is the primary data (cloud) safe with you?*

*Answer - No. The technical team had saved it on the company's local server by serving it with code no. 573.*

*Question- What was your procedure for providing the results of the candidates by Jal Nigam after the CBT exam?*

*Answer- The Computer Based Test (CBT) result from Bombay Technical Team was made available to MD of Jal Nigam, PK Ashudani in downloadable format which was password protected. The result of all the candidates was given along with the marks of CBT. This result was in Excel format. Thereafter, the password was got applied by MD of Jal Nigam, PK Ashudani by Hemant and Santosh Rastogi of Aptech and after short-listing the list was prepared for interview and the result was again sent to Jal Nigam. After the interview in the format demanded by Jal Nigam, the interview marks were obtained from Jal Nigam in hard copy and the final merit list was prepared by adding the marks of CBT and interview and given to Jal Nigam by his team.*

*Question- Did you match the result provided by Jal Nigam with the primary result (data) already available with Aptech or did you prepare the list for interview from the results provided by Jal Nigam and gave it to Jal Nigam while the list was in Excel form, meaning that it was possible to change the result at any stage?*

*Answer-No, their list was not matched with that of Jal Nigam.*

*Question- You said that the cloud server has been deleted? So was it not possible that the result provided by Jal Nigam was present on your server because you at every stage paid more attention to the wishes of Jal Nigam by not following the conditions given under the contract?*

*Answer-Since multiple departments work independently, this is not possible at first sight.*

*Question: Is it not possible that Jal Nigam may have made changes in the result at its own level and the rest of the results were prepared on that basis because you have said that that result was not matched with the result of Aptech.*

*Answer-Yes. It is possible.*

*Question – Who is responsible for not matching the two results?*

*Answer – This is their responsibility.*

*Question: Why was the answer key not uploaded by Aptech on time?*

*Answer-This is a miss on the part of Aptech."*
*(Translated by Court)*

243. Mr. Neeraj Malik, another official of M/s Aptech Ltd. made similar statement as other officials of the Aptech had made and regarding a query whether transparency was maintained at the level of M/s Aptech Ltd., he stated that transparency was fully ensured and reiterated the stand that corporation had insisted for declaration of result in stead of publishing master answer key.

244. Regarding signing of an agreement by him on 13th December, 2016 itself whereas agreement took place between the corporation and M/s Aptech Ltd. on 15th December, 2016 he stated that it might have had happened but the fact was that agreement was entered on 15th December, 2016 by all the witnesses to it, namely Senior Manager Mr. Santosh Kumar Rastogi and Mr. Hemant Pal, the Assistant Manager.

245. Mr. Prem Prakash Ashudani, who was the then Managing Director of U.P. Jal Nigam, upon being interrogated by the officials of the special investigating team stated that insofar as the recruitment of Routine Grade Clerks and that of Stenographers are concerned, it was the duty of the Chief Engineer (A-3) Mr. Anil Kumar Khare and it was he, who used to undertake correspondence for any query made in regard to the select list.

246. Regarding Assistant Engineer he stated that the responsibility was of Mr. Pramod Kumar Sinha and after his retirement the responsibility fell upon Mr. Anil Kumar Khare.

247. Regarding a query as to why the recruitment process undertaken in respect of the 32 Stenographers was suddenly stopped and cancelled, he stated that only 32 candidates were found eligible after due relaxation accorded, for which the recommendation was made to the Chairman/ Hon'ble Minister, through the office of the officer on special duty, Mr. Syed Affaqu Ahmad but in order to get more meritorious candidates in future by conducting the re-examination, the then selection process in progress was cancelled.

248. Regarding a query being made as to why the answer sheets were not published despite there being a condition so prescribed under the contract, he gove only this much reply that it was the duty of M/s Aptech Ltd. and if it had not adopted this procedure, it was to be blamed only. He stated that he never directed M/s Aptech not to invite objections and so far as the letter written by M/s Aptech on 17th December, 2016 was concerned, he claimed to have knowledge of any such letter.

249. Regarding action to be taken against M/s Aptech Ltd. for violating terms and conditions of the contract it is stated by Mr. P.K. Ashudani that the serious lapses that happened at the end of M/s Aptech was subject matter of inquiry for which a committee was duly constituted.

250. To another question for ensuring sanctity and transparency in an open competitive examination by inviting applications through public tender procedure, Mr. Ashudani in reply stated that in the year 2013 when tender was uploaded only two agencies had applied, out of which one agency was selected because the other agency had no requisite

infrastructure facility. He further stated that generally the Government institutions do not undertake to conduct competitive examinations and, since work was of such magnitude in respect of open competitive tests to be held by inviting applications for holding selection on posts in public employment that only limited number of agencies were having this experience and expertise and, therefore, inviting of tender could not have fetched good result.

251. He stated that not only KNIT was not agreeing to online mode of test and showed its inability to conduct online tests, even the financial proposal that was placed by the KNIT, Sultanpur was much higher than what was proposed by M/s. Aptech Limited and that was why M/s. Aptech Limited was selected and given the work order. Regarding the selection being held in a hurried manner by providing instructions that entire selection was to be concluded within four months, Mr. Ashudani in reply stated that there was an urgent requirement to make appointments upon vacant positions and normally four months time is consumed in conducting selection and issuing appointments. Since the post of Assistant Engineer was outside purview Public Service Commission, therefore, no approval was required from the State Cabinet for carrying out recruitment drive. Regarding declaration of results in respect of the vacancies of Assistant Engineer and Junior Engineer and issuing appointment order just a day or two before the notification of Model Code of Conduct in view of the forthcoming Legislative Assembly elections, Mr. Ashudani replied that in matters of selection and appointment through Public Service Commission or Staff Selection Commission such examination and selection process continues even after notification of the election. Moreover, in this case only joining was to be given as rest of the exercise was already over. Therefore, he asserted, the results were declared and appointment orders were issued. Regarding four candidates namely Mohd. Shams, Syed Ahmad Ali, Samrah Ahmad and Kailash Vishwakarma whose response to questions either the correct or incorrect answers were all similar as 58 same questions were correctly answered and two same questions were attempted with same wrongly answer choice for which they were allotted same marks, Mr. Ashudani replied that this matter did not come to his notice, nor was placed before him while he was in service and therefore, in that regard such query may be put to M/s. Aptech Limited.

252. Regarding sanction of loan of Rs. 300 crores, he submits that there was no such issue there and instead letters were written and correspondence was made with the State Government to convert the Corporation into a Government Corporation. Regarding procedures not being followed or followed in hurried manner that may have resulted in serious lapses, Mr. Ashudani stated in reply that with the appointment order issued in respect of RGC on 19.11.2016 and till the joining of Junior Engineers made on 16.01.2017, in all two months' time took place and the period of four months under the contract was the maximum period and not the minimum period. Regarding general powers of management of the Corporation and the exercise of power of the Chairman who enjoyed it in the ex-officio capacity, Mr. Ashudani told to the SIT officials that in terms of Section 8 and 89 of the relevant Act, all the crucial decisions had to be taken by the department of Urban Development and for taking certain decisions the Board of Directors had

authorized the Chairman of U.P. Jal Nigam and in that regard a circular letter was issued on 20.10.1987, photocopy of which had been handed over to the Investigating Officer. He further stated that since regular meeting of the Board of Directors of the Corporation would ordinarily not take place and which resultantly would have seriously affected the working of the Corporation, therefore, the Chairman was authorized to take decision in the matter and since he was heading the Board as Chairman and being a very senior Cabinet Minister, some of the decisions were left to his discretion accordingly. Regarding a query that four posts out of 9 posts Assistant Engineers were directed to the trade of Computer Science and Electronic Communication out of way by the Chairman of U.P. Jal Nigam and for relaxation in the matter of appointment of Stenographers the proposal was mooted though the Officer on Special Duty for which neither the O.S.D. was competent, nor the Chairman of the Board, he replied that there were three circular letters issued from time to time for carrying out properly the work of three departments which were being headed by the Minister concerned and as per the wish of the Minister the papers used to be processed through the OSD concerned only. Regarding financial sanction in respect of vacancies in question that were required from the State Government and that under the U.P. Water Supply and Sewerage Act, 1975 the fund was to be spent only upon work relating to the Services of the Sewer and Water Supply, he stated that these are the provisions under the Act for which he cannot make any comment but he was apprised on 05.12.2017 that the loan that was provided by the Government for that no demand was raised by the Corporation. The only demand raised was that the department should be made a Government Department so that the dues *qua* salary and pension of retired employees should be cleared and out of total demand of Rs. 374/- crores only a limited amount was paid.

253. Another person who was crucial to the controversy and interrogated by the SIT was Syed Afaq Ahmad, the Officer on Special Duty directly attached to the then Minister of Urban Development and Chairman of U.P. Jal Nigam Mr. Azam Khan. Regarding four posts of the Assistant Engineers (Mechanical and Electrical) that were diverted to the trade of Computer Science and Electronic Communication, he stated that in that regard the Board of Directors had granted approval but he did not remember the exact date. With regard to the permission taken from the State Government for amending the regulation, he stated that he had no information regarding the same. On the question of placement of the file before the Urban Development Department and the remarks made upon the same, he stated that the budget was allocated to U.P. Jal Nigam by the State Govt. as U.P. Jal Nigam did not have its own budget, nor any other source of income and whatever the papers were forwarded to the Government by the U. P. Jal Nigam, were forwarded to the Chairman Mr. Azam Khan. Regarding cancellation of recruitment drive in respect of posts of Stenographers, he stated that that was all within the domain of Managing Director of U.P. Jal Nigam and he had unnecessarily forwarded the papers to the office of the Chairman. Regarding Computer based test results, he stated that he had no such information that entire result had reached the office of U.P. Jal Nigam.

254. Regarding procedure adopted in the CBT conducted in respect of Assistant

Engineers, Junior Engineers and that of the Routine Grade Clerks, he stated it to be the duty of M/s. Aptech Limited and as per the information received by him the question papers were drafted by the subject experts. Regarding the act and conduct of M/s. Aptech Limited in not publishing the master answer key despite there being a clause under the agreement, he stated that since oral directions were issued by the Corporation to first declare the result and proceed with the selection process, neither the master answer key, nor the response sheets were published. Regarding four persons namely Mohd. Shams, Syed Ahmad Ali, Samrah Ahmad and Kailash Vishwakarma obtaining similar marks in CBT attempting same number of questions as correct and same number of questions as incorrect with the similar incorrect answers, he stated that this can be taken only as a coincidence. The question whether subject experts can be from anywhere, he stated in reply that subject experts can be taken from anywhere but in order to ensure transparency, the experts were taken from outside the State.

255. After discussing these statements of the crucial witnesses who were interrogated by the SIT, I would now like to refer to the crucial documents also examined by the SIT. Out of various documents that were examined by the SIT, the most crucial of the documents were the report submitted by the CFSL which was discussed by it in detail while conducting analysis of the evidence collected by it in arriving at a conclusion that the offences under various sections of IPC and the Special Acts charged against those accused persons were made out. The SIT report has discussed it in detail in its analysis part to arrive at a final conclusion that it did identify such persons whose marks retrieved from the original data base of the hard disks were not same as provided by the SIT for comparison purposes and 169 such candidates were identified in such category who would not have been called for interview for inflated marks. The SIT also examined the details provided to it regarding constitution of the Interview Board, the list of candidates who were selected for the purpose of interview and upon drawing an average time spent per candidate concluded that not much time was available to the Board to conduct interview of the candidates so as to appreciate and assess their personality.

256. The SIT has also examined the experts of the interview board so as to elicit from them as to whether any kind of influence was ever exercised upon any of them to favour a particular candidate or a particular category of candidate. The SIT has also gone into the details of incorrect questions and incorrect answers to which objections were raised and having recorded and analysed the oral statements as well as the documentary material it finally concluded that in the matter of selection process for conspiracy of the officials of the Corporation with those of M/s. Aptech Limited, the selection process appeared to have been absolutely compromised and sufficient evidence was there available to it to charge these officials of M/s. Aptech Limited and those of Corporation for committing offence under various sections of Indian Penal Code, the Information and Technology Act and the Prevention of Corruption Act.

257. Two Officers of U.P. Jal Nigam, namely, Anoop Kumar Saxena, the then Chief Engineer (Urban) and Rakesh Nigam, the then Engineer, Level-II, who had submitted initial two reports, were also

interrogated by S.I.T. and during their interrogation they have been only queries as to those aspects of the matter regarding permission not taken to fill up the vacancies and that the Committee which was constituted to look after the Corporation never held any meeting and they only stated that looking to the circumstances involvement of highups of the Corporation in vitiating the selection process cannot be denied.

258. In its final analysis it has referred to certain admitted facts that emerge out from interrogation

(i) The OSD Urban Development Department, Government of U.P. vide letter no. 2421/9-3-15C/10TC Urban Development Department No. 3 dated 14.01.2016 intimated sanction of Hon'ble the Governor vide Government Notification No. 66/2015/1978/47-A-Ka-3-2015-13/65/2015 dated 30.12.2015 to fill up the vacancy of Routine Grade Clerks and Stenographers through recruitment process to be carried out by any agency other than subordinate selection commission.

(ii) A committee was constituted under the Chairmanship of Sri A.K. Khare, the Chief Engineer, U.P. Jal Nigam to carry out the recruitment drive. The said committee however, never met, nor records reveal that any such meeting of the committee was ever held.

(iii) For assessment of expenditure a letter was written by M.D., U.P. Jal Nigam; MNIT, Allahabad and IIT, Lucknow and KNIT, Sultanpur, Government of U.P., Lucknow on 28.10.2015 and ultimately on 19.05.2016 M/s. Aptech Limited was approved and which carried out the entire selection process under the agreement that was reached between M/s. Aptech Limited and Corporation on different dates for different categories of posts.

(iv) On 20.12.2016 suddenly the recruitment for Stenographer was cancelled by the Chairman of the Board as he failed to obtain relaxation in typing in respect of 32 candidates who could have been ultimately selected and since no such authority vested with him, he was left with no other option but to cancel the same vide order dated 20.12.2016. This resulted in the loss of Rs. 33,75,880.20 paise as the CBT exercise was undertaken in respect of these vacancies of Stenographers also.

(v) The similar findings have come to be returned in respect of Junior Engineers and Assistant Engineers also regarding permission to be taken for conducting recruitment through some Government agency or institutes in the first instance but since nobody came forward, therefore, the task was entrusted to a private agency.

(vi) The report discusses the dates and the letter numbers also by which the Government had granted sanction to fill up the vacancies like in the case of Assistant Engineers letter was written on behalf of the Government on 16.11.2016 to fill up the vacancies of Assistant Engineers. Similarly, in the case of Junior Engineers also the letter was written by the Government on 09.03.2016.

(vii) Regarding four persons obtaining similar marks attempting same questions as correct answers and same questions with some wrong answers, after final analysis the finding arrived at by the SIT is that this could not have been taken to just a co incidence.

(viii) The SIT also considered the reports of experts of Institutes of Technology and placed heavy reliance upon the same and after analysing all the

material documents available before it including the reports, it came to conclude that M/s. Aptech Limited had deliberately selected undeserving candidates in order to give them undue benefit and raised/ inflated accordingly their CBT marks which resulted ultimately in denial of selection to the meritorious candidates. This act and conduct of M/s. Aptech Limited according to the SIT was absolutely illegal and in the clear clandestine manner in which they processed the result and published the same in a clandestine manner by giving password and login ID in advance to Managing Director so as to expose it the officials illegally and it deserved to be blacklisted as well.

(ix) The further finding is that the evidence sufficiently are available to enable it to conclude finally that entire selection was a result of conspiracy and fraud just to give selection and appointment to own men by the selectors and those who were in helm of affairs. This entire exercise violated the constitutional mandate to ensure transparency and sanctity in the matter of open selection in competitive examination inviting applications from public in matters of public employment.

259. Upon arriving at these above findings on the basis of material available to it and detailed interrogations carried out with various process, the SIT found that charges levelled against these named accused persons stood valid so as to prosecute them under various sections of IPC, Prevention of Corruption Act and Information and Technology Act and hence it filed the charge sheets.

260. Having discussed and examined all the above reports minutely the findings arrived at, in general, as contained in the reports, I summarize them as under:

*(I). The reports discuss and record findings to the effect that sanction was not obtained from the State Government for carrying out recruitment drive in respect of posts in question.*

*(II). The reports further record findings to the effect that financial sanction from the State Government was also a must which remained wanting in the matter. Rs. 300 crore advanced to U.P. Jal Nigam as loan only and so diverting the said money towards recruitment drive was questionable.*

*(III) Reports also give findings to the effect that sincere efforts were not made to get selection held by any government institute or any recognized University, nor efforts were made to invite applications in general from various private agencies/ government agencies through open tender process for outstanding selection.*

*(IV) The selection of M/s Aptech Ltd. to conduct CBT was hurriedly done to somehow hold selection and give appointments to own men and Service provider agency M/s Aptech Ltd. breached the terms of contract and conditions given in the work order by not publishing master answer key immediately after CBT was concluded and this act resulted in selecting and giving appointments to undeserving candidates.*

*(V) Forensic examination of data retrieved from the seized hard disks from the local environment office of M/s Aptech Ltd. and comparison thereof with data of candidates called for interview disclosed that 169 candidates in all three categories namely RGC, AE, JE, whose marks were changed to higher marks to give them opportunity to walk in for interview to the*

*prejudice of those deserving candidates who were not called for interview.*

*(VI) The four candidates, namely Mohd. Shams, Sayed Ahmad Ali, Kailash Vishwakarma and Samrah Ahmad had resorted to unfair practise as they not only attempted similar number of questions but whose wrong options as answers to certain identical questions led to inevitable conclusion that selection process in fact was vitiated for gross irregularities and use of unfair means.*

*(VII). Two male candidates in Junior Engineer category were wrongly placed in select list and appointed upon seats reserved for women category and this led to another inevitable conclusion that preparation of select list was malafidely done in conspiracy with officials of U.P. Jal Nigam to select and given appointments to own men and these irregularities and illegalities were deeply rooted in the system of selection.*

*(VIII). M/s Aptech Ltd. had the responsibility to get question papers prepared and so also master answer key prepared, and therefore, due to incorrect/doubtful questions asked and incorrect / doubtful answers given in the question papers and the master answer key respectively, a blunder was committed which very much hit at root of the CBT conducted by it and thus entire selection process stood vitiated.*

*(IX). Due to illegal act of suddenly cancelling the recruitment drive on the post of Stenographer vide orer dated 26.12.2016 a huge financial loss was caused to public exchequer amounting to Rs. 33,75,880.20 as expenditure was incurred in conducting CTB in respect of these vacancies as well.*

*(X). The Chairman of U.P. Jal Nigam and the then Union Development Minister Mr. Azam Khan with the aid of OSD Mr. Afaq Ahmad abused his position both as a Senior Cabinet Minister and Chairman of U.P. Jal Nigam in getting the recruitment drive conducted to select own men on various posts so advertised and therefore, as a sequel to this design, he conspired with the officer of the upper echelons of the U.P. Jal Nigam and M/s Aptech Ltd. as well to manipulate CBT results and get the interview conducted in a hush-hush manner.*

*(XI). The entire selection process that was carried out, was absolutely compromised and so consequential appointments made on post of Routine Grade Clerk , Assistant Engineer and Junior Engineer were liable to be held void. The report/revised result sheet prepared by M/s Aptech Ltd. itself established that 656 candidates in Junior Engineer who were called for interview were in fact not entitled to be called for interview and 479 candidates in JE category (331 JE (Civil) and 148 JE (Electrical/ Mechanical) though deserved to be called for interview, but were not called for interview.*

*(XII). The original data relating to selection process having been deleted from primary source cloud server CtrlS, the outsourced agency from whom M/sAptech Ltd. had hired the cloud server space and in the absence of digital finger print or signature, like hash value, checksum information and audit trail information to the students response data, neither any verification could be done of the data provided in the CDs handed-over to the experts of the institutes of technology as to its integrity, nor any opinion could be given authoritatively as to the status of data provided, whether genuine or modified and so it became impossible to segregate tainted from untainted candidates.*

*(XIII). The CD data provided to the expert of the institutes of technology proved itself that data was modified on 27th February, 2017 and 8th March, 2017.*

261. The above findings have weighed decision of the respondent Corporation in annulling the entire selection of RGC, AE, JE and resultant cancellation of appointments.

262. Having dealt with the various report in *extenso* in this judgment and having examined the order impugned, before I give my final verdict, I consider it appropriate at this stage to consider the authorities/ rulings cited before me by the learned Advocates appearing for respective parties.

**Rulings cited for petitioners**

263. Learned Advocates appearing for petitioner have heavily relied upon the authority in the case of ***Indrapreet Khalon and others Vs. State of Punjab and others 2006 (11) SCC 356.*** In this case controversy had arisen for cancellation of entire selection process by the State Government *qua* the selection and appointment of Officers of the PCS executive branch as well as PCS Judicial branch. High Court had constituted a scrutiny committee which submitted a report on the basis of which High Court had affirmed the decision of the State Government. The finding of the High Court was to the effect that corrupt means were adopted to secure selection by the candidates which vitiated the entire selection process and because of a large scale corruption and malpractice and manipulation of marks and other illegalities that were committed during the tenure of the then Chairman Ravindrapal Singh Siddhu, there remained no doubt that the entire selection deserved annulment. Supreme Court dealing with the SLP, framed a question as to whether due to misdeed of some of the candidates, honest and meritorious candidates could also be permitted to suffer. In the said judgment the Court categorized vide paragraph-52 the various authorities falling in different categories.

*"We may, at this stage, notice that the following cases would fall in the different categories which are enumerated hereinbelow:*

***(i) Cases where the 'event' has been investigated:***

*(a) Union Territory of Chandigarh v. Dilbagh Singh, (1993) 1 SCC 154 at paragraphs 3 and 7.*

*(b) Krishan Yadav v. State of Haryana, (1994) 4 SCC 165 at paragraphs 12, 15 and 22.(c) Union of India v. Anand Kumar Pandey, (1994) 5 SCC 663 at paragraph 4.*

*(d) Hanuman Prasad v. Union of India, (1996) 10 SCC 742 at paragraph 4.*

*(e) Union of India v. O. Chakradhar, (2002) 3 SCC 146 at paragraph 9.*

*(f) B. Ramanjini v. State of A.P., (2002) 5 SCC 533 at paragraph 4.*

***(ii) Cases where CBI inquiry took place and was completed or a preliminary investigation was concluded:***

*(a) O. Chakradhar (supra)*

*(b) Krishan Yadav (supra)*

*(c) Hanuman Prasad (supra)*

***(iii) Cases where the selection was made but appointment was not made:***

*(a) Dilbagh Singh (supra) at paragraph 3*

*(b) Pritpal Singh v. State of Haryana, (1994) 5 SCC 695*

*(c) Anand Kumar Pandey (supra) at paragraph 4.*

*(d) Hanuman Prasad (supra)*

*(e) B. Ramanjini (supra) at paragraph 4.*

***(iv) Cases where the candidates were also ineligible and the appointments were found to be contrary to law or rules:***

*(a) Krishan Yadav (supra)*

*(b) Pramod Lahudas v. State of Maharashtra, (1996) 10 SCC 749 wherein appointments had been made without following the selection procedure.*

*(c) O. Chakradhar (supra) wherein appointments had been made without type-writing tests and other procedures of selection having not been followed."*

*(emphasis added)*

264. The Court then proceeded to refer to earlier judgment in the case of **Benni TD *v.* Registrar Cooperative Societies (1998) 55 SCC 269** where the Court had referred to the contention raised that for a tampering of marks in respect of several candidates would draw a conclusion that there had been no fair and objective selection and public interest demanded annulment of selection, and then rejected the same. It then referred to another judgment in the case of **Omkar Lal Bajaj *v.* Union of India (2003) 2 SCC 673** in which the issue of *en masse* cancellation of LPG distributors on the plea that uneuqals were clubbed together as a result of arbitrary exercise of executive power, had arisen. The court observed vide paragraph 45 in the said judgment that *"solution by resorting to cancellation all more worse than the problem. Cure was worse than a disease"*. Dealing with the principles of law on the point of public interest or probity in governance, the Court referred to paragraphs 35 and 36 of that very judgment, which are reproduced hereunder:

"*35. The expression 'public interest' or 'probity in governance' cannot be put in a straitjacket. 'Public interest' takes into its fold several factors. There cannot be any hard-and-fast rule to determine what is public interest. The circumstances in each case would determine whether government action was taken in public interest or was taken to uphold probity in governance.*

*36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilised society based on rule of law not only has to base on transparency but must create an impression that the decision making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate."*

265. Having perused those judgments on the point of cancellation *en masse* only on account of certain irregularities detected in respect of a few, the court vide paragraph-58 rejected the arguments of Mr.

Dhawan in Khalon's case that decision of the commission was collegiate in nature.

266. The Court having thus discussed authorities above and applying the same on the facts of the said case directed the matter to be re-examined by the High Court after constituting a committee afresh to find out those who were tainted. Thus the matter was remitted to segregate tainted from untainted candidates vide paragraphs 94, 95 of the judgment the Court now reproduced as under:

"***94.*** *The impugned judgment as also the orders of the State Government and the High Court are, thus, liable to be set aside and directions are issued. Although the impugned judgments cannot be sustained, we are of the opinion that the interest of justice would be subserved if the matters are remitted to the High Court for consideration of the matters afresh. However, with a view to segregate the tainted from the non-tainted, and that in the interest of justice the High Court should be requested to constitute two independent Scrutiny Committees—one relating to the executive officers and the other relating to the judicial officers.*

"***95.*** *We would, furthermore, request the High Court to consider the desirability of delineating the area which would fall for consideration by such Committees within a time-frame. Copies of such reports of the Committees shall be supplied to the learned counsel for the petitioners and/or at least they should be given inspection thereof. The parties shall be given opportunity to inspect any document including the answer sheets, etc. if an application, in that behalf is filed. Such inspection shall, however, be permitted to be made only in the presence of an officer of the Court. The appellants shall be given two weeks' time only for submitting their objections to such reports and their comments, if any, on any material whereupon the High Court places reliance, from the date of supply of copies or inspection is given. Having regard to the fact that the appellants are out of job for a long time, we would request the High Court to consider the desirability disposing of the matter as expeditiously as possible and preferably within the period of three months from the date of receipt of the copy of this order. Before parting with the case, however, we may observe that it is expected that the State having regard to the magnitude of the matter shall leave no stone unturned to bring the guilty to book. It is the duty of the State to unearth the scam and spare no officer howsoever high he may be. We expect the State to make a thorough investigation into the matter. These appeals are allowed to the aforementioned extent and with the directions and observations made hereinbefore."*

267. Disagreeing on some points, the other Judge on Bench Justice Dalveer Bhandari, as his Lordship then was, in agreement with Senior Judge, observed vide paragraph 127 thus:

*"In somewhat similar circumstances, in which initially it looked that it was impossible to weed out the beneficiaries of one or the other irregularities, or illegalities, if any form the others, even then in Union of India v. Rajesh P.Pu this Court observed that the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections."*

268. Another judgment relied upon is in the case of **Joginder Pal and another Vs. State of Punjab (2014) 6 SCC 644.**

This judgment arose out of same controversy, as after the remand of the matter in the case of Inderpreet Khalon (*supra*) the High Court again held that the entire selection process and consequential appointments to be result of manipulations, forgery and fraud even though tainted candidates were identified and were segregated, the court while dealing with the judgment of the High Court very categorically held that a Court was always required to consider the foundational facts and once foundational facts are established then principle of law could be made applicable to test whether appointments were made in violation of Articles 14 and 16 of the Constitution being result of such an absolute arbitrary exercise of power. The Court expressed its view that there existed distinction between a proven case of mass-cheating and unproven charge of corruption and it is only in those circumstances where it is found to be highly improbable to identify the tainted candidates to segregate them from untainted candidates, that mass cancellation of selection and appointment could be resorted to. These were the principles that were discussed along with related principles of law *qua* selection and appointments on the basis of the judgment in the case of Indrapreet Khalon vide paragraph 10.1 to 10-5 which are relevant for the purpose of the case and hence are being reproduced hereunder:

*"10.1 An appointment made in violation of Articles 14 and 16 of the Constitution of India would be void. It would be a nullity. Since the services of the appellants were terminated not in terms of the rules but in view of the commission of illegality in the selection process involved, the applicability of the relevant provisions of the statutes as also the effect of the provisions of Article 311 of the Constitution need not be considered.*

*10.2 Before a finding that an appointment has been made in violation of Articles 14 and 16 of the Constitution can be arrived at, the appointing authority must take into consideration the foundational facts. Only when such foundational facts are established, can the legal principles be applied. When the services of employees are terminated inter alia on the ground that they might have aided and abetted corruption and, thus, either for the sake of probity in governance or in public interest their services should be terminated, the court must satisfy itself that conditions therefor exist. The court while setting aside a selection may require the State to establish that the process was so tainted that the entire selection process is liable to be cancelled. In a case of this nature, thus, the question which requires serious consideration is as to whether due to the misdeed of some candidates, honest and meritorious candidates should also suffer.*

*10.3 A distinction exists between a proven case of mass cheating for a board examination and an unproven imputed charge of corruption where the appointment of a civil servant is involved. Only in the event it is found to be impossible or highly improbable that the tainted cases can be separated from the non-tainted cases could en masse orders of termination be issued. Both the State Government as also the High Court in that view of the matter should have made all endeavours to segregate the tainted from the non-tainted candidates*

*10.4 Cases which may arise where the selection process is perceived to be tainted may be categorised in the following manner:*

*(i) Cases where the "event" has been investigated.*

*(ii) Cases where CBI inquiry took place and was completed or a preliminary investigation was concluded.*

*(iii) Cases where the selection was made but appointment was not made.*

*(iv) Cases where the candidates were also ineligible and the appointments were found to be contrary to law or rules"*

*If the services of appointees who had put in a few years of service were terminated, compliance with three principles at the hands of the State was imperative viz.: (1) to establish satisfaction in regard to the sufficiency of the materials collected so as to enable the State to arrive at its satisfaction that the selection process was tainted; (2) to determine the question that the illegalities committed went to the root of the matter, which vitiated the entire selection process. Such satisfaction as also the sufficiency of materials were required to be gathered by reason of a thorough investigation in a fair and transparent manner; (3) whether the sufficient material present enabled the State to arrive at a satisfaction that the officers in majority had been found to be part of the fraudulent purpose or the system itself was corrupt.*

*10.5 Once the necessary factual findings as enumerated above are arrived at, or it is found impossible or highly improbable to separate tainted from untainted cases, all appointments traceable to the officers concerned could be cancelled. But admittedly, in the present case, although there had been serious imputations against Ravinderpal Singh Sidhu being at the helm of the affairs of the State Public Service Commission, all decisions made by the Commission during his tenure are yet to be set aside."*

269. The Court after examining the entire controversy in hand in the said case and the judgment in the case of Khalon observed that in Khalon's case the Court had not accepted the submission of respondent that it was not practicably possible to segregate tainted from untainted candidates. The Court, therefore, in the circumstances when there was no evidence available to hold those who had been offered appointment and had discharged duties pursuant to the appointment orders who had not in any manner in-judged in any fraud in finding place in the select list their appointment and posting orders were to be saved against the existing vacancies and in the circumstances if the vacancies were were not there then supernumerary posts were directed to be created giving them limited benefit. Vide paragraph 44 the Court held thus:

***44.*** *It would be apposite to quote the following portion of the said judgment in this behalf : (High Court of Punjab and Haryana case [High Court of Punjab and Haryana v. State of Punjab, (2010) 11 SCC 684 : (2011) 1 SCC (L&S) 769] , SCC pp. 692-93, paras 26-27)*

"*26. It is not in dispute any more that the candidates were given fresh opportunity to appear for selection for the aforesaid post in the exams exclusively held for them in the year 2004. Out of 57 such candidates, 20 candidates were reselected and they were given benefit of original appointment. As many of these candidates are the respondents and have worked as judicial officers for some period and it has also not been proved or established completely against them that they had indulged in malpractice in examinations, we are of the view that they should also be given reappointment and posting orders to the existing vacancies in the State of Punjab and if no vacancy exists, Mr Sharan has assured the court that the State will*

*create supernumerary posts for them but they would not be entitled to get all the benefits as have been granted to them vide the impugned judgment [Sirandip Singh Panag v. State of Punjab, (2008) 4 SLR 432 : (2008) 4 RSJ 288] . 27. However, it should not be construed that our judgment is giving seal of approval to the judgment [Sirandip Singh Panag v. State of Punjab, (2008) 4 SLR 432 : (2008) 4 RSJ 288] of the Full Bench of the Punjab and Haryana High Court but with an intention to work out the equities and to do complete justice between the parties and in view of the earlier judgment of this Court in Kahlon case [Inderpreet Singh Kahlon v. State of Punjab, (2006) 11 SCC 356 : (2007) 1 SCC (L&S) 444] that tainted candidates be separated from untainted, meaning thereby that this Court did not accept the submission that it was not practically possible to do so; and further this Court had taken note of reselection held in 2004 in para 92 of the judgment, but held that the effect thereof would be subject to this case, this is the only via media, through which the respondents could also be granted relief as it could not be established that even otherwise, they would have been declared as unsuccessful candidates. Precisely, that is the reason we have moulded the reliefs granted to the respondents by the High Court as our order is not likely to affect seniority of any of the judicial officers, who had already been working prior to the respondents. We are conscious of the fact that by this procedure, there is no likelihood of any offshoots of the said order and hopefully the whole controversy triggered in the year 1998, would stand settled for all times to come."*

270. The Court also dealt with the statistics as was recorded in the judgment of the High Court where 66% of the persons who were offered appointments, were tainted and which influenced selection process. This percentage was drawn/ worked out taking both direct recruits and nominated candidates together and out of 93 direct recruits 76 had joined and only 10 were found to be tainted. So percentage of tainted candidates in the nominated category was higher to the extent of 80 percent and, therefore, direct recruits were held to be wrongly equated with nominated officers. The Court then held that direct recruits were mostly non-tainted who were appellant before the Court.

271. Thus the Supreme Court set aside the judgment of the High Court and saved those who were selected and appointed falling in untainted category, vide paragraph 47 and 48 the Court held thus:.

***47.*** *We may note that the High Court has recorded in the impugned judgment [Amarbir Singh v. State of Punjab, CWP No. 8421 of 2002, decided on 31-5-2013 (P&H)] that 66% cases were found to be of the persons given appointment who were tainted, which influenced the entire selection process. However, during the course of arguments, it was placed before us that the aforesaid percentage is worked out by taking the cases of direct recruits and nominated candidates together. If the figures are separately taken, out of 93 direct recruits, 76 have joined and only 10 are found to be tainted. In fact, the percentage of such tainted candidates in nominated category was much higher i.e. 80%. It was, thus, argued that the cases of direct recruits cannot be taken along with those in nominated category, who influenced the decision in their matter as well. This is also a supportive and important fact which goes in favour of these appellants viz. the non-tainted direct recruits.*

***48.*** *The aforesaid discursive exercise prompts us to set aside the*

*judgment [Amarbir Singh v. State of Punjab, CWP No. 8421 of 2002, decided on 31-5-2013 (P&H)] of the High Court in respect of these persons with the direction that the appellants be allowed to join the duties forthwith. It is, however, made clear that the intervening period during which they remained out of service shall not count for seniority or any other benefit. However, these persons shall be given the benefit of service rendered by them earlier viz. from September 1999 till 22-5-2002, when they actually worked, for the purpose of seniority and future promotion, etc. These appeals are partly allowed to the aforesaid extent. There shall, however, be no order as to costs.*

272. The other judgment which is cited by Mr. Khare is the case of **State of N.C.T. Delhi and another v. Sanjeev @ Bittu, (2005) 5 SCC 181**. The judgment has been cited on the point of judicial review. The principle of judicial review has been discussed in the judgment at a great length *vis a vis* the principle of Wednsebury Unreasonableness and the Court has very categorically held that this power of judicial review can be exercised on the ground of illegality, irrationality and procedural impropriety. It is observed that the Court will be slow to interfere in matters relating administrative functions unless decision suffers from any vulnerability enumerated as illegality, irrationally and procedural impropriety. If the actions taken falls in any of the above categories then it will be a established case of exercise of power not justified one and will fall within the mischief of Wednsebury Unreasonableness. Vide paragraphs 19 to 25 the Court has held thus:

"***19.*** *Before summarising the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1947) 2 All ER 680 : (1948) 1 KB 223 (CA)] (KB at p. 229 : All ER pp. 682 H-683 A). It reads as follows:*

"*… It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. … In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."*

*Lord Greene also observed (KB p. 230 : All ER p. 683 F-G)*

"*… it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. … The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."*

*(emphasis supplied)*

*Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view.*

***20.*** *The principles of judicial review of administrative action were further summarised in 1985 by Lord Diplock in CCSU case [(1984) 3 All ER 935 : 1985 AC 374 : (1984) 3 WLR 1174 (HL)] as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows :*

"*Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;"*

*Lord Diplock explained "irrationality" as follows : (All ER p. 951a-b)*

"*By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

*21. In other words, to characterise a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.*

*22. These principles have been noted in the aforesaid terms in Union of India v. G. Ganayutham [(1997) 7 SCC 463 : 1997 SCC (L&S) 1806] . In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself. (See Indian Rly. Construction Co. Ltd. v. Ajay Kumar [(2003) 4 SCC 579 : 2003 SCC (L&S) 528] .)*

*23. Though Section 52 limits the scope of consideration by the courts, the scope for judicial review in writ jurisdiction is not restricted, subject of course to the parameters indicated supra.*

*24. It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary the order directing externment should show existence of some material warranting an order of externment. While dealing with the question mere repetition of the provision would not be sufficient. Reference is to be made to some material*

*on record and if that is done, the requirements of law are met. As noted above, it is not the sufficiency of material but the existence of material which is sine qua non.*

*25. As observed in Gazi Saduddin case [(2003) 7 SCC 330 : 2003 SCC (Cri) 1637] satisfaction of the authority can be interfered with if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice. To that extent, objectivity is inbuilt in the subjective satisfaction of the authority."*

273. Mr. Khare has also relied upon a Division Bench judgment of this Court in the case of **Akanksha Yadav v. State of U.P. and 5 others** in Special Appeal Defective No.- 127 of 2023 decided on 12th April, 2023, wherein the matter was that the Commission *suo motu* acted to re-evaluate the amendments after making recommendation of those very appellants. Citing the authorities of this Court itself and one of the Supreme Court wherein the Court had saved those candidates who were selected by giving them placement at the bottom of rectified select list, vide paragraph 17 the Court has held thus:

"*17. In a similar controversy to settle the issue, this Court in Ram Naresh Singh and 26 others vs. State of U.P., 2018 (4) AWC 3521, along with companion writ petitions, relying on the decision rendered by the Hon'ble Supreme Court in Rajesh Kumar and others vs. State of Bihar and others, 2013 (4) ADJ 690 and Vikas Pratap Singh and others vs. State of Chhatisgarh, 2013 (14) SCC 494, the Court held that the selected candidates cannot be ousted from service but kept at the bottom of the rectified select list. The relevant paragraph of the report is extracted :*

*"97. The writ petitioners therefore cannot be ousted from service altogether and shall be kept at the bottom of the rectified Select List issued for Advertisement No. 1 of 2010, and also any other Select List on the basis of any later advertisement issued by the Selection Board, selection on the basis of which has been completed and recommendations made for appointment. The petitioners shall be offered fresh appointments on the posts of Hindi Teachers L.T. Grade in Institution, which have determined such vacancies in direct recruitment quota and intimated them to the District Inspector of School concerned and further notified to the Selection Board, but on which vacancies selection has not been advertised or finalized by the Selection Board till date. 98. If need be then supernumerary posts be created for the petitioners as directed by the Hon'ble Supreme Court in Civil Appeal No. 367 of 2017 for similarly situated appellants therein, who were ousted as a consequence of rectification of result of selection held for Trained Graduate Grade Teachers in Advertisement No. 1 of 2009 of the Selection Board.*

*99. The private respondents shall be issued appointment letters forthwith, their dates of appointment relating back to date of first appointment of the writ petitioners herein, and although they will not be entitled to back wages for the period they have not worked, they shall be entitled to seniority and consequential benefits arising out of continuity in service from the date of such back-dated appointment. The entire excise shall be completed by the Government within a maximum period of three months."*

274. Learned counsel for the petitioner has also relied upon the judgment in the case

of **Ran Vijay Singh and others v. State of U.P. and others (2018) 2 SCC 437**. This judgment has been relied upon for emphasising the point that once the candidates have been selected and subsequently the revision of marks has taken place, then this re-evaluation or for that matter third evaluation that had taken place in that case, will not prejudice the selected candidates. The Court in that case has adopted the middle path in the given facts and circumstances of the said case, to permit Board to declare the third set result after reevaluation but at the same time protected those candidates who had already been selected and might have to be declared unsuccessful on account of the third reevaluation exercise. Vide paragraphs 34, 35 and 36 the Court had held thus:

"***34.*** *Having come to the conclusion that the High Court (the learned Single Judge [Ranjeet Kumar Singh v. State of U.P., 2012 SCC OnLine All 268 : (2012) 4 All LJ 19] as well as the Division Bench [U.P. Secondary Education Service Selection Board v. State of U.P., 2015 SCC OnLine All 5788 : (2016) 3 All LJ 405] ) ought to have been far more circumspect in interfering and deciding on the correctness of the key answers, the situation today is that there is a third evaluation of the answer sheets and a third set of results is now ready for declaration. Given this scenario, the options before us are to nullify the entire re-evaluation process and depend on the result declared on 14-9-2010 or to go by the third set of results. Cancelling the examination is not an option. Whichever option is chosen, there will be some candidates who are likely to suffer and lose their jobs while some might be entitled to consideration for employment.*

***35.*** *Having weighed the options before us, we are of the opinion that the middle path is perhaps the best path to be taken under the circumstances of the case. The middle path is to declare the third set of results since the Board has undertaken a massive exercise under the directions of the High Court and yet protect those candidates who may now be declared unsuccessful but are working as Trained Graduate Teachers a result of the first or the second declaration of results. It is also possible that consequent upon the third declaration of results some new candidates might get selected and should that happen, they will need to be accommodated since they were erroneously not selected on earlier occasions.*

***36.*** *The learned counsel for the appellants contended before us that in case her clients are not selected after the third declaration of results, they will be seriously prejudiced having worked as Trained Graduate Teachers for several years. However, with the middle path that we have chosen their services will be protected and, therefore, there is no cause for any grievance by any of the appellants. Similarly, those who have not been selected but unfortunately left out they will be accommodated."*

275. Mr. Khare has relied upon the latest judgment of Supreme Court in the case of ***Vanshika Yadav vs Union of India and others; 2024 SCC Online SC 1870***. In this case, the petitioners had filed a number of writ petitions directly before the Supreme Court questioning the results in respect of CBT conducted for National Eligibility Entrance Test for admission for under graduate medical course, by the National Testing Agency. The argument advanced before the Supreme Court was that since investigation into the complaint *qua* leak of paper and adoption of other unfair means initially by the Bihar Police and later on by the Central Bureau of

Investigation called for inaction to cancel the entire examination with a direction N.T.A. to conduct afresh. The Court heard the matter and framed three issues:

"*(a) Whether the answer for question in controversy ought to be processed by N.T.A.;*

*(b) Whether there was a conflict of interest with Director of IIT, Madras analysing the data in this case and;*

*(c) Whether the sanctity and integrity of examination were compromised at a systemic level.*

276. It is the judgment upon the third issue which is relevant for the purpose of this case.

277. In the first instance, the Court discussed the position of law vide paragraphs 62 to 69. The Court held that in arriving at a conclusion as to whether an examination suffers from vide spread irregularities, the Court must ensure that allegations of malpractice are substantiated and that the material on record including investigative reports, point to that conclusion there must be at least some evidence to allow the Court to reach to that conclusion and, therefore, *"in the absence of any specific or categorical finding supported by any correct and relevant material that vide spread infirmities of perversive nature there is no need to hold that there were irregularities into conduct of selection at systemic level".* Vide paragraphs-70 to 84, the Court discussed the facts and came to conclude that it was possible to separate the beneficiaries of malpractice or fraud from the honest students. These paragraphs are reproduced hereunder:

"***70.*** *That the question paper was leaked and some students indulged in malpractice is beyond cavil. No party before the Court including NTA disputes this. The question, however, is whether this leak was systemic and of a nature as to vitiate the sanctity of the exam. There are various aspects in this case which require the consideration of the Court - the inflation of marks and ranks, the leak of the question paper, other forms of malpractice, the reopening of the registration window, the change of city when the form was opened for corrections, and the award of compensatory marks to 1563 students. These are considered in turn.*

***71.*** *At the outset, it is necessary to understand certain aspects of the NEET. It is well-known that the counselling process or the process by which admission is gained into different medical colleges depends on the rank of the candidate. The concept of 'qualifying marks' is, however, sometimes misunderstood. The qualifying mark is arrived at after the declaration of results each year and corresponds to the 50$^{th}$ percentile. This year, the 50$^{th}$ percentile was identified to be at 164 marks of a total of 720 marks, for the unreserved category. Candidates who score 164 marks or above are eligible for admission to the MBBS course. However, not all those who have qualifying marks will necessarily gain admission to a medical college. The qualifying marks are necessary but not sufficient for admission. NTA, in its affidavit, states that the purpose of qualifying marks is to ensure that private colleges do not grant admission to totally undeserving candidates. Only a small percentage of those who obtain the qualifying marks will be allotted one of the 1,08,000 available seats. As mentioned above, 56,000 seats of the total figure are in government medical colleges and the remaining 52,000 are in private colleges. Hence, it is appropriate to assess the percentage of success with respect to the*

*1,08,000 available seats. Rank 1,08,000 corresponds to 577 marks and rank 56,000 corresponds to 622 marks.*

***72.*** *Data analysis of results has long been an accepted method of discerning the extent to which an examination has been vitiated. In Bihar School Examination Board (supra), this Court considered the validity of the decision to cancel a secondary school examination conducted at a particular centre in Bihar due to the adoption of unfair means by the students. At the centre in which malpractice appeared to have taken place, the percentage of successful examinees was about 80%. In stark contrast, the average percentage of successful candidates at other centres was 50%. The Court also considered the percentage of success subject-wise for thirteen subjects. The marks detailed in the judgment indicate that the candidates performed exceedingly well in all subjects, leading the Court to hold that the "figures speak for themselves". Despite this conclusion, the Court called for some answer booklets and inspected them. Its conclusion (which was based on the data) that the exam was vitiated was substantiated by the answer booklets, which showed that there was "remarkable agreement in the answers". Data analysis is a useful tool in the endeavour to detect malpractice.*

***73.*** *The data placed before us on the percentage of success from different centres did not account for seats which would be allotted on the basis of reservation for the Scheduled Castes, Scheduled Tribes, Other Backward Castes, and Economically Weaker Sections. Were such seats to be accounted for, the figure of 1,08,000 would almost be halved. Hence, the data analysis errs on the side of caution.*

***74.*** *Certain centres found themselves in the midst of the controversy in this case. It was averred that malpractice was widespread in Hazaribagh, Jharkhand, Patna, Bihar, and Godhra, Gujarat. The data provided by NTA in relation to Hazaribagh for 2024 is as below:*

*a. 2733 candidates in total appeared for the exam;*

*b. 126 candidates are within Rank 1,08,000. This indicates a success rate of 4.6%; and*

*c. 58 candidates are within Rank 56,000. This indicates a success rate of 2.1%.*

*Further, the statistics from previous editions of the NEET indicate that the success rate (relative to the total number of available seats) for Hazaribagh was 7.2% in 2022 and 6.0% in 2023. When these figures are compared with the success rate for 2024 which is 4.6%, no abnormality becomes evident. To the contrary, the success rate for this year is lower than for the past two years.*

***75.*** *Similar data for Patna for 2024 is encapsulated below:*

*a. 48,643 candidates in total appeared for the exam. The exam was conducted in 70 centres across the city;*

*b. 2691 candidates are within Rank 1,08,000. This indicates a success rate of 5.5%; and*

*c. 1482 candidates are within Rank 56,000. This indicates a success rate of 3.0%.*

*In 2022, the success rate (relative to the total number of available seats) was 8.9% and in 2023, the success rate was 7.7%. In Patna, too, the success rate for this year (5.5%) is lower than for the past two years. Even otherwise, there is no irregularity which comes to light.*

***76.*** *The numbers for Godhra for 2024 are as follows:*

*a. 2484 candidates in total appeared for the exam. The exam was conducted in 2 centres;*

*b. 21 candidates are within Rank 1,08,000. This indicates a success rate of 0.8%; and*

*c. 13 candidates are within Rank 56,000. This indicates a success rate of 0.05%.*

*To compare, the success rate (relative to the total number of available seats) in Godhra was 1.5% in 2022 and 2.1% in 2023. Hence, in Godhra, fewer candidates are within the zone in 2024. There are no other deviations in the data which are cause for concern and which meet the standard of indicating a systemic malaise.*

***77.*** *From the above figures, it becomes clear that there are no abnormalities in the results for 2024 when compared with the results for the past two years. The report of the Director of IIT, Madras also supports the conclusion of this Court. The report stated that there were no "abnormal indications" in the results for this year, when compared to previous years. It also stated that "analysis shows that there is neither any indication of mass malpractice nor a localized set of candidates being benefitted leading to abnormal scores." Hence, an analysis of the results does not lend support to the case of the petitioners who seek the cancellation of the exam. The leak of the paper does not appear to be widespread or systemic. It appears to be restricted to isolated incidents in some cities, which have been identified by the police or are in the process of being identified by the CBI.*

***78.*** *We now turn to the issue of the reopening of registration for NEET. The registration window was initially to be open from 9 February 2024 to 9 March 2024. The last date for registration was later extended to 16 March 2024. Thereafter, NTA reopened the registration portal for two days - 9 and 10 April 2024. During the course of the hearing, the Court enquired into the reasons for the reopening as well as the performance of the candidates who registered when the portal was reopened.*

***79.*** *NTA stated that it received numerous representations from candidates who raised issues related to One Time Passwords, Aadhar authentication, uploading of documents, and payment. Other technical issues were also raised. Further, it appears that the High Courts of Rajasthan and Karnataka directed NTA to permit certain petitioners, who reported such issues during their registration, to register after the last date. NTA states that it reopened the registration portal to permit all similarly situated candidates to submit their forms for the exam.*

***80.*** *The data submitted to the Court reflects the performance of the candidates who registered for the exam on 9 and 10 April 2024 and thereafter, appeared for the exam. The students who registered on these dates but did not appear for the exam are excluded from this analysis. Of the 8039 candidates who registered on 9 April 2024, it is seen that five candidates were within the top 1,08,000 ranks and two candidates were in the top 56,000 ranks. This indicates a success rate of 0.06% and 0.02% respectively. Further, of the 14,007 candidates who appeared after having registered on 10 April 2024, forty-four were within the top 1,08,000 ranks and twenty-three were in the top 56,000 ranks. The success rate was 0.31% and 0.14%, respectively. This data does not indicate that an abnormal number of candidates*

*who registered on 9 and 10 April 2024 were successful. We do not find that an unusually high number of students who registered on these dates have been successful. Hence, the Court cannot reach the conclusion that the reopening of the registration portal led to or facilitated malpractice. There is no other material on record at the present time which would indicate the same.*

***81.*** *The next aspect which falls for consideration is that some candidates changed their preferred cities for the exam, which in turn led to the change of their exam centre. The petitioners averred that this was done to enable malpractice. After changing their preferred city, 33 aspirants went to Hazaribagh, 637 went to Patna, and 24 went to Godhra. Out of the 33 who appeared from Hazaribagh, only one candidate's scores placed him in a rank higher than or equal to Rank 56,000. Thus, the success rate is 3%. Out of 637 candidates who changed their centre to Patna, only 35 were in the top 1,08,000 ranks, indicating a success rate of 5.5%. 17 candidates scored more than 622 marks (corresponding to Rank 56,000). The success rate is 2.7%. Out of 24 candidates who went to Godhra, no candidate scored more than 577 marks (corresponding to 1,08,000 rank). Here, too, the data is not abnormal and therefore does not indicate that a systemic breach has taken place. An unusual number of candidates who changed their preferred cities do not appear to have a higher rate of success. This is a facility which is intended to subserve the interests of candidates. Therefore, the fact that some aspirants changed their preferred cities, taken alone, cannot be considered evidence of malpractice or of dishonest intention. The choice to appear for the exam from a different city may be motivated by myriad factors and the option to change the preferred city is made available every year. Some other relevant and concrete material must be present before the Court can infer that this led to mass malpractice.*

***82.*** *The parties in the hearing also addressed submissions on a video on Telegram (an instant messaging application) purportedly showing the leaked paper. It was alleged that the leak took place on 4 May 2024. The NTA, in its affidavit, stated that the video shared on Telegram was fabricated and the time-stamp was altered to indicate that the leak took place before the examination date. The investigation by CBI revealed that the images in the video were indeed doctored. The Telegram channel itself was created on 6 May 2024 and the paper was uploaded on 7 May 2024. Hence, there is no merit in this allegation.*

***83.*** *As for the re-exam conducted for the 1563 candidates who were initially awarded compensatory marks, the order of this Court dated 13 June 2024 found the re-exam to be fair and justified. The issue no longer subsists. NTA was also permitted to act accordingly following the test which was held, by the order of this Court dated 23 July 2024.*

***84.*** *Hence, sufficient material is not on record at present which indicates a systemic leak or systemic malpractice of other forms. The material on record does not, at present, substantiate the allegation that there has been a widespread malpractice which compromised the integrity of the exam. To the contrary, an assessment of the data indicates that there are no deviations which indicate that systemic cheating has taken place. The information before us at this stage does not show that the question paper was disseminated widely using social media or*

*the internet, or that the answers were being communicated to students using sophisticated electronic means which may prove difficult to trace. The students who were beneficiaries of the leak at Hazaribagh and Patna are capable of being identified. The CBI investigation reveals the number of students who are the beneficiaries of the malpractice at Hazaribagh and Patna at this stage. This leads us to conclude that it is possible to separate the beneficiaries of malpractice or fraud from the honest students. This being the case, the Court cannot direct a re-exam"*

278. Learned counsel appearing for the petitioner has also relied upon the authority in the case of **Anamika Mishra and others v. Uttar Pradesh Public Service Commission, Allahabad, 1990 Suppl. SCC 692**, where the Court was considering the plea that all those candidates, who though had scored better marks in the written but could not do well in interview/ personality test. The Court did not appreciate cancellation of written examination and in the given facts of that case where no appointments were made the Court directed for interview afresh only.

279. Yet another judgment relied upon is of **Kapil Kumar and others v. State of U.P. and others, (2023) SCC Online 4024**. The controversy in the said case had arisen only on account of challenge being made to certain questions/ answers. The Court vide paragraph 31 issued the following directions instead of offering cancellation of entire selection:

"*31. Accordingly, we set aside the judgment of learned Single Judge and dispose of the instant appeals with the following directions:-*

*(a) The Recruitment Board will revise the result of written examination of such of the appellants who are short of 2.5 or less marks from the cut off marks in their respective categories.*

*(b) The Recruitment Board will hold their medical examination and in case they succeed on all other parameters, they shall be appointed against the posts which remained vacant after the final round of recruitment. The aforesaid exercise shall be carried out within six weeks from today after due intimation and public notice to all concerned.*

*(c) These candidates, if selected finally, will be placed at the bottom of the seniority list, while maintaining their inter-se merit position and they shall be entitled to salary and allowances only from the date of their actual appointment, as admissible under the Service Rules.*

*(d) The aforesaid benefits shall only be available to those who have approached this court so far and not to any other candidate."*

280. Yet another judgment of Supreme Court has been cited in the case of **Shri Dhar Yadav and others v. State of U.P. and others**, wherein upon a misc. application No.- 566 of 2024 in SLP (Civil) No.- 25828 of 2023, learned Solicitor General on behalf of the State of Uttar Pradesh had made statement before the Court that in the event if petitioners before the Court succeed, they would be adjusted against supernumerary posts. The judgment has been cited to take the plea that the candidates, who have been selected and appointed if after the revision of marks due to solution to the challenged questions and answers if merit gets revised then those already selected may be protected.

**Rulings cited for Respondents**

281. Mr. Goyal has sought to urge before the Court and so strenuously that since the authority has considered all the reports available to it, this Court may not exercise the power of judicial review on the ground that the material considered by the corporation was not sufficient enough to arrive at a conclusion to which it has arrived. In this regard Mr. Goyal has relied upon the authority in the case of **Mohinder Singh Gill and another v. Chief Election Commissioner and others, 1978 (1) SCC 405**, in which vide paragraph 8 the Court held thus:

"*8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji:*

*Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*

*Orders are not like old wine becoming better as they grow older."*

282. Yet another judgment relied upon is of the Division Bench of this Court in the case of **M/s Aptech Ltd. v. U.P. Power Corporation and others, (2019) SCC Online Allahabad 4906**. In this matter the Court considered the order of black listing passed by the State Government in respect of M/s Aptech Ltd. on the basis of inquiry report conducted by the STF relating to the examination conducted by the agency for making recruitment on the post of Stenographer Grad III and Office Assistant III Accounts, Additional Personal Assistant, Assistant Review Officer, Junior Engineer (Electrical).

283. Mr. Goyal has placed reliance of paragraphs 14, 18, 20, 22, 23, 28 and 30 of the judgment, wherein the Court considered the report of STF replying to the M/s Aptech Ltd. to the show cause notice and the Sate action in black listing the agency and also in respect of the proportionality of the decision taken. The Court in the said judgment had relied upon the authority of the Supreme Court in the case of **Teri Oat Estates Pvt. Ltd. v. Union Territory, Chandigarh, (2004) 2 SCC 130**.

284. Mr. Goyal has also relied upon the judgment in the case of **Sachin Kumar and others v. Delhi Subordinate Service Selection Board and others, (2021) 4 SCC 631** to canvass the principle of judicial review as he has argued by him before this Court that there was no flaw in the decision making process by the authority while arriving at a conclusion under the order impugned. According to him, since the Court itself permitted that all available reports be taken into account including such other reports that are made available to it, in view of Division Bench judgment in the case of Mahesh Kesharwani and others v. Amrish Kumar

Pandey and others in Special Appeal No.- Defective No.- 625 of 2019 decided on 31st July, 2019 the decision would be subject to SIT report, the authority of the corporation also considered the SIT report.

285. Yet another judgment relied upon is of learned Single Judge of Madras High Court in the case of **R. Prem Lata & Others v. State of Tamilnadu and others being Writ No. 19939 of 2014** and other connected matters decided on 17.11.2022. The controversy in the said case arose on account of cancellation of entire selection and appointments as a result of a report of the Administrator which was indicative of large scale fraud committed in which 156 candidates were found to be tainted. Allotment of marks in the said case without experience, less experience, drastically changed the rank in the selection. The Court found that the findings arrived at by the Administrator as a matter of fact affected the rights of hundreds of meritorious candidates who had participated in the process of selection. It is submitted by Mr. Goyal that the court emphasised on the principle of law where the candidates have been deprived of equal opportunity as enshrined under the Constitution and this mandate was violated and that at a too large a scale, then in such circumstances segregation of untainted candidates became difficult.

286. According to Mr. Goyal the Court acknowledged that in cases where there is a deep rooted illegality and irregularity in awarding marks to candidates on pick and chose basis, then it becomes a case of systemic fraud and fraud unravels everything and therefore, looking to the larger public interest in matters of public employment, such selection and appointments are liable to be annulled.

287. Learned Advocate has relied upon paragraph nos. 79 to 83 of the judgment which are reproduced hereunder:

"*79. The findings of the Administrator of the Board revealed an act of illegality, favouritism and the selection was conducted without proper interview and even as per the petitioners, the constitution of Selection Committee itself was irregular. Thus, they have raised a ground that entire selection was vitiated even in respect of the appointed candidates, who all are working few years.*

*80. In this context, in the case of* ***Union of India and Others vs. O.Chakradhar [(2002) 3 SCC 146],*** *the Hon'ble Supreme Court held that* ***"The extent of illegalities and irregularities committed in conducting a selection have to be scrutinised in each case, so as to come to a conclusion about future course of action is to be adopted in the matter. If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons, who have been unlawfully benefited or wrongfully deprived of their selection, in such cases, it will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance.''***

*81. Even in the present case, illegality and irregularity are so intermixed with the whole process of the selection that it becomes impossible to sort out the right from the wrong or vice versa. The Result of such a selection cannot be relied or acted upon.*

*82. In the present case, the selected candidates pleaded that they were appointed and working for about 6 to 8 years and therefore, they should not be*

*disturbed. The undue lenient view of the Courts on the basis of human considerations in regard to selection of candidate for public appointments by adopting illegal means on the apart of the authorities has served to create an impression that even where an advantage is secured by stratagem and trickery, it could be rationalised in Courts of Law. Courts do and should take human a sympathetic view of matters. That is the very essence of justice. But considerations of Judicial Policy also dictate that a tendency of this kind, where undue advantage gained by illegal means is permitted to be retained will jeopardise the purity of selection process itself. Engender cynical disrespect towards the judicial process and in the last analyses embolden errant authorities and candidates into a sense of complacency and impunity that gains achieved by such wrong could be retained by an appeal to the sympathy of the Court. Such instances reduce the jurisdiction and discretion of Courts into private benevolence.*

*83. Thus, the entire selection is to be set aside, if the selection is conceived in fraud and delivered in deceit. Awarding of irregular marks, selection of less meritorious candidates in adopting a trickery method are also corrupt practices, the entire selection is liable to be set aside."*

**ANALYSIS AND FINDINGS**

288. According to Mr. Goyal, learned Senior Advocate and learned Additional Advocate General appearing for the Corporation, Mr. Ajeet Kumar Singh, learned Additional Advocate General appearing for the State of U.P., Mr. Sanjay Kumar Om, learned Advocate appearing for U.P. Jal Nigam (Rural) these findings based upon various reports supported by sufficient material and so if the authority has arrived at a particular conclusion, this conclusion cannot be held bad on the ground that decision making process was a flawed one. Further, this Court may not in exercise of its power of judicial review upset the decision for the material being not sufficient, nor on the ground that there was a possibility to arrive at a different conclusion. On the principle of Wellsburry Law of reasonableness, what a prudent man would come to conclude, in fact has been concluded in the order impugned by the competent authority.

289. On the contrary the argument as quoted in the earlier part of this judgment led by Mr. Ashok Khare, Mr. R.K. Ojha, learned Senior Advocate, Mr. Ashish Mishra and Mr. Seemant Singh, learned Advocates have in fact questioned the findings firstly on the ground that forensic examination experts' report of IIT, Kanpur and IIIT, Allahabad was not tenable being not within the legal framework as prescribed for under the Information Technology Act, 2000 and secondly, the findings arrived at to the effect that there was no possibility to segregate tainted from untainted candidates are perverse and material available itself identified untainted candidates.

290. Learned Advocates had further argued that under the orders of the Court while liberty was to examine the reports only to find out as to whether it was possible to identify tainted and untainted candidates. The further argument was that there was neither any seal by the court in approving either the reports, nor there was any judgment by the Court that entire selection undertaken by the respondents was compromised.

291. I have already referred to the arguments of learned Advocates as were

advanced before me and the authorities cited by them before the Court, both on behalf of petitioners as well as respondents and have also discussed them at length. For testing their rival statements on principle of law laid down in various authorities cited before me and applying them to the facts involved in the case in hand and to find answer to the question framed initially in the earlier part of this judgment, I need to find answer to the following questions:

(i) Whether the report of CFSL, Hyderabad conclusively and validly evidences that sanctity of entire examination/ CBT held by the service provider agency was questionable or is merely a indicative of favour shown to certain candidates only and hence findings that the entire selection was result of conspiracy and fraud, are perverse and not sustainable.

(ii) Whether the report of CFSL, Hyderabad is not sufficient material to identify the tainted candidates to segregate them and so also report by way of revised result provided by the service provider agency M/s. Aptech Limited.

(iii) Whether act of M/s Aptech in deleting the data from primary source cloud server within 30 days of conduct of CBT and downloading the same to save in its server drive including archive NAS, at Noida place amounted to compromising data integrity and made it impossible to verify original data inasmuch as such an act resulted in violation of terms of contract.

(iv) Whether the report submitted by the experts/ Associate Professor of IIT, Kanpur and IIIT, Allahabad were within the legal framework of IT Act, 2000 and so do themselves count as sufficient opinions to return a finding validly enough that there was no data available, nor any material available to come to conclude that selection process had stood in fact compromised. In other words whether the opinions of the experts are conclusive in nature.

(v) Whether on the principle of preponderance of probability the statements recorded of various persons as witnesses by the SIT can be considered to lead to a conclusion that as a matter of fact the selection process had stood compromised and findings, therefore, returned by the SIT on the basis of material available before it correctly merited the decision of the respondent in annulling the entire selection.

(vi) Whether the report of SIT runs contrary to the report of CFSL for returning a finding that there was no possibility to segregate tainted candidates from untainted candidates.

292. Now I proceed to examine the evidenciary value of the report submitted by the CFSL and whether it is sufficient to segregate tainted from untainted candidates.

293. The CFSL, Hyderabad is one of the six Forensic Science Laboratories in the country. The other Forensic Science Laboratories are at Chandigarh, Kolkata, Bhopal, Pune and Guwahati. The CFSL, Hyderabad was the first one created and established in the year 1967. It had been earlier also a government agency and still continues to be a government agency even after 2002. It is a wing of Ministry of Home Affairs. With the new Act coming into force namely the Directorate of Forensic Science, 2002 the Ministry of Home Affairs vide its letter dated 31.12.2002, it recognized and accredited the CFSL at Hyderabad to Directorate of Forensic Science Services, Department of Home Affairs. It is an accredited Laboratory to perform forensic

examination of materials *qua* criminal and civil. It is a highly innovative and productive entity of Ministry and that of law enforcement agencies. Thus, there cannot be any doubt about the fact that CFSL, Hyderabad is a government laboratory established by Government to carry out forensic examination of material provided to it in whatever form within the legal frame work. Information Technology Act, 2000 came to be enacted with a purpose to look into the forensic examination of various records stored and supplied using digital technology. It provides for verification in relation to all such digital tools that are applied for storing the data and also digital signatures, other electronic records or public key that it is grammatical variations and cognate expressions which has been further defined in Section 2(z)(h) as under:

"*2(zh) "verify", in relation to a digital signature, electronic record or public key, with its grammatical variations and cognate expressions, means to determine whether–*

*(a) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber;*

*(b) the initial electronic record is retained intact or has been altered since such electronic record was so affixed with the digital signature."*

294. Vide Section 79-A it provides for Central Government to notify the examiner of electronic evidence. Section 79-A of the Act is reproduced hereunder:

"***79A. Central Government to notify Examiner of Electronic Evidence.–*** *The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.*

***Explanation.–****For the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.]"*

295. From a bare reading of aforesaid provisions, it is clear that an authority has to specify by notification in official gazette any department body or agency either of the Central Government or State Government as examiner of electronic evidence. The Ministry of Home Affairs having notified the CFSL, Hyderabad as a Government agency to carry our forensic examination of records, it goes without saying that the report submitted by CFSL, Hyderabad would fall within the definition of report under the Information and Technology Act, 2000 and therefore, have full evidenciary value for the purposes of courts/ judicial proceedings.

296. Having arrived at the above finding, I may hold that the report submitted by the CFSL will hold good for determination of controversy involved in hand in the present case and since the CFSL report has not been questioned either by the Corporation or State Government at any stage at any forum, therefore, it would depend now as to how the court evaluates the report of CFSL.

297. I have already discussed the report in detail in the earlier part of this judgment but it is necessary her to summarise the same:

(i) The CFSL, Hyderabad completely verified the data obtained from the 6 hard disks that were seized and recovered by the SIT and handed over to the CFSL for its examination. It has not only looked into the backup data files but has also examined the mirror image of primary source cloud server available in its disk drive that was also recovered and seized from the local environment office M/s. Aptech Limited. The report records in its finding part that the entire data of those who participated in the examination/ CBT held in all the three categories namely the RGC/ Junior Engineer/ Assistant Engineer was duly verified after being retained by applying the necessary recovery tools to recover the data and after its verification it clearly opined that there were candidates belonging to different categories 169 in number whose original marks stored in the data base retrieved from the hard disk where less than those provided by the SIT on the basis of which the candidates were called for interview. The entire report does not disclose any other candidate's name or roll number except 169 candidates whose marks shown as inflated marks in the records provided by SIT. The report nowhere records any finding to the effect that the data retrieved from the hard disk seized from the local environment office of M/s. Aptech Limited was manipulated or modified one.

(ii) The CFSL in fact while recovered the data/ retrieved data from the hard disk was fully in a position to testify as to whether the data at any point of time stood modified by way of manipulation or any effort made by agency at its end to change it from what was originally there. Since the CFSL was provided with both the hard disks as well as the data in its entirety *qua* the candidates who had participated in the selection process, the CFSL could have easily identified if the data recovered/ retrieved from the original hard disk were insufficient but there is no such report.

298. Having summarised the findings arrived at in the report of CFSL as above, I am not able to accept the argument of Mr. Khare that the authenticity of the data provided by the CFSL to be doubtful and therefore, it could not be said that findings arrived in identifying 169 candidates by the CFSL were conclusive. Mr. Khare seems to have based his arguments on the basis of the argument advanced by learned counsel for the Corporation that the original data had stood deleted and the expert opinion of the IIT was to the effect that there was no place available to the software tools which were given access for verification of data, inasmuch as, in the background that the original data had stood deleted from the original cloud server.

299. In my considered view, Mr. Khare could not have maintained the argument relying upon certain findings arrived at by the respondent authorities that the original data's authenticity was under cloud while questioning the decision which is also based upon the report of SIT that had relied upon CFSL report.

300. **The CFSL report is held to be within the legal framework of IT Act, 2000 and that sufficient evidence to identify and segregate tainted candidates. Thus question Nos. (i) and (ii) are decided accordingly.**

301.The question that arises for consideration is as to what would the effect of deletion of original data from the cloud server of (CtrlS) and whether for a mere act of the deleting the primary source data from the primary source cloud server soon

after its expiry of a period of 30 days as per data retention policy of M/s Aptech Ltd., can it be assumed that whatever data was left there in the storage at the local environment office of the Aptech lost its integrity and whether it would go to the root of the matter to hold that there was not data available to verify so as to hold that sanctity of the CBT got eroded.

302. I have carefully examined the contract agreement between Corporation and M/s Aptech Ltd. and I have no reason to doubt that as per recitals made in Clause 'e' of the conditions made thereunder M/s Aptech Ltd. was required to hold back data for a period of one year. The agreement Clause E which I have already quoted above in earlier part of this judgment does not in any manner lead to draw a conclusion that M/s Aptech Ltd. was required to retain data at its primary source cloud server for one year. What inference can be drawn from the terms of contract is that M/s Aptech Ltd. will preserve data for one year and as and when required by the Corporation, M/s Aptech Ltd. will certainly be furnishing the requisite data.

303. Nothing has been brought on record on behalf of the Corporation in its entire counter filed in Samrah Ahmad or Surendra Singh's case from where it can be deduced that Corporation at any point of time required original data downloaded from the CtrlS cloud server to be furnished. What Corporation required as the correspondences showed that result of CBT data be given and that was of course given to the Corporation in CD form. Had there been any effort to the Corporation to request to provide access to the data storage device of the Aptech Ltd. so as to verify the original data that was downloaded from the cloud server and Aptech had failed to provide access, it could have been presumed that date was lost. The question, therefore, now remains to be answered whether in the given facts and circumstances M/s Aptech Ltd. can be held to have breached the contract. In my considered, Aptech cannot be said to have breached the contract by just getting download the original data from the cloud server CtrlS to it storage device. The agreement between Corporation and Aptech Ltd. does not show anything from its clauses that secondary storage device could not be utilized by Aptech for storing the data. There is also nothing in agreement, which may have further guided for the agreement between Aptech Ltd and CtrlS. It is an admitted position on facts that the cloud server was be utilized for live CBT to be held and was to be utilized for uploading the application forms of candidate and also providing for admit cards online. All these data were live on a cloud server hired by M/s Aptech Ltd, may be for a period of 30 days but that agreement between Aptech Ltd and cloud server are not in issue. It is worth noticing here the terms of contract as has been highlighted by me while reproducing the same in this judgment earlier, that propriety was there already with the service provider and the data retention policy of the year 2015 did not change. Storage of data for security purposes and to ensure data integrity, lies within the domain and discretion of the service provider. The retention policy very clearly provided for transmission of data in copy form and corporation never disputed either the contract or the data retention policy. Thus, the data saved in the assigned server in the local environment or in its archival server cannot be held to be against the terms of contract. Thus, it cannot be said that deletion of data from the cloud storage in

any manner has denied an opportunity for Corporation or any other forensic agency of verifying truthfulness or correctness of the data.

304. Yet another point important to be noticed here that after hard disks were seized by SIT from the possession of the Aptech, which was there in its local environment office at Mumbai. The said hard disks were given to the Central Forensic Science Laboratory for examination. Original data was retrieved from the hard disks and was provided back to the SIT in DVD form giving a hash value so as to have access to the data downloaded from the hard disks. So endeavour of the Corporation should have been to get an access to the hard disks or DVDs from SIT to be further verified or examined from the expert of the institutes of technology. Admittedly, SIT submitted a report on 22nd January, 2020 whereas letters were written to the institutes of technology on 31st August, 2018, therefore, at that very point of time, the SIT was in possession of the CDs/DVDs provided by the CFSL containing data. The hard disks that were given to the CFSL will be deemed to be in possession of SIT and so while seeking report from the experts of the IITs they should have been provided access to the data. From the reports of the IIT experts, it is clear that opinions and observations have been made in the report with this implicit condition that all the documents and data shared with experts of the IITs had verified prominence and responses provided by personnel made available for interaction with undersigned on relevant dates ,13th and 14th December, 2018. It is, therefore, clear that original hard disks that were recovered from the possession of the Aptech Ltd. though were provided to the Central Forensic Science Laboratory for its examination, but were not provided to the experts of the IITs who were required to given their opinion, moreso when opinion was sought with this statement that original data had been deleted from the primary source cloud server.

305. M/s Aptech Ltd. has taken a stand and so firmly before this Court during course of argument by learned Advocate representing the agency that CDs that were provided to the Corporation were secondary data source as these were having processed data of result and copy of original data. Thus original data from the cloud server was either there in hard disks or there in secondary storage devices kept at Noida office of Aptech Ltd. However, despite correspondences made in that behalf nothing was done either by SIT or Corporation to ask for access to storage device at Noida. There is no counter affidavit filed to the counter the averments made by the Aptech in its counter affidavit filed in Ambrish Kumar Pandey's case though it is admitted by Corporation that it is in possession of counter affidavit. Under the circumstances, it will be presumed that correspondence is made between Aptech Ltd. and the SIT were there available on record and were correct and yet no effort was made either by the Special Investigation Team or the Corporation to get access to the storage device/ Archive NAS at Noida placed office where the data were stored. The correspondence having not been denied, now the Corporation cannot take a stand that there is serious doubt about any such correspondence to have taken place.

306. It is to be noticed here that upon a pointed querry being made, learned Additional Advocate General, Mr. Ajit Kumar Singh had accepted this fact that the mail ID that was shown by the M/s Aptech Ltd. in the correspondence with SIT was in fact Mail ID

of the SIT. Thus, in absence of any challenge to the CFSL report, nor anything coming out in the CFSL report questioning correctness of the data stored in the storage device, namely, 6 hard disks which also contained one hard disk having direct mirror image of data taken from the cloud server CtrlS, it can be safely concluded that the data in absence of any dispute as retrieved from the hard disks were the true data taken from primary source cloud server.

307. The stand taken by the Aptech's counsel during course of argument that data were not true data is also not sustainable for the simple reason that certificates have been issued by the responsible officers of the M/s Aptech Ltd. certifying those six hard disks one of them very clearly was mentioned as mirror image of data taken from cloud server CtrlS. Processing data was also there in one of the hard disks. It is also worth noticing that when Roman Fernandes is admitted to be the person who had authored data retention policy , if he certified that data was stored at the local environment office of M/s Aptech Ltd. at Mumbai, now M/s Aptech Ltd. cannot be permitted to take stand that Roman Fernandes was not authorized to issue any certificate, and therefore, in absence of any challenge to the data that was retrieved by the Forensic Science Laboratory, which was authorized to carry out forensic science examination being government agency of the Ministry of Human Affairs of the Government of India, it can safely be held that data that was retrieved from the hard disks provided to CFSL by the SIT contained the original data taken from the primary source cloud server. **Thus question no. (iii) stands answered in negative.**

308. Now I proceed to examine the arguments regarding the reports of the Associate Professors of IITs, whether to be within the legal frame work of the Information of Technology, 2000 or not. I find that the experts opinions were called for immediately after the Supreme Court wanted the corporation to place the status report as to the action taken by it in compliance of the judgment and order of Division Bench of this Court on 27th November, 2017 vide its order dated 16th March, 2020 that letters were written to the IITs asking for their respective opinions in the background of two basic information given to them in the letter: *firstly,* that the original data was deleted from the primary source cloud server and, therefore, whether in these circumstances any verification of the data provided in CD could have been done; and *secondly*, whether in these circumstances any exercise for segregation could be undertaken between tainted candidates and the untainted candidates. Although Mr. Goyal has strenuously argued that these reports of Associate Professors are based upon their knowledge, expertise with experience and skills and relate to the basic aspects of data storage by the authority who is to ensure data integrity, Mr. Goyal could not place before the Court any material by which it could be said that these IITs were in fact authorized by the appropriate Government to carry out any forensic examination of the digital records taking aid to the provisions of the Act which are undisputed to both the parties, namely Information Technology Act, 2000. In the light of the provisions quoted in my analysis and findings upon question Nos. (i) & (ii), it becomes very much clear that an authority to carry out forensic examination of any digital records is required to be recognized and authorised so also by a certification and notification in that behalf, would carry out such forensic examination.

309. One of the arguments advanced by Mr. Goyal is that these expert reports were called for in the light of the judgment of Division Bench of this Court and, therefore, it was not a voluntary decision of the corporation to ask for the opinion from these experts.

310. I have carefully gone through the order of Division Bench dated 15th May, 2017 in Writ – A No.- 15948 of 2017 and I find that this order relating to the issue of doubtful/ incorrect questions and doubtful/ incorrect answers in respect of which objections were raised and instructions were placed before the Court that the corporation was trying to get it examined through the experts of the institutes of technology. The Court recorded the statements of learned Advocate appearing for the corporation, "*it is also stated that in the event no comments are received from the said agency, the same shall be examined by some professionals in some reputed engineering colleges in the state*". This observation relates to the instructions only in respect of doubtful/ incorrect questions and doubtful/ incorrect answers. Therefore, the argument advanced by Mr. Goyal that these reports were called for in the light of the order of Division Bench of this Court passed in Writ – A No.- 15948 of 2017 and in the connected matters dated 15th May, 2017 is not correct.

311. Comparing the two reports with that of Central Forensic Science Laboratory with reports obtained from the experts/ Associate Professors of the Indian Institute of Technology, Kanpur / Institute of Information and Technology, Allahabad as to their legal status, it can be safely concluded that the reports obtained from and submitted by the Central Forensic Science Laboratory, Hyderabad were within the legal frame work of the Information Technology Act, 2000, as I have already discussed earlier whereas the reports obtained from the Institutes of Technology like IIT Kanpur and IIIT, Allahabad were definitely not within the legal frame work of the Information of Technology Act, 2000. In the circumstances, therefore, the objections raised by Mr. Khare regarding maintainability of the report of the two experts of the Institutes of Technology is liable to be upheld. **Question No. (iv) accordingly stands answered in negative.**

312. Now coming to the questions as to findings arrived at by the Special Investigation Team in its final report submitted on the basis of the statements recorded of the various persons, who were interrogated and also the material perused and examined by it and approved by the State Government and whether findings by SIT as to impossibility of segregation between tainted and untainted are bad being contrary to CFSL report, in my considered view the law is very much clear that in the matter of administrative law where a decision has to be taken by the authority especially in service matter, then strict law of proof as required to establish the guilt in criminal law under Evidence Act, is not required, instead, the preponderance of probabilities is to be taken into consideration to hold the material to be sufficient one for the charge to be proved.

313. Supreme Court in the case of **State of Rajasthan and others v. Heem Singh, (2021) 12 SCC 569**, referred to its earlier judgment in the case of **Moni Shankar v. Union of India**, **(2008) 3 SCC 484** in which vide paragraph 17 it was held thus:

"*17. The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality."*

314. Applying the above principle to the facts of present case, where the SIT has interrogated a large number of persons out of which statements of certain persons are very crucial to the controversy in hand and which are being chiefly relied upon by the Special Investigation Team by submitting its final report, it becomes necessary to analyse the statements recorded by the SIT during interrogation to come to the conclusion whether the findings arrived in SIT report are perverse or are worth reliance to justify the decisions taken by the corporation under the orders impugned. Although Mr. Khare has argued vehemently that the police report is nothing but a simple report under Section 173(2) of Code of Criminal Procedure and, therefore, will not be having any evidentiary value and the statements so recorded by it are further to be proved in the testimonies that are taken and recorded during the criminal trial but in my considered view, the statement can be taken into consideration in order to test the findings finally arrived/ returned by the Special Investigating Team in its final report holding that the entire selection process stood compromised. As that report has been heavily relied upon in the order impugned and so this is to be seen on the same principle of preponderance of probability.

315. The principle of what a prudent man would realise in understanding a point to arrive at a conclusion has been taken to be a wednesbury reasonableness principle and has been discussed in the judgment of Supreme Court in the case of **M. Siddiq (D) through legal representatives Ram Janm Bhumi Temple Case v. Mahant Suresh Das and others, (2020) 1 SCC 1**. The Court in that judgment vide paragraphs 724 referred to the analysis done by the Supreme Court in the case of **N.G. Dastane v. S. Dastane, (1975) 2 SCC 326** and then also observed vide paragraph 725 regarding the principle of preponderance of probability upon the subject matter involved in the case. Paragraph 724 and 725 of the judgment are reproduced hereunder:

"***724.*** *Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in N.G. Dastane v. S. Dastane [N.G. Dastane v. S. Dastane, (1975) 2 SCC 326] held : (SCC pp. 335-36, para 24)*

"*The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man*

*faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note:'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue [ Per Dixon, J. in Wright v. Wright, (1948) 77 CLR 191 (Aust).] , CLR at p. 210'; or as said by Lord Denning, 'the degree of probability depends on the subject-matter'. In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, 1966 AC 643 : (1966) 2 WLR 634 : (1966) 1 All ER 524 (HL)] , All ER at p. 536'. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."*

*(emphasis added)*

***725.*** *The Court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved."*

316. As I have already referred to hereinabove the statement of Mr. Ashudani, the then Managing Director, U.P. Jal Nigam, an officer on special duty in Ministry of Urban Development, Mr. Asfaque Ahmad, four officers of M/s Aptech Ltd Mr. Roman Fernandes, Mr. Ajay Kumar Yadav and Mr. Neeraj Malik are very crucial to the controversy and so I proceed as per discussions already held above to summarize, what they have stated, as under:

(i). The statement of Mr. Ashudani the then Managing Director fully explains the circumstances in which permission was taken from the State Government to carry out the recruitment drive and even letters were written to the government institutes who showed inability to conduct the selection. It has also come in the statement that the proposal of KNIT Sultanpur was not found to be financially viable in view of the financial proposal proposed by M/s Aptech Ltd. inasmuch as KNIT was not ready to conduct CBT online and that was why and how M/s Aptech Ltd. was chosen.

(ii). Power of the Chairman was also explained away and it came to be categorically stated that the board had approved all such decisions.

(iii). The statements of official of M/s Aptech fully supported the act and conduct of the service provider agency in adopting the procedure as per the terms of the contract and as per the instructions received from officials of U.P. Jal Nigam from time to time.

(iv). None of the statements of the members of Interview Board can be said to be indicative of any pressure being ever exerted or exercised upon any one of them to favour a particular candidate

belonging to a particular caste, creed or religion.

(v). The members of Interview Board have also very clearly stated before the SIT that they were not made aware of the CBT marks of the candidates, who were interviewed by them.

(vi). The members of the Board very clearly stated about the time schedules of the interview for each shift each day and it appears that since no question was was put as whether the whole day interview was held or not so they did not tell the actual time consumed in interview.

(vii). In arriving at findings by SIT that sufficient time was not provided in interview to each candidate, the SIT has apparently looked to the numbers of the candidates to whom call letters were issued and the scheduled period and time and then drew an average time given to a candidate but I find that 266 candidates in the Junior Engineer category and 16 candidates in Assistant Engineer category did not turn up to participate in the interview.

(vii) Looking to the affidavit filed before the Supreme Court as has been brought on record as annexure to the counter affidavit filed by the corporation in writ petition of Samrah Ahmad, I find that each board for Assistant Engineer and Routine Grade Clerk had been provided sufficient time to interview the candidates and a number of candidates was not so proportionally high to conclude that sufficient time was not provided to.

317. Vide paragraph 20 of the affidavit of Mr. I.K. Srivastava the then Chief Engineer, Level – II (Establishment 2-1) the chart of Interview board of Assistant Engineers has been given.

318. In board No.- 1 in the first slot 27 candidates were put to interview. So also in the second slot 25 candidates were put in interview on 30th December, 2016. On 31st December, 2016 likewise 26 and 24 candidates were to be interviewed.

319. This figure has continued up to the board – 5. The board – 6 had only two shifts interview on 31st December, 2016 having 21 candidates and 18 candidates respectively on its board.

320. Now applying the average in terms of time and number, 25 candidates and 3 hours' time if were interviewed, it comes to 8 candidate in one hour's time.

321. Vide paragraph 21 it is stated in respect of Junior Engineers that each day there was one slot only for whole day and there were 10 boards constituted. Board No.- 1, for instance, had 73 candidates in a day and lastly on 24th December, 2016 it had only 64 candidates. Similar was the number almost in all other boards each day. Now considering the 75 candidates each day for the interview scheduled to be held from 10:30 am to 5:30 pm and in some cases 10:00 am to 5:00 pm (as per the statements made by two different members of different boards) so approximately 15 candidates in 60 minutes if absentees are also included.

322. Again vide paragraph 22 the details of the interview board and the candidates had been given in respect of the Routine Grade Clerk. Each day only there was one shift for whole of the day. Board No.-1, for instance, had 41 candidates to be interviewed on 30th November, 2016 and on third day on 2nd December, 2016 it had 30 candidates on board to be interviewed. Similar is the case with the last board that is the 6th board having 40 and 30 candidates to be interviewed. Now drawing the average of 40 candidates if interviewed in

five hours, time spent comes to 60 minutes for 8 candidates and again when absentees are not excluded.

323. This above is the pure statistics base on law of average. It does not exclude the candidates who did not turn up to participate in the interview and, therefore, the findings by the SIT based on the statistics it had drawn to conclude what only 4-5 minutes were given to a candidate does not appeal to reason and rather is found to be perverse as against the records.

324. These findings arrived at by SIT regarding selection process having been compromised on the basis of the reports obtained from the IITs are also not sustainable in view that I have already held about the maintainability of those four reports.

325. Findings arrived by SIT that since original data was deleted from the cloud server therefore, verification could not be done about the correctness of the data provided in the CD to the experts of the institute of technology, is also not sustainable for the reason that the Court has already held the opinion obtained from the reports from the IIT, Kanpur was not within the legal frame work.

326. From the perusal of the entire report of the SIT, I have found that the Special Investigation Team has broadly discussed the doubtful questions and doubtful answers in its report on the basis of challenges made to the questions and answers by the different candidates after the master answer key and response sheet were published. The Special Investigation Team has arrived at this conclusion that this was the duty of the M/s Aptech Ltd. to prepare the questions papers as well as to provide the answers in the master answer key for its final verification. After the response sheets were published, the challenges that were laid to various questions and answers and the revised result that was prepared by M/s Aptech Ltd was sufficient to demonstrate that the agency failed to perform its duty properly and as a matter of fact these wrong questions and wrong answers resulted in calling for undeserving candidates for interview and placing them in the select list. This according to SIT was also a result of conspiracy that was hatched by the then senior Minister who happened to be the Chairman of the corporation in connivance with officials in the upper echelons of the corporation and with those of M/s Aptech Ltd.

327. This above finding merely on the basis of the revised result cannot be sustained for the simple reason that only a very few number of questions and answers were found to be doubtful. It is true that the result came to be revised and, therefore, candidates stood identified who in fact should not have been called for interview and yet were called but this is nothing exceptional. In any examination which is a competitive in nature in which the papers are prepared on the format of multiple choice questions, some questions and some answers are bound to fall in doubtful category. This is also apparent from the report submitted by the service provider agency in which 19 answers in respect of certain questions were still doubtful as two experts had given two different options to be the correct answers of same questions.

328. The total questions that were asked in the four papers with 80 questions each for the CBT held in respect of the

Assistant Engineer were 320. The questions that were finally determined as incorrect were 7 and so 20 wrong answers were determined. Meaning thereby a doubtful or incorrect questions answers in total were 27 in number. Now taking the average out of 320 it comes to eight percent (8%).

329. So also in the case of Junior Engineers total 400 questions were there in 5 papers consisting 80 questions in each paper and only 6 wrong questions were found by the experts and so the 18 wrong answers. So there were in all 24 doubtful questions and answers out of 400 and it comes to six percent (6%).

330. So also in the case of Routine Grade Clerks total 480 questions were there in 6 papers consisting 80 questions in each paper and only 7 wrong answers were found. This also totals to 7 out of the 480 which comes to one point four percent (1.4%).

331. Thus, there is only a very miniscule percentage or number of doubtful questions and doubtful answers and this cannot be said to be sufficient ground itself to hold that the entire selection process insofar as conduct of CBT is concerned was compromised.

332. Still further, M/s Aptech Ltd. has taken its clear stand taken before the Court that the agency itself outsourced preparation of questions to a third party/ persons who are experts in their field and, therefore, M/s Aptech Ltd. did not have expertise to evaluate the questions and answers for every questions asked and answers given by the said experts and it is all further put to test by way of notification for the experts of the concerned subject when the challenges are made. Therefore, to come to the conclusion and hold that there was a conspiracy by the Minister concerned and the M/s Aptech Ltd. was a part of it in preparing question papers and answers to benefit poorer candidates does not appeal to reason in the given facts and circumstances of the case.

333.Applying principle of criminal law as to be admissibility of report as evidence, in my considered view, such police report is absolutely inadmissible. This report is only for the purposes of a court of law to take cognizance of the matter to conduct trial and it is yet to be proved in trial whether findings arrived in the SIT report are worth merit or not. Police reports submitted under Section 173(2) Code of Criminal Procedure are mere collective opinion of police officers conducting investigation and are just placed for the Court to hold trial. Such opinions by themselves are not conclusive and prosecutive whereas have to prove the charge by entering the witness box. If such reports are taken as conclusive proof of this charge even for administrative purpose then it will run against all norms of law in the matter of charge and its proof. Such police reports are not substantive piece of evidence (**Rajesh Yadav v. State of U.P. (2022) 12 SCC 200**).

334. During the discussion above in this judgment *qua* statements of persons interrogated by SIT, I find that none of the statements corroborates the findings that have been arrived at by the SIT in its final conclusion. It appears that SIT after perusing the entire records proceeded to assume that selection process got compromised and there was a conspiracy hatched by the then Minister in connivance with the officer at higher echelons of U.P. Jal Nigam. It is still not clear as to how SIT has come to form this view. If SIT has relied upon the report of CFSL, then it clearly clarifies and identifies only 169

persons who have been shown with inflated marks and were given opportunity to walk in for interview. Besides those 169 candidates, there is no doubt express in the CFSL report regarding marks allotted to any other candidate, nor CFSL report doubts in any manner preparation of result of CBT.

335. It is also interesting to notice that in the SIT report there is no discussion regarding conduct of the CBT. The entire interrogation has centred around the marks obtained by 169 candidates named in the list of CFSL were inflated and that the selection by agency was not done properly to conduct CBT and also cancellation of the result of Stenographers by executive fiat of the Chairman was a biased decision. The entire conduct of Chairman of the U.P. Jal Nigam has been doubted and finding has been arrived that not only conduct of the agency was questionable, but even selection process itself was entirely a result of conspiracy and fraud.

336. It is also worth interesting to notice here that at no point of time prior to the objections being invited by publishing the master answer key, there was any challenge to the CBT held by the Aptech Ltd. As a matter of fact, all this controversy arose after challenges were made as to the correctness of certain questions and certain answers and certain writ petitions came to be filed setting up the claim by the respective petitioners of those petitions. It was ultimately when in-house enquiries were held by two Chief Engineers of the U.P. Jal Nigam, it all raised controversy regarding sanction of posts, exercise of discretion by Chairman of U.P. Jal Ngam and preparation of select list and manipulation of results etc. Although, I have considered the statements recorded by the Special Investigation Team, as it carried out interrogation with various persons and also examined certain records on the principle of preponderance of probability at least to find out whether the findings arrived at by SIT worth reliance or not, as conclusion has been arrived at by the authority under the orders impugned relying upon the same, but I must observe here that interrogation by the police and statement recorded under Section 161 Cr.P.C. are absolutely in admissible in law. The statements that are recorded by the police after carrying out interrogation with various persons during investigation is required to be corroborated by testimonies of prosecution witnesses during trial. It is only investigating agencies *prima facie* view that sufficient evidence has been collected so as to make out a charge for particular offence committed but this by itself cannot be conclusive admissible report in law to place absolute reliance thereupon.

337. I find merit in submission of Mr. Khare that SIT report being a plane sample report filed under Section 173(2) Cr.P.C. it has no evidenciary value. I have already discussed the report of SIT in detail and have found that none of the persons who were interrogated and who were the responsible officials of M/s. Aptech Limited as well as the officers of U.P. Jal Nigam gave any statement to the effect that selection process was in any manner conducted with gross irregularity or illegality. They have not even accepted that selection was compromised, though questions were put to them as to the alleged was grossly committed by M/s. Aptech Limited of the contract entered with the Corporation while conducting the selection. All that they had stated was not publishing the master answer key before CBT result but there is no whisper about the conduct of the CBT being vitiated or any irregularity or illegality on the part of M/s. Aptech Limited. Therefore, merely because the SIT have arrived at some findings which

will not be admissible at this stage even in law and decisions to conclude that the entire selection process was vitiated for gross illegality and irregularity committed at the end of agency conducting the CBT proceeding is, therefore, unjustified and hence unsustainable.

338.**Thus in view of the above question No. (v) stands answered in negative and question No. (vi) stands answered in affirmative.**

**Findings as to sustainability of orders impugned**

339. Now it becomes necessary here to discuss the orders impugned in the different writ petitions in respect of the three categories of selectees and appointees. The impugned orders that are passed, are of the same data i.e 2nd March, 2020 and are *verbatim* same, the reasons assigned are also same and they discuss the same very reports. The findings that have been arrived in the orders impugned so as to annul the selection and appointments of the candidates in different above categories can be summarized as under

(i) M/s Aptech Ltd. an outsourced agency/ service provider that was entrusted with the task to carry out the CBT for selection in respect of different categories of posts in U.P. Jal Nigam, under work contract/ orders separately issued in respect of CBT for individual categories of RGC, AE and JE, failed to abide by contract in its letter and spirit. Contracts were signed in order to ensure transparency and to maintain sanctity of selection process to be held in respect of posts in question to offer employment, required under the contract to immediately declare / publish the master answer key soon-after the CBT was concluded, but this was not done by the M/s Aptech Ltd. in gross violation of the terms of contract which in fact compromised selection process.

(ii) The procedure adopted to publish select list calling candidates for interview and preparing and publishing final select/merit list and offering appointments before even inviting objection to the questions and answers which would have been doubtful, has caused serious prejudice to meritorious candidates.

(iii). The compact disk containing data of the CBT examination handed over to U.P. Jal Nigam on 28 February, 2017 in respect of Junior Engineer, and RGC, which were all forwarded to the IIT, Kanpur and III Allahabad for opinion on 31.8.2018

(iv) Looking to the doubtful act and conduct of the M/s Aptech Ltd. in carrying out CBT and preparing select list publishing the same without due verification of the records provided to it by the U.P. Jal Nigam original data that was contained in its data base, there left no other option but to request the State for investigation by a Special Investigation Team, which came to be constituted on 13th July, 2017. The findings have come to be returned by Special Investigation Team in its final report that original data had been deleted against the terms / conditions of the contract, which made it impossible for experts to verify the correctness of data contained in the CDs.

(v) Heavily relying upon the reports/opinion given by the experts of the Institutes of Technology, Kanpur and Institute of Information Technology, Allahabad, according to which, it stood clearly established that data provided in the compact disk could not be verified as to have traces of original data, as neither the

software tools for the purpose ensuring security of the data were used nor, audit trail details that were used and this all automatically concluded that there remained nothing to form a definite view that data provided in the CDs were the original data.

(vi) The reports that were considered under the impugned order, specially the report of SIT led it to conclude that entire selection process stood compromised and it became very difficult to trace out and explain as to at what stage and in what manner manipulations had taken place and in such circumstances, it was difficult to identify as to who were the untainted candidates In other words Corporation's authority has doubted the CBT result itself on the basis of which select list was drawn besides 169 candidates identified by CFSL.

340. In the total circumspect of the events that have taken place and the statements and materials as discussed in the SIT report, there appears to be a serious question raised about the powers of the Chairman of the Board to exercise certain discretion which lay with the Board itself and further the committee that was constituted to carry out the selection process had not met and it was done single handedly. I may observe here that this Court is bound by the earlier judgment of the Division Bench dated 28.11.2017 and two subsequent judgments of the Supreme Court affirming the Division Bench judgments of the High Court dated 16.03.2018 and 15.11.2018. Supreme Court noted that the judgment of the Division Bench of the High Court had set aside the impugned order earlier passed by the authority cancelling the selection and appointment on the ground that principles of natural justice were not complied with and that no effort sincere enough, was made by the corporation to segregate tainted from untainted candidates and this view of the Division bench came to be affirmed with observation made by the Supreme Court in its final order dated 15.11.2018 that the appellant corporate must in the first place comply with directions of the Division Bench issued under its judgment and order dated 28.11.2017 and it is in that process the appellants may take into consideration the previous enquiry reports and all other relevant materials and documents which may be available to them in order to find possibilities of segregation of tainted from untainted candidates.

341. Thus, those questions *qua* exercise of power by the Chairman of the Board, question of availability of vacancy, issue regarding sanction/ permission from the state government to carry out recruitment drive etc. were no more available for the respondent Corporation to look into. The corporation was only to find out whether there was a systemic fraud committed in the process of selection so as to hold that the entire selection process stood compromised and, therefore, the selections had to go and so also the consequential appointments and so there remained no scope of identifying and isolating tainted candidates and giving them show cause notices individually.

342. Upon reading various paragraphs quoted above in this judgment of various authorities/ rulings cited on behalf of the rival parties, a principle of law emerges out *qua* which there is not dispute that an administrative action can be interfered with if the decision is irrational, illegal or arbitrary. A decision would be irrational, if it is not based upon any cogent material to

support the decision taken. It will be illegal, if it has not gone into the question required to be addressed taking into consideration all the aspects that are required to meet the requisites of arriving at a conclusion and thirdly in the event of procedural impropriety.

343. In order to test, if upon any of these basic principles the decisions in question can be upheld, the principles of Wednsebury Law of Reasonableness becomes a good testing anvil. The Wednsebury Unreasonableness is what a reasonable man would have ordinarily arrived at a conclusion given the facts and circumstances involved in a particular case, but the authority arrived at different conclusion. The question, therefore, would arise in the present case as to whether the decision taken by the authority was illegal or irrational or procedural impropriety was committed.

344. I have already discussed various reports and have held that as far as the reports of experts of IITs is concerned that was not within the legal frame work. With the enforcement of Information Technology Act, 2000 it is clear that every electronic evidence, if is to be led, is to be examined and tested by experts of forensic field and that too by those experts who are having the expertise and have received accredition of an appropriate government. The Act requires the appropriate government to notify such agencies. Two of the agencies have already been authorized as have been placed before the court by the learned counsel appearing for M/s. Aptech Limited namely CERT-In and HTQC. The Act, 2000 and Rules framed thereunder very clearly provide detailed procedure and with the advancement of technology and their use it becomes necessary that the electronic evidence is examined thoroughly by the experts of the field only. It is not clear what method was adopted by the Associate Professors of Institutes of Technology in conducting forensic examination of the evidence in the form of CDs provided by the Corporation whereas four times the reports were called for by the SIT from the CFSL which is a government agency of the Ministry of Home Affairs. It is a settled law that when a thing is required to be done that should be done in that manner alone, **(2015) 11 SCC 628, Tata Chemicals Limited v. Commissioner of Customs (Preventive), Jamnagar**.

345. In the circumstances, therefore, I have already held that the expert opinions that were sought from the Associate Professors of Institutes of Technology were neither the experts recognized under the Information and Technology Act, 2000, nor these opinions could have been termed to be admissible within the legal framework as prescribed for under the Act, 2000 besides the fact that opinions were not conclusive. In the circumstances, therefore, any finding arrived at by the authority on the basis of these reports are bound to be held irrational. It is equally important to notice here that in the earlier part of this judgment these reports itself are found not conclusive because the experts have opined on the basis of material provided to it by the Corporation. It is admitted position of fact that the Corporation did not give any access to the hard disks seized from the office of local environment of M/s. Aptech Limited for seeking opinion of these experts of Institutes of Technology, nor did it provide DVDs with data issued by the CFSL. It was well within the prerogative of the Aptech Ltd that whatever data will be provided to a party/ person (Corporation)

would be a copied data (vide clause 12-c (iii) of data retention policy). Further, all intellectual property rights with respect to the services and the Aptech Ltd propriety material etc. was to belong to that agency (vide clause Propriety Rights under the contract with U.P. Jal Nigam) so unless and until access to original data was given by U.P. Jal Nigam to the experts of IIT, Kanpur and IIIT, Allahabad, no definite opinion could have been given on the basis of the copied data. In the circumstances therefore, the decision arrived at on the basis of opinion of experts is clearly unsustainable.

346. I must add here that initially at the very beginning and subsequently upon argument being advanced by Mr. Ojha for examination of archival data of M/s. Aptech Limited saved in its office at NOIDA place both Mr. Goyal questioned the retention of data beyond one year being grant agreement/ written contract and refused it to be trust worthy to be put to forensic examination any further. Mr. Khare and Mr. Mishra also disagreed to this suggestion.

347. I do not find in the entire order impugned in these petitions there to be any discussion by the authority over and above findings reached out in the SIT report. It is true that in a decision making process authority was required to consider and discuss reports so as to draw a conclusion, but the authority is equally required to consider as to whether conclusion drawn in the reports was tenable or not.

348. I have already discussed in detail those findings of the SIT which have been relied upon by the Corporation and have found it to be *sans* material indicative of deep rooted corrupt practice except for the CFSL report which had clearly identified 169 candidates to have been given inflated marks to facilitate their entry in to the interview board.

349.The argument therefore, advanced by Mr. Goyal relying upon the judgment of learned Single Judge of Madras High Court that there was a deep rooted conspiracy and fraud and it was all grounded in the system to be treated as systemic fraud which vitiated the selection process, also does not find favour in the given facts and circumstances of the case. There is no finding either by the SIT or the other two in-house inquiry reports which can be said to be indicative of this fact that any of the candidate was indulged in any corrupt practice or tried to influence the selectors to award him/ her special marks. This is also so clear from the statements of marks of interview board who had repeatedly stated to the police that nobody had approached them to give higher marks to a particular candidate. Therefore, I find merit in the submission of Mr. Mishra as referred to paragraph no. 89 of the judgment in **R. Prem Lata** *(supra)* that there was no sufficiency of material collected on the basis of which satisfaction came to be recorded, nor there was any material to be indicative of fact that any candidate in order to find favour committed any kind of fraud in connivance with or in conspiracy with the selectors. I have already answered above important question that CFSL reports findings finally identify tainted candidates to be segregated. The forensic report finding is clearly indicative of fact and that 169 candidates were awarded inflated marks and these very candidates found place in select list and resultantly were offered appointments. It is true that *there may be situation where the nature of the irregularities may be manifold and the*

*number of candidates involved is of such a magnitude that it is impossible to precisely delineate or segregate the tainted candidates from untainted* [Sachin Kumar (*supra*)] but *the court must ensure that allegations of malpractice is also substantiated and that the material on record, including investigation reports, point to the conclusion* (Vanshika Yadav v. Union of India and others, 2024 SCC OnLine SC 1870) but the reports as discussed above including SIT report except for conclusion drawn do not indicate of any widespread and systemic level malpractice. Data surfaced out must be in respect of majority of candidates and must also count to abnormal score to establish a case of systemic breach.

350. In so far as judgment of Division Bench of this Court to which I was party being a member on Bench, relied upon by Mr. Goyal, is concerned the principle laid down was that service provider under the contract was to carry out selection as per the terms of contract and if it failed, it deserved blacklisting. Applying the test laid down in the said case, it cannot be ruled out that it was onerous task to be executed by the agency to ensure fair examination for selection. In the said case the manner in which examination was conducted as per the STF report, it found the agency to be responsible for serious irregularities that have been elaborated in paragraph 31 of the judgment. In the present case I have already found that till CBT was conducted and the CBT merit list was passed on to U.P. Jal Nigam initially with secure password and login Id, there was no issue. So it cannot be said that Aptech agency misdirected itself against the contract in conducting CBT.

351. What transpires from the reports is that at some level a deliberate act was committed either by the authorities of the Corporation or the officials of M/s Aptech Limited, who were to prepare the result and declare the same for the purposes of forming a select list. Candidates, who in fact had secured lesser marks and could not match the meritorious candidates and their marks with inflated report so as to place them in CBT select list to make them eligible for interview. The statement of officials of Aptech Mr. Vishwjeet becomes important here. Mr. Vishwajeet has very clearly stated, as discussed in the earlier part of this judgment, that after the results were prepared oral instructions were given by the officials of U.P. Jal Nigam to supply the select list. The select list prepared after processing the data on the basis of CBT result available in data base was supplied with secured password to the officials of U.P. Jal Nigam along with login ID. This access of processed result was provided to the authorities of U.P. Jal Nigam, who were in fact to hold interview of the selected candidates. After the password and login ID was given to the officials of U.P. Jal Nigam, a select list was returned to the Agency to publish. Mr. Vishwajeet has stated very clearly that this select list was also got published by the Aptech on the basis of which the interview was held. Even though there is statement given by one of the complainants Ram Sewak Shukla that there was a large scale bungling in the selection process but in his statement he has only made allegations and has failed to refer to any such incident as such or any statement of a particular person involved in the selection process, which may be said to be very cogent and convincing to hold that allegations to be true and correct to make out a proven case of fraud. This clearly shows that upto the stage of conclusion of CBT, no manipulation had taken place, nor any irregularity was committed, nor at least

could be demonstrated by any one with conviction. Since no access was given to the assigned cloud server of Ctrl S, nothing could be done to affect the data base. It, therefore, appears, to have taken place only after CBT result was prepared and access of processed data was provided to the officials of the Corporation that certain manipulations took place in result and this is apparent from the CFSL report. This shows, therefore, that some favours were shown to some candidates by the officials of the Corporation may be in league with the M/s Aptech Limited but the question arises as to whether this very act of giving inflated marks, can be said to have amounted to such a deep rooted fraud or conspiracy that would justify the annulment of entire selection. The Courts have held, as authorities are already referred to and cited by the learned Advocates appearing for the respective parties, that just for a few candidates, who have found favour at the hand of officials of the agencies, this should not prejudice the candidates, who have marched to the select list and were ultimately given appointments on the basis of their untainted merit. The CFSL report having not been questioned anywhere and as I have already held that Central Forensic Laboratory Hyderabad was the competent Government Agency in the matter to conduct forensic examination of the hard disks and the fact that CFSL report itself does not disclose that any modification of the original data had taken place or that the data was missing, it is thus clear that those candidates, who were given inflated marks and were 169 in number were the tainted candidates. This report is a sufficient evidence itself available on record to identify the tainted candidates and, therefore, findings arrived at to the contrary in the order impugned cannot be sustained in law.

352. The doctrine of impossibility as argued by Mr. Goyal would not attract in the present case for the simple reason that once 169 candidates were found to be only candidates with inflated marks during the forensic examination by the established and recognized Central Forensic Laboratory, Hyderabad, there remains nothing further to undertake any enquiry for segregation of tainted and untainted candidates.

353. In the absence of any direct evidence to prove a case of systemic fraud, the concerned authority has relied upon circumstantial evidence drawn on the basis of certain candidates for being favoured in matters of selection and appointments and it, therefore, in such circumstances has considered it to be a judicious decision to cancel the entire selection and more so in the name of restoring public trust and confidence in the system. The plea taken is that Article 14 of the Constitution mandates absolute transparency and sanctity in the matter of open selection for public employment. The courts, in my considered view are required to be more conscious in evaluating considerations that would have weighed such decisions to protect innocent and meritorious candidates so that all candidates are not tarred with same brush. In matters of competitive examination where a large number of candidates participates, the endeavour should be to protect the honest and meritorious candidates who have found place in merit list out of their sheer hard work and labour and this is also necessary to maintain trust and faith in the adjudicatory function of constitutional law Courts.

354. In view of the above and considering the point in the light of judgment in the case of State of NCT of Delhi and another vs. Sanjeev @ Bittu

(*supra*) about misreading of evidence or there being no evidence at all, in my considered view from the entire material discussed in the judgment it can be concluded that the order impugned completely misjudged and misconstrued them so as to annul the entire selection and appointments in the name of inspiring confidence of people in the system. Thus, orders impugned in these petitions dated 02.03.202020 in respect of AE, JE and RGC deserve to be held unsustainable in law.

355. Now the question arises whether these above tainted candidates, if were issued with appointment orders deserved prior notice and ultimately relief, if any, may be granted to the untainted candidates in the given facts and circumstances of the case and in the light of law discussed by Division Bench of this Court on 28.11.2017 and the last judgment of Supreme Court on 15.11.2018.

356. The question of relief to such above candidates arises if their case survives. Original CBT marks, it maintained, they would not have reached to the stage of interview even. I have already arrived at this conclusion that segregation of tainted and untainted candidates was possible and this is so apparent on the face of record. This litigation has continued for a very long period of time and so, I consider it appropriate to give a quietus to the controversy in the light of various authorities of Supreme Court.

357. 363 candidates are before this Court in respect of post of Junior Engineers in various writ petitions, 56 candidates are relating to the post of Assistant Engineers and 20 candidates are in respect of Routine Grade Clerks.

358. Following are the names with their roll numbers present in the computer list as per CFSL report with inflated marks of the candidates in the category of Assistant Engineer, Junior Engineer and Routine Grade Clerk, who are petitioners in different writ petitions.

**JUNIOR ENGINEER**

| NO. | ROLL NO. | PETITIONER NAME | FATHER'SNAME | SR.NO INSIT REPORT | CBT PRESENTITN COMPUTER DATABASE | CBT PRESENTITN THELISTOFSELECTED/SHORTLISTEDDOCUMENTS | INTERVIEW | WP |
|---|---|---|---|---|---|---|---|---|
| 1. | 11090524 45 | JITESH KUMAR | NARVED SINGH | 32 | 21 | 67 | 12 | 4531/2020 |
| 2. | 11090538 67 | SATISH GUPT | PHOOL CHAND | 40 | 22 | 67 | 11.75 | 4531/2020 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | A | RA GUPTA | | | | | |
| 3. | 12010060037 | VIVEK SINGH | MAHESH SINGH | 28 | 44 | 62 | 17.25 | 5912/2020 |
| 4. | 12060351558 | SACHIN KUMAR | PRATAP SINGH | 11 | 30 | 69 | 12 | 4631/2020 |
| 5. | 12020087887 | AJAY SINGH | MAHENDRASINGH | 4 | 24 | 69 | 15.50 | 10075/2020 |
| 6. | 11120741797 | AJEET KUMAR RAJAK | BHULAN RAJAK | 18 | 0 | 62 | 18 | 10075/2020 |
| 7. | 12080389717 | MUKESH KUMAR | RAMRAJ SAROJ | 44 | 33 | 61 | 17.75 | 10075/2020 |
| 8. | 22070384660 | RAHUL KUMAR**(JEE/M)** | RAMA SHANKAR TRIPATHI | 10 | 25 | 62 | 17.50 | 10075/2020 |
| 9. | 22090498995 | ASHUTOSH KUMAR SINGH**(JEE/ M)** | GYANENDRA SINGH | 16 | 46 | 61 | 18 | 10075/2020 |
| 10. | 13120727274 | ASHOK KUMAR**(JEE/M)** | GOVARDHAN PATEL | 11 | 34 | 68 | 11.25 | 7150/2020 |
| 11. | 11020086440 | AANAND GUPTA | ASHOK KUMAR G | 2 | 35 | 69 | 16.75 | 7150/2020 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | UPTA | | | | | |
| 12. | 12080460 58 | VISHAL TIWARI | RAMESHWAR TIWARI | 5 | 27 | 69 | 15.25 | 7150/2020 |
| 13. | 22090514 83 | SANJAY SINGH(**JEE/ M)** | RAM | 7 | 30 | 68 | 11.75 | 7474/2020 |
| 14. | 11090537 86 | SANDEEP KUMAR PATEL | RANJEET CHAUDHARY | 21 | 25 | 69 | 10.50 | 7474/2020 |
| 15. | 11050272 13 | SANJAY CHAUDHARY | RAMCHANDRA CHAUDHARY | 26 | 38 | 69 | 10.25 | 9333/2020 |
| 16. | 13080426 13 | SHABAB HAIDAR **(JE E/M)** | ZWFEQUARHAIDAR | 6 | 49 | 62 | 18 | 9333/2020 |
| 17. | 11090481 17 | ARJUN KUMAR | RAMDAYAL | 57 | 36 | 64 | 12.12 | 9333/2020 |
| 18. | 21050294 92 | SESHMANI NISHAD **(JE E/M)** | BAGIRATHI NISHAD | 1 | 29 | 68 | 15 | 9333/2020 |
| 19. | 12090521 47 | FAIYAJ AHMAD | NIYAZ AHMAD | 1 | 26 | 69 | 17.25 | 9333/2020 |
| 20. | 12050278 69 | MOHAMMAD AMEEN | LATEN AYEEM AHMAD | 15 | 31 | 62 | 18 | 9333/2020 |

## Assistant Engineer

| NO. | ROLLNO. | PETITIONERNAME | FATHER'SNAME | SR.NOIN SITREPORT | CBTPRESENTINCOMPUTERDATABASE | CBTPRESENTINTHELISTOFSELECTED/SHORTLISTEDDOCUMENTS | INTER-VIEW | WP |
|---|---|---|---|---|---|---|---|---|
| 1. | 12082170 59 | AYUSHMAN SRIVASTAVA | VIJAYKUMAR LAL | 4 | 28 | 60 | 18.9 | 10440/2021 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 2. | 1109221405 | ZUBZIR KHAN | NIZAMUDDIN KHAN | 19 | 31 | 60 | 17 | 10440/2021 |
| 3. | 1208219088 | KRISHNA KUMAR KHARE | L.N. KHARE | 18 | 29 | 60 | 17 | 10440/2021 |
| 4. | 1108220303 | AMIR AKHTAR | ASIF AKHTAR | 24 | 35 | 60 | 16.8 | 10440/2021 |
| 5. | 1107214878 | VIVEK SINGH | RAM NAYAK SINGH | 17 | 32 | 60 | 17.2 | 10440/2021 |
| 6. | 1112230788 | ANKUT KUMAR YADAV | INDRA BHOSHAN YADAV | 30 | 39 | 63 | 12.4 | 10440/2001 |
| 7. | 1208221029 | SYED SHUJA ABBAS RIZVI | SYED ABBAS RAZA RIZVI | 1 | 24 | 64 | 17.4 | 10440/2021 |
| 8. | 1208219062 | KAMRAN AHMAD KHAN | ANWAR AHMAD KHAN | 3 | 35 | 63 | 17 | 10440/2021 |
| 9. | 1202204259 | SYED AMIR JAMAL | SYED JAVED JAMAL | 16 | 23 | 60 | 17.2 | 10440/2020 |
| 10. | 11072143911 | SAMAR ALI | SHAKIR ALI | 22 | 27 | 60 | 17 | 10440/2021 |
| 11. | 12042068779 | HUSAIN HUZUR | SYED MOHAMMAD HUZUR | 10 | 40 | 60 | 17.2 | 10440/2021 |
| 12. | 12082191588 | SAMRAH AHMAD (AEE/M) | SIRAJ AHMAD | 4 | 31 | 58 | 16.6 | 7076/2021 |
| 13. | 12082183855 | ASIF KHAN | MOHD. SHAMIM | 7 | 24 | 60 | 18 | 17507/2022 |
| 14. | 12022030622 | FAISAL SALAMAT | SALAMAT | 13 | 42 | 60 | 17.2 | 17507/2022 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 15. | 12082157 55 | MOHD. FAHAD ANSARI | MOHD .ASLAM | 25 | 37 | 60 | 16.8 | 17 50 7/ 20 22 |
| 16. | 12022034 16 | MOHD. SHARIQ SHAHAB | MOHD. KHALID SHAHAB | 12 | 27 | 60 | 17.2 | 17 50 7/ 20 22 |
| 17 | 11112275 48 | HARSH SATENDRA SINGH | SATENDRA SINGH | 15 | 29 | 60 | 17.2 | 17 50 7/ 20 22 |
| 18. | 12042085 20 | SYED MOHAMMAD JAWAD | MOHD .IDRIS | 20 | 37 | 60 | 17 | 17 50 7/ 20 22 |
| 19. | 11102226 65 | LALIT KUMAR YADAV (AECS/EC/ EE) | OMPRAKASH YADAV | 2 | 29 | 58 | 18 | 12 01 0/ 20 20 |
| 20. | 11102294 72 | MOHD. YASAR KHAN(AECS/EC/EE) | MAHFOOZ RAHMAN KHAN | 1 | 41 | 58 | 18 | 12 01 0/ 20 20 |
| 21. | 12102245 33 | KAILASH VISHWAKARMA( AEE/ M) | CHEDILAL VISHWAKARMA | 3 | 38 | 58 | 16.6 | 12 01 0/ 20 20 |
| 22. | 12102245 40 | MOHD. SHAMS (AEE/ M | KURSHEED ANWAR | 1 | 39 | 58 | 18 | 12 01 0/ 20 20 |

| | | ) | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 23. | 1108216025 | RAJESHKUMAR (AECS/EC/EE) | RAMUGRAH | 3 | 26 | 55 | 17 | 8936/2021 |
| 24. | 12082183 40 | ASHISH PRATAP SINGH | JITENDRA BAHADUR SINGH | 8 | 48 | 60 | 17.9 | 1250 1/2021 |
| 25. | 12082186 64 | DILSHADKHAN | IRSHADKHAN | 2 | 31 | 63 | 17 | 1250 1/2021 |
| 26. | 1106212023 | DHIRENDRAKUMAR PRAJAPATI | JITENDRAKUMAR PRAJAPATI | 27 | 26 | 60 | 16.4 | 1250 1/2021 |

## Routine Grade Clerk

| NO. | ROLL NO. | PETITIONER NAME | FATHER'S NAME | SR.NO INSIT REPORT | CBT PRESENTIN COMPUTER DATA BASE | CBT PRESENTIN THE LIST OF SELECTED / SHORTLISTED DOCUMENT S | INTER-VIEW | WP |
|---|---|---|---|---|---|---|---|---|
| 1. | 7201163257 | SARFARAZ KHAN | PARVEZ AHMADKHAN | 39 | 32 | 75 | 20 | 4453/2020 |
| 2. | 5201191273 | MAYANK RAJPUT | MAHENDRA PRATAPSINGH RAJP-UT | 8 | 59 | 69 | 20.4 | 4453/2020 |
| 3. | 7101250843 | FAIZ SALAMAT | ALAMAT ULLAH SIDDIQUI | 43 | 59 | 66 | 19.4 | 7952/2022 |
| 4. | 7201126171 | MOHD. SADIQ KHAN | MOHD. SHAMIM | 37 | 38 | 75 | 20.2 | 7952/2022 |

359. It is an admitted position of fact that these candidates had been originally awarded marks that were lesser to what they were given for the purposes of interview while select list was being prepared with the involvement of officials of the Corporation and it is clear from the comparative study by CFSL with their original marks retrieved from the data base of hard disks that was seized by the police from the local environment Office of M/S Aptech Limited, Mumbai.

360. The report, therefore, makes it clear that marks of 169 candidates were enhanced or rather inflated to their advantage only. It is a case of fraud committed by the selectors, for some extraneous considerations and the beneficiaries cannot be permitted to take advantage of fraud only on the plea of non compliance of principles of natural justice. The law on the point is well settled in a number of authorities of Supreme Court and High Courts.

361. To begin with, in the case of ***Ram Chandra Singh vs. Savitri Devi and others; (2003) 8 SCC 319***, the Court held that fraud vitiates every solemn act and fraud and justice never dwell together. It is relevant here to refer to paragraphs-15, 16, 17 and 18 of the judgment, which run as under:-

*"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.*

*16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.*

*17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.*

*18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."*

362.The Court also refer to judgment of Calcutta High Court in the case of ***Chittranjan Das vs. Durgapore Project Limited: 1995 (2) Calcutta Law Journal 338***, wherein it was held that even the principles of natural justice are not required to be complied with in such cases. Paragraph-29 of the said judgment is reproduced hereunder:-

*"29. In Chittaranjan Das vs. Durgapore Project Ltd. it has been held: (Cal LJ p. 402, Paras 57, 58:*

*"57. Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.*

*58. It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor*

*the respondent company would be bound thereby.""*

363. In the case of ***State of Chhatisgarh vs. Dhirojo Kumar Sengar; (2009) 13 SCC 600,*** the Court held that commission of fraud once proved, principles of natural justice were not required to be complied. Vide paragraphs-17, 18 and 19, the Court held thus:-

*"17. It is in the aforementioned premise, the contention in regard to the breach of audi alteram partem doctrine must be considered.*

*Principle of natural justice although is required to be complied with, it, as is well-known, has exceptions. [See V.C., Banaras Hindu University and Others v. Shrikant (2006) 11 SCC 42]*

*24. One of the exceptions has also been laid down in S.L. Kapoor v. Jagmohan and others [(1980) 4 SCC 379 : AIR 1981 SC 136] wherein it was held:*

*"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."*

*(Emphasis supplied)*

*18. Legality of grant of a valid appointment was dependant upon the proof that the respondent was the adopted son of Chittaranjan Singh Sengar. He not only failed to do so, the materials brought on record by the parties would clearly suggest otherwise. His application for grant of appointment on compassionate ground was rejected by the Joint Director of Education. He did not question the legality or validity thereof. He, it can safely be said, by suppressing the said fact obtained the offer of appointment from an authority which was lower in rank than the Joint Director, viz., the Deputy Director. When such a fact was brought to the notice of the Deputy Director that the offer of appointment had been obtained as a result of fraud practiced on the Department, he could, in our opinion, cancel the same.*

*19. Respondent keeping in view the constitutional scheme has not only committed a fraud on the Department but also committed a fraud on the Constitution. As commission of fraud by him has categorically been proved, in our opinion, the principles of natural justice were not required to be complied with."*

364. This view was further reiterated in the case of ***Ganpati Bhai Mahiji Bhai Solanki vs. State of Gujrat and others; (2008) 12 SCC 353***. Again in the case of ***Commissioner of Customs (Preventive) vs. M/s Aafloat Textiles (I) Pvt. Ltd. and others in Civil Appeal No. 2447 of 2007 decided on 16th February, 2009*** it has been held that if somebody secures unfair advantage upon a deliberate act of deception then it is a gain for another's loss and it amounts to deliberate cheating intended, to get advantage. Vide paragraphs-12 and 17, the Court held thus:-

*"12. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, `wing me into the easy hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. Derry and Ors. v. Peek (1886-*

*90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B- C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja v. Secretary of State for Home Deptt. (1983) 1 All ER 765, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not*

*have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive. (See Shrisht Dhawan (Smt.) v. M/s. Shaw Brothers, (1992 (1) SCC 534).*

*17. In Lazarus Estate Ltd. v. Beasley (1956) 1 QB 702, Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (page 722)"*

365. The above view came to be reiterated by Supreme Court in the case of ***Badami (Deceased) by her L.R. vs. Bhali: (2012) 11 SCC 574*** in holding that fraud vitiates even the most solemn proceedings in any civilized system of jurisprudence.

366. Applying these principles to the facts of the present case, I find that these persons, whose names have been given in the chart have deliberately obtained benefit of inflated marks and that appears to be at the instance of Officers of U.P. Jal Nigam because they were provided by the Aptech, password and login ID to go through the processed result, the final CBT merit list. It is clear that since they were provided access only to processed result and not to the original data base, they could not do tampering of select list and the original marks contained in the original data base of Hard disks of M/SAptech Pvt. Ltd. and this is how the act of commission of fraud has surfaced out. It is not only an established case of fraud in respect of those very candidates but it must have been done in conspiracy and connivance with such candidates. I can only term it to be unfortunate that Special Investigation Team did not interrogate these very candidates. Once CFSL report was there, these candidates ought to have been interrogated because ultimately it was done for their benefit and they cannot plead innocence in the matter. They are very much part of entire conspiracy that was hatched, may be at the instance of high ranking officers of U.P. Jal Nigam. I gave ample opportunity to Mr. Khare to counter the CFSL report so as to show any material that original marks contained in data being of hard discs retrieved by CFSL were incorrect but Mr. Khare would only argue that since U.P. Jal Nigam authorities have themselves doubted data integrity, it could not be said with authority that this data based information were correct. However, Mr. Ashish Mishra and other Advocates have trusted the forensic experts of hard discks by CFSL and its report. Mr. Ojha of course, took the plea that M/s. Aptech's archival data be forensically examined but both learned Advocates appearing for Corporation, Mr. Khare for petitioners did not agree to this. In the circumstances except for those 169 candidates' own efforts no one else would have changed their marks in select list after it was forwarded to Managing Director U.P. Jal Nigam to be transmitted back to agency M/s. Aptech Ltd. for publication. Thus according to me these persons do not deserve even a notice and their candidature, therefore, deserves to be rejected/ cancelled including their appointment orders and,

accordingly, their claims deserves to be rejected.

367. **Thus the main issue as is framed in paragraph No.- 163 above *qua* controversy is decided in favour of the petitioners other than those 169 candidates mentioned in the CFSL report and it is held that there was sufficient material available with the respondents especially the CFSL report to hold 169 candidates to be tainted candidates and the order impugned therefore, in respect of these untainted candidates deserve to be set aside**.

368. In view of the above, therefore, respective claims of all those petitioners whose marks were inflated and were permitted wholly illegally to participate in interview and find place in the final select list and got appointments for fraudulently given inflated marks, deserve to be rejected.

369. The question now is what about those candidates, who according to revised list of result, count for 479 (Junior Engineer category) in number and who deserved to be called for interview but were not called. In my considered view those petitioners who are before this Court, if they are amongst the 479 candidates, they deserve to be called for interview and after their interview, if they reach to last cut off of the respective category of the selected candidates excluding 169 tainted candidates, they can be placed accordingly, against the available vacancies with U.P. Jal Nigam Urban and Rural.

370. The Court is however, conscious of this fact that many candidates on their own volition have failed to challenge the orders impugned for reasons known to them but law on the point is very clear. Those who have remained satisfied and failed to approach the court in time, would not be entitled to similar relief given to those who challenged the orders. In the case of **U.P. and others v. Arvind Kumar Srivastava and others (2015) 1 SCC 347**, the Court held that ordinarily in identical matters the litigants who were identically placed are entitled to identical relief but those who have remained not vigilant in their matter of claims and have not approached the Court, may not be entitled to identical relief. Vide paragraphs 22.1 and 22.2 the Court held thus:

"***22.1.*** *The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*

***22.2.*** *However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to*

*them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*

371. I am also reminded here of a maxim "*Invito beneficium non datur*" meaning thereby, law confers upon a man no rights or benefits which he does not desire. Abandonment of right is held to be much more than a mere waiver, acquiescence or laches. The selections in question were in respect of advertisements issued in the year 2016 pursuant to which appointments were made in the year 2017. Many petitioners approached this Court in the first leg of litigation and then in the second and third leg of litigation but many of them may have on their on sweet will and desire not approached the Court to question orders/ action taken, taking themselves to be satisfied with the final outcome of the results of selection. In such circumstances, they are to be taken to have acquiescenced to the results of selection carried. Even after the litigations started and continued for a long, if they chose not to set up their claim they are to blame themselves. In these circumstances, therefore, they are liable to be held to have abandoned their claims and the relief in this bunch of petitions is confined to only those who have already approached the law courts till the time of this judgment.

372. It is further clarified that since the Corporation earlier was a unified Corporation, namely, Jal Nigam when advertisement was published and selections were held and appointments were given, these employees were definitely the employees of unified Corporation who were selected and appointed and who were liable to be selected and appointed. Merely for the bifurcation of the erstwhile U.P. Jal Nigam in two different units in year 2021, namely, U.P. Jal Nigam (Urban) and (Rural) it will have hardly any bearing upon the claim of the petitioners to be adjusted in the appointments as a consequence of this order.

373. U.P. Jal Nigam (Urban) has filed a supplementary counter affidavit duly sworn by Mr. Ashutosh Yadav, Deputy Manager (Law), U.P. Jal Nigam (Urban), Prayagraj appended therewith a chart disclosing 158 vacancies in the cadre of Assistant Engineer (Civil), 18 vacancies in the cadre of Assistant Engineer (Electrical/ Mechanical) 622 vacancies in the cadre of Junior Engineer (Civil) and 114 vacancies in the cadre of Junior Engineer (Electrical/ Mechanical) as on 1st September, 2024. Similarly 35 vacancies in the cadre of Junior Engineer in the headquarter to be available as on 1st September, 2024.

374. Similarly, the supplementary counter affidavit has been filed by U.P. Jal Nigam (Rural) duly sworn by Mr. Sandeep Kumar, Chief Engineer (E-2-1), (E-2-2), (E-3) U.P. Jal Nigam (Rural) appending therewith the chart showing 154 vacancies of Assistant Engineer (Civil), 24 vacancies of Assistant Engineer (Electrical/ Mechanical), 793 vacancies of Junior Engineer (Civil), 42 vacancies of Junior Engineer (Civil) for direct recruitment, 186 vacancies of Junior Engineer (Electrical/ Mechanical) for direct recruitment and 35 vacancies of RGC in the headquarter cadre and 20 vacancies in the original cadre of corporation as on date of filing of affidavit i.e. 18th September, 2024.

375. In view of the above following directions are issued:-

(i) All writ petitioners, who are untainted (other than 169 candidates) and have found place in the merit list and were

accordingly given appointments on posts falling in their respective categories, their appointment orders stand restored as a consequence of quashing of the orders passed by the Corporation impugned here in these petitions. The Corporation shall ensure their joining and payment of salary accordingly within a maximum period of two months from today. However, these petitioners will not be entitled to any arrears of pay for the period they have remained unemployed, may be for the action taken by the Corporation but their seniority shall be restored and so also pay protection shall be granted accordingly with notional increments;

(ii) Both the Corporations namely U.P. Jal Nigam (Urban) and U.P. Jal Nigam (Rural) represented here before this Court through their panel Advocates, shall each adjust 50% of untainted candidates in their respective departments and it is after their adjustment only that any recruitment drive shall further be undertaken pursuant to the advertisement, if any, issued. The adjustment, in order to avoid any controversy, should be roster based *qua* every category of posts as well as General/ OBC/ SC/ ST categories. The first candidate in the order of merit of respective category against the post AE/JE/RGC will go to be U.P. Jal Nigam (Urban) whereas second will go to U.P. Jal Nigam (Rural) and so on;

(iii) Those candidates whose names find place in the list of 479 candidates as per the revised result published by the M/s Aptech Limited and have approached the High Court, shall be called for interview for their respective category of posts AE/JE/RGC respectively. A merit list shall be drawn in their respect within three months from today. Those whose total marks in their respective categories of General/OBC/SC/ST match with the last cut off of respective categories in the earlier merit list after removing names of 169 candidates of CFSL report, shall be offered appointment as per the roaster provided above for untainted candidates;

(iv) Those candidates, who have not approached the Court are taken to have remained satisfied with the result of selection and the ultimate decisions of the corporation in that regard and are held to have abandoned their respective claims;

(v) The respective claims of petitioners, whose names occur amongst the 169 candidates be AE or JE or RGC category in the report of CFSL report, Hyderabad, are hereby rejected.

376. This bunch of writ petitions thus stands finally disposed off in above terms and accordingly the orders impugned in writ petitions, dated 2nd of March, 2020 passed by the competent authority of the U.P. Jal Nigam [Now U.P. Jal Nigam (Urban) & U.P. Jal Nigam (Rural)] in respect of posts of Assistant Engineers, Junior Engineers and Routine Grade Clerks are hereby quashed and above issued directions to follow.

377. Before parting, I may acknowledge with appreciation the hard work rendered by Ms. Nidhi Verma and Ms. Simran Yadav, Research Associates (Law) attached to my office for their valuable assistance rendered in the matter that helped me to navigate through thousands of pages of records (petitions, affidavits and compilations) and also their meticulous efforts in searching authorities of this Court and of Supreme Court in addition to those cited, to help me go through contours of law to finally author this judgment.

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**(2024) 10 ILRA 162**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 16.10.2024**

**BEFORE**

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

Writ A No. 7622 of 2024

**Akash Srivastava ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Abhinav Trivedi, Parimal Bhatt

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

**A. Service Law – UP Dying in Harness Rules, 1974 – Rule 5 (1) – Compassionate appointment – Mother of deceased was already in Government Service – Effect – Held, appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointment on merits. The basic premise behind compassionate appointment is the word "compassion". It is to be provided when the family of the deceased employee is deprived of the means of livelihood and its object is to enable the family to get over the sudden financial crisis – The mother of the petitioner is also a government servant and thereby the family is not deprived of means of livelihood. (Para 12 and 13)**

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

**List of Cases cited:**

1. Special Appeal No. 73 of 2016; Kumari Vanshika Nigam Vs St. of U.P. and 3 others

2. Sumit Kumar Sharma Vs U.O.I.& ors..; 2021 SCC OnLine All 854

3. Director of Education (Secondary) & Anr. Vs Pushpendra Kumar & ors..; (1998) 5 SCC 192

4. Commissioner of Public Instructions & ors.. Vs K.R. Vishwanath; (2005) 7 SCC 206

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

1. Heard Sri Parimal Bhatt, learned counsel for the petitioner as well as Sri Indrajeet Shukla, learned Additional Chief Standing counsel appearing for the respondents.

2. By means of the present writ petition the petitioner has assailed the validity of the order dated 24.5.2024 passed by Director, Directorate of Electrical Safety, Government of U.P. wherein the application for compassionate appointment preferred by the petitioner has been rejected. It is during pendency of the petition that respondent No.2 has passed a fresh order after being directed by this Court on 19.9.2024 where the case of the petitioner was again considered and rejected has also been assailed in the present writ petition.

3. The facts in brief as stated by the petitioner are that the mother of the petitioner, namely Smt. Manju Srivastava was appointed and working on the post of Junior Clerk in the office of Director, Directorate of Electrical Safety, Government of U.P., Regional Office, Lucknow since 1983 and unfortunately died on 28.12.2021. Father of the petitioner was also a government servant and was working on the post of Review Officer in the office of Government Advocate in Lucknow Bench of the Allahabad High

Court and had attained the age of superannuation on 10.10.2022.

4. It is on death of the mother of the petitioner on 28.12.2022 that an application was given to opposite party No.2 seeking compassionate appointment. After due consideration of the case of the petitioner Director, Directorate of Electrical Safety, Government of U.P. rejected the application of the petitioner for compassionate appointment on 6.12.2022. The petitioner being aggrieved of the said order of rejection has preferred a writ petition before this Court bearing writ A No.1427 of 2023 which was allowed by means of judgment and order dated 15.2.024 and this Court had relied upon the Division Bench judgment in the case of ***Kumari Vanshika Nigam Vs. State of U.P. and 3 others*** passed in Special Appeal No.73 of 2016 and was of the view that respondent No.2 while rejecting the representation of the petitioner had not considered the relevant facts and circumstances necessary for consideration of the application for appointment on compassionate ground and consequently quashed the rejection order dated 6.12.2022 further directing him to reconsider the application of the petitioner.

5. It is in pursuance of the directions of this Court dated 16.2.2024 that the impugned order dated 24.5.2024 was passed by opposite party No.2. Opposite party No.2 while passing the said order had taken into consideration the provisions of Rule 5 (1) of Uttar Pradesh Dying in Harness Rules, 1974 (hereinafter referred to as the Rules of 1974) which provides that in case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service. On applying these rules in the case of the petitioner it was found that his father was working on the post of Review Officer in the office of Government Advocate in Lucknow High Court and the mother was also in government service and consequently the petitioner was not entitled for being appointed on compassionate grounds. It is during pendency of the present writ petition that this Court had passed an interim order on 12.9.2024 giving liberty to opposite party No.2 to revisit the order . Even after revisiting its previous order, the authority opposite party No.2 was of the view that the petitioner could not have been grant the benefit of compassionate appointment considering the bar of Rule 5 (1) of the Rules of 1974.

6. Learned counsel for the petitioner submits that even if father of the petitioner was employed in Government service it would not be a bar for grant of compassionate appointment to the petitioner. He submits that on the date of death of his mother his father was a government servant but on the date of when the application was given by the petitioner father of the petitioner had retired and submits that only in case father of the petitioner was in active service could the bar created under Rule 5(1) operate against the petitioner for grant of compassionate appointment. He has relied upon the judgment of this Court in the case of ***Sumit Kumar Sharma Vs. Union of India and***

***others, 2021 SCC OnLine All854*** where this Court has held that eligibility condition of an individual have to be considered on the date of considerations of his application. He submits that on the date of submission of his application his father had already superannuated and consequently the rigor of Rule 5 (1) of the Rules of 1974 would not operate against the petitioner.

7. Learned Standing counsel, on the other hand, has opposed the writ petition. He submits that appointment on compassionate grounds is not a routine or regular mode of employment but is granted on contingencies of the fact that the government servant has died during harness and to prevent the dependent family members of the government servant to fall into penury the beneficial piece of rules have been made for granting appointment to such an individual. He submits that accordingly the provisions of the Rules of 1974 are as a measure of exception to the regular recruitment and are supposed to be interpreted in a strict manner with regard to the eligibility of the person who has to be considered for appointment under Dying in Harness Rules. He submits that rule 5 (1) clearly creates a bar for appointment on compassionate ground to a person in such a situation where both the parents are in government employment or employed in a corporation governed or controlled by the government. Accordingly, he has supported the impugned orders passed by opposite party No.2 and prayed for dismissal of the writ petition.

8. This Court has given its anxious considerations to the arguments raised by the petitioner as well as by the Standing counsel.

9. The facts in the present case are not disputed in as much as both the parents of the petitioner were in employment of the State Government and accordingly the issue before this Court in the present controversy is that whether bar under Rule 5(1) of the Rules of 1974 would operate against the petitioner for consideration of grant of compassionate appointment ?

10. From a bare perusal of Rule 5(1) it is clear that wherever the spouse of the deceased government servant employed under Central or State Government or Corporation, owned or controlled by the Central or State Government, he cannot avail of the provisions of compassionate appointment. In the present case, clearly on the date of death which would be relevant date for consideration of the case of the petitioner for grant of compassionate appointment father of the petitioner was employed in the office of Government Advocate of this Court and in such a situation, the petitioner was clearly dis-entitled for being granted the benefit of compassionate appointment.

11. This Court in the case of *Sumit Kumar Sharma* (Supra) was considering the eligibility conditions of the applicant pertaining to age of the applicant for appointment and accordingly it is in those circumstances it was held that individual's application has to be considered and all the eligibility conditions on the date of consideration of the said application. In that case the issue before this Court was as to whether the applicant was over-aged on the date of consideration and it is in those circumstances that this Court was of the view that on the date his application was considered he had exceeded the age prescribed for appointment to the said post. Accordingly, the facts of the said case were distinguishable from the issue in the present as in the present case the case of the

petitioner would be fully guided and controlled by the provisions of Section 5 (1) of the Rules of 1974. Undoubtely, the bar of the aforesaid rule would operate against the petitioner in as much as both of the parents of the petitioner were in government service.

12. It is to be seen that appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointment on merits.The basic premise behind compassionate appointment is the word ?compassion?. It is to be provided when the family of the deceased employee is deprived of the means of livelihood and its object is to enable the family to get over the sudden financial crisis.

13. In the aforementioned case, the mother of the petitioner is also a government servant and thereby the family is not deprived of means of livelihood. The provision of compassionate appointment cannot be misused to see employment under the central government or State government or any corporation owned by them.

14. While dismissing similar petitions, Hon?ble the Apex court has elaborated the purpose of compassionate appointment in various cases which clarifies the object behind such appointments.

15. In ***Director of Education (Secondary) & Anr. vs. Pushpendra Kumar & Ors., reported in (1998) 5 SCC 192***, the Supreme Court has held:

*"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."*

16. In ***Commissioner of Public Instructions & Ors. Vs. K.R. Vishwanath, reported in (2005) 7 SCC 206***, the following principles were laid down by the Supreme Court:

*"...the claim of the person concerned for appointment on compassionate ground is based on the premises that he was dependent on the*

*deceased employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such a claim is considered as reasonable and permissible on the basis of sudden crisis, occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right.....High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments."*

17. Accordingly we do not find any infirmity in the impugned orders dated 24.5.2024 and 6.12.2022. The petition being devoid of merits is **dismissed.**

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**(2024) 10 ILRA 166**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE SAUMITRA DAYAL SINGH, J.**
**THE HON'BLE DONADI RAMESH, J.**

Writ A No. 7743 of 2019

**Justice Vinod Chandra Misra ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Prakash Chandra Shukla, Sri V.K. Singh, Sr. Advocate

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

**A. Service Law – UP St. Law Commission Act, 2010 – Section 4 – UP St. Law Commission (Salaries and Allowances and Conditions of Service of Chairperson) Rules, 2011 – Rules 4, 5 & 14 – Pension – Retired from the post of Chairman of UP St. Law Commission – Entitlement of interest on delayed payment – Held, payment of pension is a statutory right arising from services rendered. That right existed from before. Since there was no conduct offered by the petitioner as may have delayed the computation and payment of higher pension to which he was entitled and since there never existed any legal impediment or doubt in that payment, we find the stand of the St. Government untenable insofar as interest has not been paid on arrears of correct pension computed with delay. The St. must compensate for the loss of time in making the due payment – High Court issued direction to pay interest @ 8%. (Para 22 and 42)**

**B. Service Law – High Court Judges (Salaries and Conditions of Service) Act, 1954 – Sections 2(g), 2(gg) & 17A – Family pension – Entitlement of the spouse of retired Chairman of Law Commission – Held, under the Judges Act and the Judges Rules 'family pension' is included in 'pension' entitlement – 'Pension' payable to a Chairperson of a St. of Law Commission necessarily includes within it the 'family pension' that may become payable to the spouse of such Chairperson, if that contingency arises – Held further, while the petitioner demitted office as a Judge of this High Court, he became entitled to receive and is receiving higher pension than payable to a retired Judge of a High Court by virtue of his having served as a Chairperson of the St. Law Commission, upon application of Section 4(5) of the Act read with Rules 4(5) of the Rules read with the Judges Act and the Judges Rules – Spouse of the petitioner may not be treated differently with respect to the payment of family**

**pension – High Court issued direction to make necessary provision in the Pension Payment Order of the petitioner with respect to the family pension entitlement in favour of the spouse of the petitioner. (Para 33, 35, 38 and 42)**

**C. Interpretation of Statute – Rule of purposive construction – No word of the legislature may be interpreted by Courts as may render the same meaningless or otiose. (Para 27)**

**D. Interpretation of Statute – Literal Rule – Golden rule of construction – Each word and phrase used by the legislature must first be given its natural meaning and that natural meaning must always be given full effect, unless the context may otherwise require. (Para 29)**

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

**List of Cases cited:**

1. Smt. Bhagwanti Vs U.O.I.; (1989) 4 SCC 397

2. Surana Steels (P) Ltd. Vs CIT; (1999) 4 SCC 306: (1999) 237 ITR 777 : 1999 SCC OnLine SC 443

3. Aswini Kumar Ghose Vs Arabinda Bose; (1952) 2 SCC 237

4. Jugalkishore Saraf Vs Raw Cotton Co. Ltd., 1955 SCC OnLine SC 26: (1955) 1 SCR 1369: AIR 1955 SC 376

(Delivered by Hon'ble Saumitra Dayal Singh, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Shri V.K. Singh, learned Senior Advocate assisted by Shri Nand Lal, learned counsel for the petitioner and Ms. Kritika Singh, learned Additional Chief Standing Counsel for the State.

2. Present petition has been filed to assail part of the order dated 15.11.2017 passed by the Principal Secretary, Department of Law, Government of Uttar Pradesh. That order arose on an earlier direction issued by the writ Court in Writ A No.20593 of 2015 decided on 15.04.2015. Therein it was observed as below:-

*"Consequently, in the facts of the case, we proceed to direct the Chief Secretary, Government of U.P. Lucknow to look into the matter and thereafter take appropriate decision in the matter, in accordance with law, preferably within period of next two months from the date of production of certified copy of this order. For the said purpose, Chief Secretary should call all the concerned officials who have a role to play, in the said fixation in question and in respect of other benefits".*

3. While dealing with the representation thus filed, the State Government took an informed decision sanctioning pension equivalent to that payable to a retired Chief Justice of a High Court. That decision is based on the own understanding of the State Government- of Section 4(5) of the Uttar Pradesh State Law Commission Act, 2010 (hereinafter referred to as the Act) read with Rule 5 of the Uttar Pradesh State Law Commission (Salaries and Allowances and Conditions of Service of Chairperson) Rules, 2011 (hereinafter referred to as the Rules).

4. For ready reference Section 4(5) of the Act reads as below:-

*"(5) The allowances and pension, if any payable to, and other conditions of service of the Chairperson or a Full-time Member shall be such as may be prescribed:*

*Provided that in prescribing the salary, allowances and pension payable to*

*and other conditions of service of the Chairperson, regard shall be had to the salary, allowances and pension payable to and other conditions of service, of the Chiet Justice of High Court.*

*Provided further that if the Chairperson or a Full-time Member at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or under the Government of a State, his salary in respect of services as the Chairperson or, a Full-time Member as the case may be, shall be reduced-*

*(a) by the amount of that pension; and*

*(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension; and*

*(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity:*

*Provided also that the salary, allowances and pension, if any, payable to, and other conditions of service of the Chairperson or a Full-time Member shall not be varied to his disadvantage after his appointment."*

5. Also, Rule 4(5) of the Rules, reads as below:-

*"5. Pension shall be admissible to the Chairperson, equivalent to the pension which would be admissible to the Chief Justice of a High Court under the High Court Judges (Salaries and Conditions of Service) Act, 1954 and relevant Rules including Rule 2 of the High Court Judges Rules, 1956 read with the All India Services (Death-cum Retirement Benefits) Rules, 1958, for the period of service rendered as Chairperson, in addition to the pension he may be entitled to, in respect of any previous service under the Central Government or any State Government:*

*Provided that the pension, payable to the Chairperson under this rule together with the amount of pension, including commuted portion of pension, if any, admissible to him under the Central or State Government prior to his appointment in the Commission shall not exceed rupees forty five thousand per mensum or rupees five lac forty thousand per annum as admissible to the Chief Justice of a High Court under para 2.1.1(iii) of the order no. L-11017/IX 2008-Jus., dated May 11, 2009 issued by the Ministry of Law and Justice, Government of India:*

*Provided further that such ceiling shall be subject to further revision according to that applicable to the Chief Justice of High Court from time to time:*

*Provided also such pension shall be payable to the Chairperson if he has put in minimum two years of service in the Commission."*

6. Here, we may also take note of the Rule 14 of the Rules, which reads as below:-

*"14. Other allowances and conditions of service of the Chairperson provisions wherefor have not expressly been made in the Act or these Rules, shall be such as are applicable to the serving Chief Justice of a High Court."*

7. Since much reliance has been placed on the High Court Judges (Salaries and Conditions of Service) Act, 1954 (hereinafter referred to as the Judges Act) and the Rules framed thereunder, we also

consider it proper to take note of Section 2(g) and Section 2 (gg) of the Judges Act. They read as below:-

*"2. ....."*

*(g). 'Judge' means a Judge of a High Court and includes the Chief Justice, [an acting Chief Justice, an additional Judge and an acting Judge of the High Court;*

*(gg). 'Pension' means a pension of any kind whatsoever payable to or in respect of a Judge, and includes any gratuity or other sum or sums so payable by way of death or retirement benefits);]"*

8. Then, Section 17A of the Judges Act, reads as below:-

*"17-A. Family pensions and Gratuities.[(1) Where a Judge who, being in service on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986, dies, whether before or after retirement in circumstances to which Section 17 does not apply, calculated at the rate of [Fifty percent of his salaries plus fifty per cent of his dearness pay's] on the date of his death shall be payable to the person or persons entitled thereto and the amount so payable shall be paid from the day following the date of death of the Judge for a period of seven years or for a period up to the date on which the Judge would have attained the age of Sixty Five Years, had he survived, whichever is earlier, [and thereafter at the rate of thirty per cent of his salary]*

*[Provided that in no case the amount of family pension calculated under this sub-section shall exceed the pension payable to the judge under this Act.]*

*Explanation- For the purposes of determining the person or persons entitled to family pension under this sub-section,-*

*(i) in relation to a Judge who elects or is eligible to receive pension under Part-I of the First Schedule, the rules, notifications and orders for the time being in force with regard to the person or persons entitled to family pension in relation to an officer of the Central Civil Services, Group-A, shall apply;*

*(ii) in relation to a judge who elects to receive pension under Part-III of the First Schedule, the ordinary rules of his service if he had not been appointed a Judge with respect to person or persons entitled to family pension shall apply and his service as a Judge being treated as service therein."*

*[2] Where any Judge, who has elected to receive the pension payable to him under Part-III of the First Schedule, retires, or dies in circumstances to which Section 17 does not apply, gratuity, if any, shall be payable to the person or persons, entitled thereto under the ordinary rules of his service if he had not been appointed a Judge, his service as a Judge being treated as service therein for the purpose of calculating that gratuity.]*

*(3) The rules, notifications and orders for the time being in force with respect to the grant of death-cum-retirement gratuity benefit to or in relation to an officer of the Central Civil Services Class I (including the provisions relating to deduction from pension for the purpose) shall apply to or in relation to the grant of death-cum-retirement gratuity benefit to or in relation to a Judge who being in service on or after the Ist day of October, 1974, retires or dies in circumstances to which Section 17 does not apply, subject to the modifications that-*

*(i) the minimum qualifying service for the purpose of entitlement to the gratuity shall be two years and six months;*

*(ii) the amount of gratuity shall be calculated on the basis of [twenty days] salary for [each completed six months period] of service as Judge;*

*Explanation.- In [sub-section 3] the expression 'Judge' has the same meaning as in Section 14."*

9. It is in that statutory context that the impugned decision has been made by the State Government. It has accepted the base contention of the petitioner that he is entitled to be paid pension equivalent to that payable to a retired Chief Justice of a High Court. However, no interest has been paid on the arrears of such pension paid under the impugned order. The further claim of the petitioner that his spouse may remain entitled to claim 'family pension' equivalent to that payable to a spouse of a retired Chief Justice of a High Court, should that need arise, has been rejected on the following reasoning contained in the impugned order:-

*" चूँकि उत्तर प्रदेश राज्य विधि आयोग (अध्यक्ष के वेतन भत्ते और सेवा की शर्त) नियमावली, 2011 में पारिवारिक पेंशन की कोई व्यवस्था नहीं है और मा०उच्च त्यायालय द्वारा श्री मिश्र को पारिवारिक पेंशन की अनुमन्यता के सम्बन्ध में कोई आदेश भी पारित नहीं किये गये हैं, के दृष्टिगत उक्त पेंशन भुगतान आदेश दिनांक 15-06-2015 में पारिवारिक पेशन की धनराशि का उल्लेख किये जाने का कोई औचित्य नहीं है, क्योंकि उन्हें पारिवारिक पेंशन नियमानुसार अनुमन्य नहीं है। "*

10. Thus the present petition has been filed seeking two reliefs:-

(i) the petitioner be awarded interest on the delayed computation and payment of entitled pension.

(ii) direction be issued to command the respondent to make necessary provision to pay 'family pension' to the spouse of the petitioner at the rate at which such pension may be payable to a spouse of a retired Chief Justice of a High Court, should that eventuality arise.

11. Briefly, the facts giving rise to the present petition are that the petitioner demitted office as a Judge of this Court on 29.01.2008. On 30.01.2008 he was appointed as Chairman of State U.P. Law Commission. At that time, the Act and the Rules had not been framed. However, it is a fact that the Act was enforced in the year 2010 and the Rules were enforced in the year 2011. On 11.09.2012, after serving for almost five years as Chairman of the U.P. State Law Commission, the petitioner demitted office.

12. At that stage, the petitioner claimed pension entitlement in terms of the Act and the Rules. However, the State Government rejected his claim. That led to the filing of Writ A No.20593 of 2015 (noted above). Upon certain directions being issued in that writ petition, first, pension was sanctioned on 27.07.2015. The arrears were computed and paid thereafter. It is an admitted case between the parties, since then the petitioner is being paid pension equivalent to that payable to a retired Chief Justice of a High Court. The

only dispute in that regard is non-payment of interest.

13. Though the petitioner demitted office as Chairman of State Law Commission on 11.09.2012, the pension claimed was first approved by the State Government by means of the impugned order, almost four years thereafter on 27.05.2015. Hence, the petitioner claims entitlement to interest on that delayed payment. According to learned Senior Counsel for the petitioner, no legal impediment ever existed as may justify the delay in computation and payment of correct pension. Interest being accretion on capital, normally, the State must compensate the petitioner by paying appropriate interest for delay caused by its inaction in payment of pension earned by the petitioner.

14. As to the entitlement of 'family pension' being claimed by the petitioner, that claim has been declined by the State Government by the impugned order. Referring to Section 4(5) of the Act read with Rule 4(5) of the Rules read with Section 2(g) and 2(gg) of the Judges Act read with Section 17A of the Judges Act, it has been vehemently urged that the spouse of the petitioner would be fully entitled to 'family pension', should that eventuality arise. The phrases "pension of any kind", "payable to or in respect of a Judge" and "other sum or sums so payable by way of death or retirement benefits" appearing in Section 2(gg) of the Judges Act clearly include 'family pension' (provided under Section 17A of the Judges Act). They leave no doubt that 'family pension' provided under Section 17A of the Judges Act is included within the meaning of that term defined under Section 2(gg) of the Judges Act.

15. By virtue of that inclusion of 'family pension' as a type of pension and the phrase "payable to a Judge or in respect of a Judge", necessarily, 'family pension' is a pension payable arising from the status of the petitioner as a former Chairperson of the State Law Commission, by virtue of the express provision of Rule 4(5) of the Rules.

16. Alternatively, learned Senior Counsel for the petitioner has also referred to Rule 14 of the Rules to submit that in any case 'family pension' being an allowance or part of the conditions of service of a Chief Justice of a High Court, the same would necessarily apply to a Chairperson of the State Law Commission. Even though, it ('family pension') may not have been expressly provided for under the Rules, that right exists on the strength of legislation by reference.

17. On principle, the above submission have been bolstered on the strength of a decision of the Supreme Court in **Smt. Bhagwanti Vs. Union of India (1989) 4 SCC 397,** wherein, it has been observed as below :-

*"9. Pension is payable, as pointed out in several judgments of this Court, on the consideration of past service rendered by the government servant. Payability of the family pension is basically on the selfsame consideration. Since pension is linked with past service and the avowed purpose of the Pension Rules is to provide sustenance in old age, distinction between marriage during service and marriage after retirement appears to be indeed arbitrary."*

18. On the other hand, learned Additional Chief Standing Counsel states that there is no specific provision for payment of 'family pension', either under

the Act or the Rules. Specifically, Section 4(5) of the Act and Rule 4(5) of the Rules do not provide for 'family pension'. Insofar as the Act and the Rules only provide for payment of pension to the Chairperson, that compliance has been made. No further entitlement exists in favour of the petitioner or his spouse to claim 'family pension' either under the Act or the Rules, in any circumstances.

19. Second, it has been objected 'family pension' can only be granted under one rule i.e. the Judges Rules. Therefore, the entitlement of 'family pension' being claimed by the petitioner may arise only in terms of the Judges Rules and not other Rules. Those Rules do not provide for 'family pension' to be paid to the spouse of a retired Chairperson of the State Law Commission. Here, it has been further submitted that under the general Rules governing employees of the State Government, the entitlement of 'family pension' may arise only to families of employees who may have served at least for 10 years. Since the petitioner never served for that duration of time, the claim of 'family pension' is wholly unfounded. According to the State-respondents, the petitioner had served on the post of Chairperson of State Law Commission for a period of less than two years from the date of enforcement of the Act. Therefore, he may never claim entitlement to 'family pension'. At the same time, on query made, learned Additional Chief Standing Counsel could not dispute the fact that the petitioner is being paid pension in respect to service rendered as a Chairperson of the State Law Commission.

20. Since 'family pension' is described to be a separate right conferred under a separate statute, the petitioner is not entitled to raise such claim in absence of that statutory right either under the Act or the Rules or any other Rule applicable to State employees.

21. As to claim made for payment of interest on delayed payment of due pension, it has been contended, the delay was bonafide. Payment has been made in compliance to the judicial order passed in that regard. Therefore, no claim of interest may arise.

22. Having heard learned counsel for the parties and having perused the record, in the first place, it cannot be denied that there is statutory provision contained under the Act or the Rules to provide for payment of pension to a retired Chairperson of the State Law Commission. Specifically and directly, the Act and the Rules provide for payment of pension. Whereas the petitioner demitted office on 11.09.2012, that pension is being paid to the petitioner since the decision was taken in that regard by the State Government, after more than two years on 27.05.2015. It has been computed equivalent to the pension payable to a retired Chief Justice of a High Court. The only dispute surviving in that regard is with respect to computation of interest. Insofar as the statute was never in doubt and insofar as the State Government has itself reached a conclusion that the petitioner was entitled to payment of higher pension equivalent to that payable to a retired Chief Justice of a High Court, we find, no reason why interest may not be paid on the arrears amount of pension. The judicial decision referred to by the learned Additional Chief Standing Counsel was not a decision adjudicating that right. Rather, it was an order requiring the State Government to take a decision in that regard that the State Government was otherwise obligated to

make. Payment of pension is a statutory right arising from services rendered. That right existed from before. Since there was no conduct offered by the petitioner as may have delayed the computation and payment of higher pension to which he was entitled and since there never existed any legal impediment or doubt in that payment, we find the stand of the State Government untenable insofar as interest has not been paid on arrears of correct pension computed with delay. The State must compensate for the loss of time in making the due payment.

23. As to the entitlement of 'family pension', though the Act and the Rules do not make a specific/ direct provision for payment of 'family pension', at the same time provision of Rule 4(5) of the Rules. It clearly provides that the pension admissible to a Chairperson shall be equivalent to the pension admissible to the Chief Justice of a High Court under the Judges Act read with the Judges Rules. Therefore, it is not open to the State-respondent to contend that for the purpose of examination of entitlement to pension we may look at the Judges Act and the Judges Rules but for determining the entitlement to 'family pension', we may not look at the Judges Act or the Judges Rules.

24. That reasoning would be self conflicted. Once the State admits, that for the purpose of pension payable to the petitioner the Judges Act and the Judges Rules are applicable and therefore the petitioner is entitled to higher pension equivalent to that payable to a retired Chief Justice of a High Court, there is no inherent reason or logic to not read the Judges Act and the Judges Rules for the purpose of determining the entitlement to 'family pension'. Once the legislation by reference made under the Judges Act and the Judges Rules and the provisions thereof are applicable to the petitioner for the purpose of payment of pension, we must necessarily look at the provision of the Judges Act and the Judges Rules to decide the issue of entitlement of 'family pension' as well.

25. In **Surana Steels (P) Ltd. v. CIT, (1999) 4 SCC 306: (1999) 237 ITR 777 1999 SCC OnLine SC 443**, it has been observed as under:-

*"11. Section 115-J explanation clause (iv), is a piece of legislation by incorporation. Dealing with the subject, Justice G.P. Singh states in Principles of Statutory Interpretation (7th Edn., 1999)?*

*"Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it'. The effect of incorporation is admirably stated by Lord Esher, M.R.: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it.' (p. 233)."*

26. Specifically, extracted above, by virtue of Section 2(gg) of the Judges Act, pension includes within the meaning of that term (i) "pension of any kind", (ii) "pension payable to or in respect of a Judge" and (iii) "other sum or sums" so payable by way of death or retirement benefits. Thus, for the

purpose of the Judges Act, there can be no doubt that 'family pension' (provided under Section 17A of the Judges Act) is a variety of pension contemplated under that Act.

27. No counter implication may ever arise in view of that definition clause. It is so, because, if the 'family pension' were to be excluded from the scope of the definition of the term 'pension' under Section 2(gg) of the Act and 'pension' were to be restricted to any amount payable to a retired Judge during his lifetime alone and if it were to be read to exclude any amount payable thereafter, the words "of any kind", "in respect of a Judge" and the words "other sum or sums" payable by way of death appearing in that definition clause would be rendered otiose. It is a settled principle in interpretation of statutes that no word of the legislature may be interpreted by Courts as may render the same meaningless or otiose.

28. In **Aswini Kumar Ghose v. Arabinda Bose, (1952) 2 SCC 237**, it has been observed as below:-

*"26. Much ado was made on both sides about the comma occurring just before the word "or" in the non obstante clause, the petitioner stressing its importance as showing that the adjectival clause "regulating the conditions, etc." does not qualify the words "Indian Bar Councils Act" which are separated by the comma and that, therefore, the whole of that Act is superseded, while the learned counsel for the respondents insisted that in construing a statute, punctuation marks should be left out of consideration. Nothing much, we think, turns on the comma, as it seems grammatically more correct to take the adjectival clause as qualifying "law". Having regard to the words "anything contained" and the preposition "in" used after the disjunctive "or", the qualifying clause cannot reach back to the words "Bar Councils Act". But, whichever way we take it, it must be admitted that, in framing the non obstante clause, the draftsman had primarily in mind those provisions which stood in the way of an Advocate not enrolled in any particular High Court practising in that Court. It does not, however, necessarily follow that Section 2 is concerned only with the right of Advocates of the Supreme Court to practise in the High Courts in which they are not enrolled. The true scope of the enacting clause must, as we have observed, be determined on a fair reading of the words used in their natural and ordinary meaning, and in the present case, there is not much room for doubt on the point. The words "every Advocate" and "whether or not he is an Advocate of that High Court" make it plain that the section was designed to apply to the Advocates of the Supreme Court not only in relation to the High Courts of which they are not Advocates but also in relation to those High Courts in which they have been already enrolled. The learned Judges below dismissed the words "whether or not, etc." with the remark that "they are not very apposite", as "no one who is an Advocate of a particular High Court requires to be an advocate of the Supreme Court in order to practise in that Court". While it may be true to say that Section 2 does not give Advocates of many of the High Courts any additional right in relation to their own courts, it would, according to the petitioner's contention, give at least to the Advocates of the Calcutta and Bombay High Courts some additional right in the Original Side of those Courts, and that may well have been the purpose of using those words. It is not a sound principle of construction to brush*

*aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."*
*(emphasis supplied)*

29. On the contrary each word and phrase used by the legislature must first be given its natural meaning and that natural meaning must always be given full effect, unless the context may otherwise require.

30. In **Jugalkishore Saraf v. Raw Cotton Co. Ltd., 1955 SCC OnLine SC 26: (1955) 1 SCR 1369: AIR 1955 SC 376**, the Hon'ble Supreme Court has observed as under:-

*"6. ..... The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation. In the present case a literal construction of the rule leads to no apparent absurdity and, therefore, there can be no compelling reason for departing from that golden rule of construction....."*

31. Here, by virtue of Section 17A of the Judges Act, specifically 'family pension' has been provided under that Act. Therefore there can never arise any argument of any contrary intention expressed under the Judges Act vis a vis the entitlement of the spouse of a Judge of a High Court to receive 'family pension' being 'pension'. Thus, it has to be recognized that 'family pension' payable to a Judge of a High Court is a variety of pension payable to a Judge that being pension of a 'kind' of pension payable "with respect of a Judge" and may ever otherwise be included as "other sum" "payable by way of death benefit" to the surviving entitled heir of a person who may have served as a Judge of a High Court.

32. Once that is recognized, what survives for our consideration is whether by virtue of the provision of the Act and the Rules that entitlement would extend to a Chairperson of the State Law Commission. Here, we note that the term "pension" is not defined either under the Act or the Rules. Section 4(5) only provides that allowances and pension payable to a Chairperson shall be as may be prescribed. The first proviso thereto itself makes clear that in fixing the salary allowances and pension payable to a Chairperson of State Law Commission regard shall be had to salary allowances pension payable to and other conditions of service of the Chief Justice of a High Court. At the same time, the Rule 4(5) of the Rules clearly prescribes that the pension admissible to a Chairperson of a State Law Commission shall be 'equivalent' to the pension which would be admissible to the Chief Justice of a High Court under the High Court Judges (Salaries and Conditions of Service) Act, 1954 and the relevant Rules including Rule 2 of the High Court Judges Rules, 1956.

33. Therefore the prescription made under the Rules necessarily adopts the entitlement, the method of computation and payment of pension admissible to a retired Chairperson of the State Law Commission- as provided to a Chief Justice of a High Court in terms of the Judges Act and the Judges Rules. As noted above, under the Judges Act and the Judges Rules 'family

pension' is included in 'pension' entitlement. For that reason the payment of 'family pension' to the spouse of a retired Chairperson of the State Law Commission would remain included in the 'pension' admissible to a retired Chairperson of the State Law Commission.

34. If there may exist any doubt, the same stands cured by the express provision of Rule 14 of the Rules. Thus, if for any reason it were to be considered that 'family pension' payable to the spouse of a Chairperson of a State Law Commission may not be included in the term "pension payable to a Chairperson", then in that case, by virtue of all other allowances and conditions of service of the current Chief Justice of a High Court being applicable to the Chairperson of State Law Commission, by necessary implication, on that (second) legislation by reference made all allowances and conditions of service as may come to be conferred to a serving Chief Justice of a High Court would become applicable to a Chairperson of the State Law Commission as well. Insofar as there is no doubt that the spouse of Chief Justice of a High Court remains entitled to a family pension, where that contingency arises, there is no available reason to deny that parity to the spouse of a Chairperson of the State Law Commission either. To accept the objection being raised by the State would be to curtail the plain effect of law arising from legislation by reference made both under Rule (4)5 of the Rules and Rule 14 of the Rules.

35. Thus in our view, in the first place 'pension' payable to a Chairperson of a State of Law Commission necessarily includes within it the 'family pension' that may become payable to the spouse of such Chairperson, if that contingency arises. Alternatively, even if 'family pension' were not included in the term 'pension' payable to the Chairperson of the State Law Commission, that entitlement would arise by virtue of Rule 14 of the Rules read with the Judges Act and the Judges Rules.

36. Therefore, the fact that there exists no specific/ direct provision in the Act and the Rules itself to provide for family pension to the spouse of a retired Chairperson of the State Law Commission is of no consequence. By virtue of legislation by reference made both under Rule 4(5) of the Rules and Rule 14 of the Rules, the objection being raised by the State is of no consequence.

37. The further objection that there can be only one rule for grant of 'family pension' is misconceived and it cannot be accepted. Though on principle it may not be denied that 'family pension' is not to be paid twice, yet that statutory protection exists in Rule 4(5) itself, under the proviso thereto. Once we have found that 'family pension' was included in the pension payable to the Chairperson of the State Law Commission under Section 4(5) of the Act read with Rule 4(5) of the Rules and in any case that entitlement arises by virtue of Rule 14 of the Rules read with Judges Act and the Judges Rules, it cannot be gain said that there exists no rule for payment of that 'family pension', should that contingency arise. In that event, the spouse of the petitioner may only claim 'family pension' equivalent to that payable to the spouse of a Chief Judge of the High Court. Here, we note the State does not object to computation and payment of pension to the petitioner equivalent to that payable to a retired Chief Justice of a High Court as provided under the Act and the Rules read with the Judges Act and the Judges Rules.

38. Thus, while the petitioner demitted office as a Judge of this High Court, he became entitled to receive and is receiving higher pension than payable to a retired Judge of a High Court by virtue of his having served as a Chairperson of the State Law Commission, upon application of Section 4(5) of the Act read with Rules 4(5) of the Rules read with the Judges Act and the Judges Rules. For reasons noted above we find no reason why the spouse of the petitioner, may be treated differently, with respect to the payment of family pension, should that eventuality arise.

39. As to the reference made by the learned Additional Chief Standing Counsel to State Rules that provide for qualifying service of ten years for payment of 'family pension', we find that objection raised is wholly mis-conceived. In face of the specific statutory provision of the Act and the Rules read with the Judges Act and the Judges Rules and in view of our reasoning noted above, the entitlement to pension and 'family pension' being claimed in the present facts has no dependence on the general provisions made by the State Government for its other employees. In face of specific provision under the Act and the Rules providing for entitlement to full pension as a Chairperson of the State Law Commission- equivalent to pension payable to a retired Chief Justice of a High Court, upon completion of two years of service as Chairperson of the State Law Commission, the general rule/ principle of qualifying service of ten years has no application. No provision has been shown to us either under the Act or the Rules or otherwise as may allow us to consider that objection any further. In short, that objection has no legs to stand. It is wholly imaginary and unreal.

40. As to the further objection that the petitioner did not complete two years of service as a Chairperson of the State Law Commission and that the State Law Commission itself was abolished by the State Government, we find absolutely no merit in the same. In the first place, the petitioner did serve for the length much more than two years and second, the objection is not available to the State in view of its admission that higher pension is being paid to the petitioner equivalent to that payable to a retired Chief Justice of a High Court as he was found entitled to it.

41. As to the further objection that the petitioner may never be entitled to claim two pensions, that case does not exist. The petitioner has never claimed two pensions. He is only receiving the differential amount of higher pension (from the State) on the principle of equivalence with a retired Chief Justice of a High Court. Same principle would govern the payment of higher 'family pension', should that contingency arise. That statutory protection is available under Rule 4(5) of the Rules, itself.

42. In view of the above, the impugned order is set aside, to the extent it denies the claim of family pension to the spouse of the petitioner. Respondent nos. 2 and 3 are directed to make necessary provision in the Pension Payment Order of the petitioner with respect to the family pension entitlement- in favour of the spouse of the petitioner in terms of the above. Also, we provide that the interest be paid to the petitioner @ 8% for the delay in computation and payment of the differential/ higher pension to the petitioner commensurate to the pension payable to a retired Chief of the High Court, from the date 11.09.2012 to date of actual payment of the differential amount. That payment may be paid within a period of three months from today.

43. Accordingly, the present writ petition is **allowed as above**. No order as to costs.

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**(2024) 10 ILRA 178**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2024**

**BEFORE**

**THE HON'BLE MRS. SANGEETA CHANDRA, J.**
**THE HON'BLE BRIJ RAJ SINGH, J.**

Writ C No. 8606 of 2024

**M/s Theme Engg. Services Pvt. Ltd. ...Petitioner**
**Versus**
**National Highway Authority of India & Anr. ...Respondents**

**Counsel for the Petitioner:**
Geetika Yadav, Anshuman Singh, Ashok Kumar Singh, Nishcay Anand

**Counsel for the Respondents:**
Samidha, Sarvesh Kumar Dubey

**(A) Contract Law - Debarment in tender process - Request for Proposal (RFP) - Clauses 10.4, 10.5 - Blacklisting and debarment - Tender evaluation - Proportionality of penalty - Debarment is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission - It is for the State or the appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case - Debarment is never permanent and the period of Debarment would invariably depend upon the nature of the offence committed by the contractor. (Para -38,39)**

Petitioner challenged the debarment order – Allegations - incorrect financial proposal - citing calculation errors by the Tender Evaluation Committee - bid was as submitted and denied calculation errors - Petitioner requested upward correction of its bid after being declared H1, which was denied, citing RFP rules.(Para - 2 to 30)

**HELD: -** Respondents' actions were within the scope of RFP clauses, and the petitioner was found non-compliant. Six-month debarment was deemed reasonable. (Para - 40,44 ,45)

**Petition dismissed.** (E-7)

**List of Cases cited:**

1. Oryx fisheries Pvt. Ltd. Vs U.O.I., 2010 (13) SCC 427

2. Siemens Ltd Vs St. of Maha., 2006 (12) SCC 33

3. M/S BCITS Pvt. Ltd Vs P.V.V.N.L.Ltd, Writ-C No.15363 of 2022

4. Ramlala Vs St. of U.P, Writ-C No.31059 of 2023

5. M/S Pooja Jaiswal Vs F.C.I., Writ-C No. 1349 of 2023

6. VetIndia Pharmaceuticals Ltd. Vs St. of U.P., 2021 (1) SCC 804

7. S.E.C. Ltd Vs S Kumar`s Associates AKM (JV), 2021 (9) SCC 166.

8. UMC Technologies Pvt. Ltd Vs F.C.I. & ors., 2021 (2) SCC 551

9. Gorkha Security Services Vs Govt. of NCT of Delhi, 2014 (9) SCC 731

10. St. of Punj. Vs Davinder Pal Singh Bhullar, 2011 (14) SCC 770

11. St. of Odisha & ors. Vs Panda Infraproject Ltd., 2022 (4) SCC 393

12. Erusian Equipment & Chemicals Ltd Vs St. of W.B. & anr., 1975 (1) SCC 70

13. Grosons Pharmaceuticals Pvt Ltd Vs St. of U.P., 2001 (8) SCC 604

14. Kulja Industries Ltd. Vs C.G.M., Western Telecom Project, BSNL & ors., 2014 (14) SCC 731

15. BTL EPC Ltd. Vs Macawber Beekay Pvt Ltd & ors. , 2023 SCC OnLine SC 1223

16. Tata Motors Ltd. Vs Brihan Mumbai Electric Supply & Transport (BEST) & ors., 2023 SCC OnLine Supreme Court 671

17. Michigan Rubber (India) Ltd. Vs St. of Karn., 2012 (8) SCC 216

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Brij Raj Singh, J.)

1. We have heard Sri Prashant Chandra, learned Senior Advocate assisted by Sri Anshuman Singh and Ms. Geetika Yadav, Advocates, for the petitioners and Sri Sanjay Bhasin, learned Senior Advocate, assisted by Sri Sarvesh Kumar Dubey, learned counsel for the respondents.

2. This Writ Petition, namely, Writ-C No. 8606 of 2024 has been filed by the petitioner arraying the National Highways Authority of India through its Chairman as the respondent No.1, and the Regional Officer, National Highways Authority of India, as the respondent no.2. The petitioner has challenged its debarment order dated 26.09.2024 and prayed for a mandamus to be issued to the respondents not to treat the petitioner as debarred from participating in future tenders and to allow it to participate in forthcoming tenders ignoring the impugned order dated 26.09.2024.

3. The brief facts of the case as disclosed in the writ petition and as argued by learned counsel for the petitioners are:-

A Notice Inviting e-Tender for commissioning of an Independent Engineering Service to supervise the operation and maintenance of 100.840 kms of six lanning of NH-24 from Hapur Bypass to Moradabad Section was uploaded on the website of N.H.A.I. on 23.12.2023. The Notice Inviting Tender is hereinafter referred to as "Request For Proposal (RFP)". The last date for receiving queries was 07.01.2024. A pre-Bid meeting at a specified venue was to be held on 27.01.2024. The N.H.A.I. was to respond to the queries latest by 30.01.2024. The Technical bid and the Financial bids had to be uploaded with effect from 0000 hrs 06.02.2024 up to 1100 hrs. The opening of the Technical Bids was to be done on 07.02.2024 at 11 AM, and 5 bidders having highest number of technical points were to be shortlisted for opening of Financial bids. It is the case of the petitioner that it downloaded the RFP and participated in the pre bid meeting and submitted its Technical and Financial bid before 06.02.2024 in the format downloaded from the web portal, omitting to notice that a corrigendum was issued on 05.02.2024. It has been alleged that the firms which had been provided with the RFP were required to only fill up specific columns containing per item rate in Appendix-C to Section 5 of the RFP. The final calculation was to be done by the Tender Evaluation Committee on the basis of information submitted by the bidder. The Tender Evaluation Committee instead of adding Rs.1.39 crores mentioned by the petitioner in its financial bid against the column of Supporting Staff, added only Rs.7.80 lakhs which was with regard to salary of an Office boy. In view of this error of calculation committed by the Tender Evaluation Committee, instead of a total of Rs.6.08 crores, the financial bid was calculated at Rs.4.76 crores. As a

significant part of expenditure on supporting staff had been omitted to be taken into consideration, the bid of Rs.4.76 crores was found to be the lowest and without further reference to the petitioner, the said financial proposal was forwarded to the Competent Authority for approval for award of tender. With the approval of the Competent Authority, a Letter of Acceptance was issued on 09.05.2024 by the respondent no.2. By the said letter the petitioner was required to confirm the availability of all key personnel and to accept, sign and return the duplicate Letter of Acceptance in acknowledgment thereof within seven days of issuance of such letter. It was also requested to furnish an unconditional Bank Guarantee from a nationalized bank for an amount equivalent to 3% of the total contract value, being Rs.14,30,099/- within 15 days from the date of issuance of the Letter of Acceptance.

4. It has been argued by Sri Prashant Chandra that in view of the timelines indicated in the Letter of Acceptance, it is clear that submission of Bank guarantee was to follow a formal acknowledgment by signing of the Letter of Acceptance. This Letter of Acceptance further stipulated that upon submission of required performance guarantee and finalization of interview of key personnel by an expert committee, a contract agreement would be required to be signed. In case the Letter of Acceptance was not signed and returned within seven days, none of the conditions following the acceptance of the LoA would be required to be complied with by the bidder. It has been argued that a perusal of the RFP would also clarify that it is only after acceptance of LoA as provided in Clause 7, that the subsequent Clauses 8, 9 and 10 would come into play, which provide the procedure after acceptance of LoA and after submission of bank guarantee and execution of agreement. The RFP is not an agreement between the parties; nor it is an offer to the bidders, and as such contractual relationship will not come into existence between the respondent and the bidder. Only after the acceptance of the LoA and the execution of agreement and completion of other formalities such as submission of bank guarantee and interview of key personnel could it be said that there was a contract.

5. It has further been argued that the petitioner upon receipt of the LoA on 09.05.2024, responded by its letter dated 17.05.2024, indicating that the rates submitted by the petitioner as per the format given in the downloaded file would work out to Rs.6.08 crores and not Rs.4.76 crores which had been mentioned in the LoA. Request was made to revise the Letter of Acceptance and incorporate the corrections in the calculations. The respondent issued a Show Cause Notice on 03.06.2024, even without the LoA having been accepted and any contract having been signed between the parties. In such Show Cause Notice, it was alleged that the petitioner had not returned the LoA as acknowledgment of the award of work within seven days and had also failed to furnish performance guarantee. Reference was made to paragraph 3.1 of Section 2 of the RFP and it was emphasized that the proposal had to be submitted in two parts using the format enclosed with the tender. The petitioners Financial proposal had to be submitted strictly in accordance with the format attached in Section 5, and no additional items/quantities should be proposed by the consultant and in case they are, the same shall not be considered for evaluation/award. The Show Cause Notice

dated 03.06.2024, further stated, that the petitioners financial proposal was duly considered and it was found that the petitioner had offered to work as independent engineering consultant for a sum of Rs.4.76 crores and upwards revision of financial proposal after determination of H1 cannot be made. In case the financial proposal of the petitioner is allowed to be treated as Rs.6.08 crores then the petitioner would not be adjudged as H1. The Notice directed the petitioner to provide performance security in terms of Clause 10.4 of the RFP and acknowledge the LoA, failing which action was proposed to be taken under Clause 10.5 and other relevant provisions of the RFP. Also, the N.H.A.I. had reserved its right to claim damages and realise any dues/losses and take such other remedies as were available under the applicable laws, against the petitioner's consultancy service.

6. It has been argued by the learned Senior Counsel for the petitioner that a perusal of the Show Cause Notice dated 03.06.2024 would show that the Authority had already taken a decision that the petitioners financial proposal was for a sum of Rs.4.76 crores and the petitioner could not be permitted to alter the same. It was also clear that the Authority considered the petitioner to have breached the conditions of the agreement which infact had not been entered into at all and had not been executed between the parties till the date of filing of the petition. The action proposed to be taken was under Clause 10.5 of the RFP regarding deeming of the withdrawal of the LoA by mutual consent and for debarring of the petitioner for a period of up to 2 years was unwarranted.

7. It has further been argued that in response to the Show Cause Notice, the petitioner replied on 08.06.2024, that there was a calculation error and an incorrect amount of Rs.4.76 crores had been taken as financial proposal of the petitioner instead of Rs.6.08 crores. As such, the LoA needed revision. It was also pointed out that corrigenda dated 05.02.2024 was not noticed by the petitioner and it had uploaded the financial proposal on 06.02.2024 in accordance with the format annexed to Section 5 of the RFP. A request was made to withdraw the Show Cause Notice, dated 03.06.2024. However, the N.H.A.I. refused to respond for nearly three weeks and a second Show Cause Notice dated 28.06.2024 was issued. It was reiterated that the financial proposal of the petitioner had been found to be of Rs.4.76 crores, and it had been accepted as H1 only on the basis of such proposal. The petitioner was informed that it was required by the LoA to sign and return the LoA in duplicate within seven days and to submit an unconditional Bank guarantee within 15 days of its issuance. Since the petitioner did not sign and return the LoA dated 09.05.2024 within seven days and failed to furnish performance guarantee within 15 days, action under Clause 10.5 of the RFP and other relevant provisions of the RFP were proposed to be taken against the petitioner including Debarment from future projects of the N.H.A.I., for a period of up to 2 years. The financial proposal had been read by the Tender Evaluation Committee and approved by the Competent Authority and it could not be altered as the petitioner would not then be adjudged as H1 bidder.

8. It has been argued that a perusal of the Show Cause Notice dated 28.06.2024 indicates that a firm decision had already been taken by the Authority. However, the petitioner was called upon to appear on 10.07.2024 before the respondent no.2 for

personal hearing. On 10.07.2024, the representatives of the petitioner, during the course of personal hearing demonstrated that a mistake had been committed by the Tender Evaluation Committee in calculating the rates given by the petitioner in its financial proposal, and the petitioner was only requesting for correction of the error in calculation which had occurred on the part of the Authority, and was not requesting for a revision of rates. The petitioner was told that in case a revision is undertaken, the entire tender will have to be reconsidered. It might mean that the petitioner will not be adjudged the successful bidder and the decision may have to be altered. The petitioner agreed that recalculation for the purpose of correcting the error may be done and in the process if the tender is to be re-evaluated, the petitioner gave his consent. The said consent was given in writing the very next day on 11.07.2024. After submission of consent for re-evaluating of the tender, another letter was sent by the petitioner on 13.07.2024, in which it detailed as to how the Tender Evaluation Committee had erred in calculating the financial proposal and it was again requested that in case any further clarification is required, the petitioner was ready to appear in person and explain. The petitioner pointed out that the bidder is required to submit its rates in Appendix C-3 and thereupon Appendix C-2, summary of costs is calculated automatically by the portal and thereafter evaluated by the Tender Evaluation Committee. The error in calculation was on the part of the Tender Evaluation Committee. However, a third Show Cause Notice was issued to the petitioner on 26.07.2024 rejecting the request of the petitioner to correct the financial proposal from Rs.4.76 crores to Rs.6.08 crores. It was reiterated that the Authority had not committed any error in its calculation, which was in accordance with the format which was uploaded in corrigendum.

9. It has been argued that it is apparent even from the earlier Show Cause Notices dated 03.06.2024 and 28.06.2024, that a firm decision had already been taken and the Show Cause Notice dated 26.07.2024, reiterated such decision. Moreover, a fresh ground was taken that all other bidders had submitted their financial proposal in the excel sheet provided through corrigendum uploaded on 05.02.2024 on the portal and that the petitioner had chosen to offer the financial proposal amounting to Rs.4.76 crores only to win the contract as H1 Bidder. The request of the petitioner by its letter dated 13.07.2024 for a personal hearing to explain the error in calculation was also granted and it was called for personal hearing on 31.07.2024. The notice dated 26.07.2024 did not indicate that the petitioner could be debarred or blacklisted. The Show Cause Notice dated 26.07.2024, only stated that action was proposed "without prejudice to the Authority to claim damages and/or realise any dues, losses or damages, or to exercise any other remedy from successful bidders, jointly and severally, which are available under RFP and the applicable laws."

10. It has further been argued by the counsel for the petitioner that during the course of personal hearing on 31.07.2024, it was impressed upon the petitioner's representative that since the rates of the petitioner were calculated by the Tender Evaluation Committee and Rs.4.76 crores had been submitted before the Competent Authority and had also been approved, the officers involved in miscalculation would be embarrassed. The petitioner's representatives were requested to agree to

execute the work at the price calculated by the Tender Evaluation Committee. In view of the long-standing relationship of the petitioner with the respondents, the petitioner even at the cost of suffering losses in order to retain goodwill it had earned over the years, agreed to execute the works at a loss, and within a week thereafter submitted a performance guarantee of Rs.14.30 lakhs and accepted the LoA on 05.08.2024. The petitioner requested for fixing a date for signing of the agreement which request has not been considered and instead a debarment order has been issued after about two months of the issuance of the third Show Cause Notice dated 26.07.2024, and despite the petitioner having submitted the performance guarantee on 05.08.2024. The impugned order dated 26.09.2024 has been issued debarring the petitioner for a period of six months. It has been argued that before doing so, the petitioner was not put to notice and no opportunity of hearing was afforded. It has been argued that reliance was placed on earlier Show Cause Notices which had passed into oblivion and which had recorded that the petitioner had failed to submit the performance security in the form of bank guarantee, but thereafter the performance guarantee was submitted on 05.08.2024, and was accepted and retained by the respondents.

11. It has been argued that the order dated 26.09.2024 is unsustainable as it in the teeth of provisions of Clauses 10.4 and 10.5 of the RFP, which provisions can be invoked in case of breach of an agreement and such agreement did not exist as there was no concluded contract between the respondents and the petitioner. The impugned order dated 26.09.2024 has its genesis in the breach of terms of the RFP, which is merely an invitation to apply/bid for tender and not a work order, and in any case as per Clause 1.3 of the RFP, it is not an agreement nor an offer by the authority to the prospective applicants or to any other person. The learned counsel for the petitioner has read out Clause 1.3 of the RFP, which provides as under: –

*Clause 1.3:-"The purpose of the RFP is to provide interested parties with information that may be useful to them in the formation of their proposal pursuant to the RFP. The RFP includes statements and assumptions which reflect various assessments arrived at by the Authority in relation to the consultancy. Such assessments and statements do not purport to contain all the information that each applicant may require. The information contained in this RFP may not be complete, accurate, adequate or correct. Each applicant should therefore conduct its own investigation about the assignment and the local conditions before submitting the proposal by paying a visit to the client and the project site, sending written queries to the client, before the date and time specified in the date sheet."*

12. It has also been argued that the Show Cause Notices dated 03.06.2024 and 28.06.2024 are premeditated in as much as a decision had already been taken and recorded in the said Show Cause Notices that the petitioner was at fault by not accepting the LoA and submitting a performance guarantee within time prescribed. The issue regarding there being a calculation error in the bid amount has been cursorily rejected without examining it as requested by the petitioner. The counsel for the petitioner has placed reliance *upon Oryx fisheries Private Limited versus Union of India, 2010 (13) SCC 427; Siemens Ltd versus State of*

*Maharashtra, 2006 (12) SCC 33; and judgement rendered by this Court in Writ-C No.15363 of 2022: M/S BCITS Private Ltd versus Purvanchal Vidyut Vitaran Nigam Ltd; and in Writ-C No.31059 of 2023: Ramlala versus State of U.P.;* to argue that a Show Cause Notice recording a definite conclusion of guilt is premeditated and vitiated on account of unfairness and bias.

13. It has also been argued that the third Show Cause Notice issued on 26.07.2024 overrides the earlier Show Cause Notices dated 03.06.2024, and 28.06.2024, and a fresh ground has been taken in it that the petitioner had not submitted the bid in the prescribed format, which had led to the calculation error. This finding regarding petitioner being at fault has been recorded without giving any reasons and without putting the petitioner to notice.

14. Also, it has been argued that the impugned order dated 26.09.2024 has been issued following the Show Cause Notice dated 26.07.2024, which did not propose that the petitioner would be debarred or blacklisted. It has also been argued that since the order of debarment dated 26.09.2024 has been passed on grounds in excess of the Show Cause Notice, it is unsustainable.

15. It has also been argued that the impugned order of debarment is in blatant violation of the principles of natural justice in as much as no opportunity of hearing was ever provided to the petitioner before the Competent Authority, i.e. the Chairman who is the authority to approve an order of Debarment. The Respondent no.2 alone gave an opportunity of personal hearing. Had the petitioner been given opportunity to place its case before the Competent Authority, it may have been able to convince it that the calculation error was on the part of the Tender Evaluation Committee and the petitioner was not asking for a revision of rates, but was only praying that the calculation error be corrected.

16. It has been argued by the learned counsel for the petitioner that even otherwise the impugned order dated 26.09.2024, debarring the petitioner for a period of six months is highly disproportionate to the alleged breach of the RFP guidelines. Any decision to blacklist/ debar, a person should be strictly within the parameters of law and has to comply with the principles of proportionality. The petitioner has been subjected to a disproportionate penalty.

It has also been argued that there is an apparent malice in law in the debarring the petitioner as the Respondents even during the pendency of the writ petition have finalized other Tenders in which the petitioner had participated and in which it was found technically qualified and was seemingly also the lowest bidder. The petitioner has been declared as non-responsive in such Tenders during the pendency of the petition.

17. The learned Senior Counsel for the petitioner has placed reliance upon a judgement rendered by this Court in Writ-C No. 1349 of 2023*: M/S Pooja Jaiswal versus Food Corporation of India,* decided on 20.02.2023, to argue that the order of blacklisting is disproportionate and in violation of the principles of rationality as well as natural justice.

18. The learned Senior Counsel for the petitioner has also placed reliance upon a

judgement rendered by the Supreme Court in the case of *Blue Dreamz Advertising Private Limited versus Kolkata Municipal Corporation* reported in 2024 SCC OnLine Supreme Court 1896; to argue that blacklisting of a firm without reasons specified amounts to civil death; debarment is a drastic measure and should not be invoked for ordinary breaches of contract and that too without proper intimation. The counsel for the petitioner has also placed reliance upon *VetIndia Pharmaceuticals Limited versus State of U.P.*, 2021 (1) SCC 804; and *South Eastern Coalfields Ltd versus S Kumar's Associates AKM (JV),* reported in 2021 (9) SCC 166.

19. It has also been argued that the Show Cause Notice must specify the intention to blacklist and reliance has been placed upon judgement rendered in *UMC Technologies Private Ltd versus Food Corporation of India and others*, 2021 (2) SCC 551; and Gorkha Security Services Vs. Government of NCT of Delhi, 2014 (9) SCC 731.

20. The learned counsel for the Respondent, on the other hand, has argued that after the Letter of Acceptance was issued on 09.05.2024, requesting the petitioner to sign and return its duplicate within seven days and to furnish unconditional bank guarantee of Rs.14.30 lakhs towards performance security within 15 days, the petitioner however wrote to the authority on 17.05.2024 that it had quoted Rs.6.08 crores and not Rs.4.76 crores and requested to revise the Letter of Acceptance accordingly. The respondent no.2 rejected such request by its letter dated 03.06.2024 and intimated that financial proposal was submitted in electronic form as per Clause 3.1 of Section 2 of the RFP and it had been duly considered, and it was found that the petitioner had categorically quoted a sum of Rs.4.76 crores as per Appendix C1 under Section 5 of the RFP. Therefore, revision of financial proposal was not possible and a request was made to acknowledge the LoA and submit performance security in terms of clause 10.4 of the RFP failing which action may be initiated as per clause 10.5 of the RFP and other relevant provisions of the RFP. In response to the said letter, the petitioner wrote again on 08.06.2024, repeating the same request for modification of LoA. The respondent no.2 issued another Show Cause Notice on 28.06.2024 as it was entitled to proceed with the actions as envisaged in the RFP. However, before taking any action in order to comply with the principles of natural justice, the authority issued Show Cause Notice requiring it to Show Cause as to why action of debarment of the petitioner (both firms), from participation in future Tenders for a period of upto 2 years should not be taken. The petitioner was given opportunity to submit its written explanation within 15 days of receipt of Show Cause Notice. The petitioner desired for an opportunity of personal hearing and the same was also given on 10.07.2024, and in case the petitioner failed to reply to the Show Cause Notice within the said period of 15 days it would be presumed that it had nothing to say in the matter, and the N.H.A.I. would be entitled to move ahead in terms of clause 10.5 of the RFP for debarment of the petitioner (both firms), namely Theme Engineering Services Private Ltd and M/s Ishita Infosolutions Private Ltd, for future projects for a period of up to two years.

21. It has been argued on behalf of the respondents that after personal hearing was given to the petitioner on 10.07.2024, the petitioner again wrote on 11.07.2024 and

13.07.2024, repeating the same request for upward revision of the LoA, and it also sought another personal hearing to explain the matter. The Respondent No.2 issued issued another Show Cause Notice on 26.07.2024, indicating that the submissions made by the petitioner in its letters dated 11.07.2024, and 13.07.2024 were mere repetition of its previous submissions, which had already been replied to after due examination. However, the petitioner was asked to appear for personal hearing again on 31.07.2024. It has been argued that since the Letter of Acceptance was issued on 09.05.2024, the last date for submission of performance security was 24.05.2024. As per Clause 10.4 of the RFP, there was a provision for extension of the period for another 15 days i.e. upto 08.06.2024, for submission of performance security. Also, damages to be levied on the petitioner for delay in submission of performance security were calculated at Rs.7,15,050/-. The petitioner did not respond for almost two months. After two months of expiry of the permissible period, the petitioner wrote a letter on 05.08.2024, submitting performance security in the form of Bank guarantee amounting to Rs.14,30,099/- only and returned the signed LoA in duplicate and took the plea that due to some unavoidable circumstances, there was a delay in submission of Bank guarantee for performance security and requested that the delay be condoned.

22. It has been argued that since the Letter of Acceptance was issued on 09.05.2024, the petitioner had to submit performance guarantee latest by 24.05.2024, which could have been further extended up to 08.06.2024 on request and on willingness to pay damages, however, the petitioner submitted the performance security on 05.08.2024 with the delay of 58 days and without any prior permission for extension of time as per Clause 10.4 of the RFP. As per Clauses 10.4 and 10.5 of the RFP, if the bidder fails to submit performance security within extended period of submission, the agreement shall be deemed to be terminated on expiry of the additional 15 days time period and the Authority may take action to debar such firm for future projects for a period of one to two years. In case of the petitioner, a lenient view has been taken and the petitioner has been debarred only for a period of six months. The petitioner had been given Show Cause Notices on 03.06.2024, 28.06.2024 and again on 26.07.2024. Personal hearing was also given to the petitioner on 10.07.2024 and again on 31.07.2024.

23. The Debarment order has thereafter been passed only on 26.09.2024 taking into account clauses 10.4 and 10.5 of the RFP. It is settled law that till such time that the contract/agreement is signed between the parties, the RFP would hold the field and as such in the absence of Contract, once the entire procedure of allotting the Tender was done in pursuance of the RFP, the proposed action of Debarment has also been passed in terms of the relevant clauses of the RFP. It has also been argued that the petitioner had chosen to quote only Rs.4.76 crores in its financial proposal to win the bid. After it was declared H1 bidder and Letter of Acceptance was issued on 09.05.2024, the petitioner chose to escalate the financial proposal and prayed for a revision which was impermissible. Moreover, based on the technical proposal and financial proposal of five shortlisted firms, the petitioners rate being the lowest he was declared H1 bidder if upward revision was allowed as

requested by the petitioner it would no longer be adjudged the H1 bidder.

24. It has further been argued that the petitioner's claim that the component of supporting staff was not added by the Tender Evaluation Committee is wrong. The petitioner itself had submitted Appendix C1 showing Rs.4.76 crores. There is no provision to edit or change the financial proposal once submitted. The letter dated 03.06.2024, informed the petitioner that correction is not permissible. The bidder is required to submit the proposal in two parts using the formats enclosed with the RFP. The financial proposal had to be submitted only in electronic format, no additional items/quantities other than those specified in the format could be proposed by the consultants, and in case they were so proposed they would not be considered for evaluation/award. Since the petitioner had offered Rs.4.76 crores its bid had been evaluated for award as per Clauses 5.8 and 5.9 of Section 2 of the RFP. It was adjudged H1 bidder based on such financial proposal. It has also been argued that a successful bidder is required to submit performance security in terms of Clauses 10.1 and 10.4 of the RFP after acknowledging the LoA however, the petitioner repeatedly requested upward revision of its financial proposal and did not seek any extension of time in terms of Clause 10.4 of the RFP for submission of performance security.

25. In response to the argument made by the learned counsel for the respondent that the petitioner has not challenged the Show Cause Notices dated 03.06.2024, 28.06.2024, and 26.07.2024, the counsel for the petitioner has argued that the petitioner is not aggrieved by the Show Cause Notices, the petitioner is aggrieved only by the debarment order dated 26.09.2024. The Show Cause Notices have merged in the debarment order. The debarment order is based on the Show Cause Notices, which are themselves defective, and it has also been argued on the basis of judgement rendered in the case of State of *Punjab versus Davinder Pal Singh Bhullar*, 2011 (14) SCC 770, that if the Show Cause Notice is defective then all subsequent proceedings would fail relying upon the Latin maxim *"sublato fundamento cadit opus".*

26. Having heard the learned counsel for the parties at length, we had initially passed an order on 30.09.2024, which is being quoted here in below: –

*1. Heard Sri Prashant Chandra, learned Senior Advocate assisted by Sri Anshuman Singh, learned counsel for the petitioner and Sri Sarvesh Kumar Dubey, learned counsel appearing for the respondent.*

*2. This writ petition has been filed with the following main prayers:*

*"(a) issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the impugned order dated 26.09.2024 passed by the Respondents contained in Annexure No. 1 to this writ petition.*

*(b) issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the Respondents not to give effect to the order dated 26.09.2024 passed by the Respondents contained in Annexure No.1 to this writ petition and not to treat the petitioner as debarred from participating in future tenders and to allow the petitioner to participate in all forthcoming tenders*

*ignoring the impugned order dated 26.09.2024."*

*3. It has been submitted by learned counsel for the petitioner that the petitioner is aggrieved by its blacklisting because when there was a disagreement with regard to the price quoted by the petitioner in its financial bid and the respondents were insisting that the petitioner had quoted only Rupees 4.76 Crores whereas the petitioner was insisting that there is a calculation error and Rupees 6.08 Crores were quoted by it. The petitioner had agreed to work on lessor price on Rupees 4.76 Crores only to continue to do the work of NHAI amicably for other contracts as well. However, the petitioner submitted a performance guarantee they did not correspond for a period of two months and later on issued a debarment order straightway to the petitioner without issuing the show cause notice and also rejected the proposal of the petitioner to carry out the work contract even for a lessor price of Rupees 4.76 Crores.*

*4. Learned counsel for the petitioner has also pointed out that the bank guarantee is still with the NHAI, which has not been returned, which was submitted after the petitioner agreed to work on a lessor price.*

*5. Learned counsel for the petitioner has also placed reliance upon an order passed by this Court in Writ-C No. 1349 of 2023, 'M/S Pooja Jaiswal A Proprietorship Form Lko. Vs. Food Corporation of India, New Delhi' and paragraph 26 onwards where this Court had dealt with the doctrine of proportionality.*

*6. Sri Sarvesh Kumar Dubey, learned counsel for the respondent on the basis of pleadings on record says that at page 85 which is an order dated 03.06.2024 and at page 89 which is an order dated 08.06.2024 which have not been challenged by the petitioner.*

*7. Learned counsel for the petitioner says that both such letters are only show cause notices. The petitioner was given a personal hearing and the petitioner has availed the opportunity on 10.07.2024 and 31.07.2024 and it was orally agreed upon by the parties including the petitioner that he will take into account the calculation even if made wrongly by the respondents and is ready to work for that particular tender for Rupees 4.76 Crores as calculated by the respondents.*

*8. Learned counsel for the respondents shall seek specific instructions from the respondents with regard to petitioner's contention that he is willing to work even at a lessor price of Rupees 4.76 Crores in case he is allowed to continue to work as contractor and not debarred as it would effect it financially in other contracts as well.*

*9. Put up this case tomorrow i.e. on 01.10.2024, as fresh.*

27. When the matter was taken up on 01.10.2024, the learned counsel for the respondents appeared and informed this court that the respondents have declined to allow the petitioner to work, emphasising that the petitioner had committed default by not submitting the performance guarantee in time. The counsel for the Respondent also took time to file a counter affidavit within 24 hours and the learned counsel for petitioner also prayed for time for filing rejoinder affidavit to the same and the matter was posted on 03.10.2024 by the Court (as 02.10.2024 was a National holiday for Gandhi Jayanti). In the meantime, two tenders of the respondents were opened and the petitioner was

declared as non-responsive in view of the debarment order dated 26.10.2024.

28. It has been argued by the Senior Counsel appearing for the petitioner that the respondent no.2 was interested in ousting the petitioner for the purpose of awarding pending tenders to parties of their choice. It has further been argued by the learned counsel for the petitioner that against the statements made by the Respondent no.2 in the Show Cause Notice dated 26.07.2024, the counter affidavit falsely claimed that the petitioner had filed a financial proposal on the basis of corrigendum issued by the respondents on 05.02.2024. Also, the learned counsel for the Respondent had pointed out that no prayer was made in the writ petition to allow the petitioner to work on the reduced price for which bank guarantee had already been given, ignoring the pleadings on record in Para 31 & 32 of the writ petition.

29. On conclusion of arguments we had reserved the judgement on 03.10.2024, and granted an interim stay of operation of the debarment order dated 26.09.2024 till delivery of judgement. On careful perusal of the record, we have found several discrepancies in the case set up by the learned counsel for the petitioner. M/s Theme Engineering services Private Ltd had applied for the tender in association with M/s Ishita Info Solutions Services Private Ltd. The writ petition has been filed on behalf of the two firms by their authorised representative, Mr Sumeet Asthana. The entire pleadings on record and the arguments made by the learned Senior Counsel appearing on behalf of the petitioner is with respect to filling up of the Financial Proposal on the electronic format as per clause 3.1 given in Appendix C-2 and C -3 of Section 2 of the RFP on the basis of which the Tender Evaluation Committee had to calculate the actual costs of supervision and monitoring by the consultant and determine the final financial proposal of a Bidder on its own in Appendix C-1 of such format.

30. However, while going through the contents of the initial Show Cause Notice dated 03.06.2024, we have found in paragraph 8 thereof a reference having been made to a copy of the financial proposal made by the petitioner, Appendix C-1 being enclosed to such notice. This enclosure to the Show Cause Notice date 03.06.2024 has not been filed along with the writ petition. It was produced before this Court by the learned counsel for the respondent Sri Sarvesh Kumar Dubey during the course of argument which was taken on record. The counsel for the petitioner had emphatically argued on the basis of page 74 to 78 of the paper book that the financial proposal submission form had blank spaces marked in grey which alone had to be filled up by a bidder. On careful examination, we have found appendix C-1 to have been filled up by the petitioner mentioning only Rs.4.76 crores both in words and in figures. This factual aspect has been repeatedly mentioned in subsequent Show Cause Notices issued to the petitioner on 28.06.2024 and 26.07.2024.

31. Moreover, in the first such notice issued on 03.06.2024, the petitioner was asked to provide performance security in terms of clause 10.4 of the RFP and acknowledge the LoA, failing which action would be taken as per provisions of clause 10.5 of the RFP and other relevant provisions of the RFP. This was without prejudice to the authorities right to claim damages and/or to realise any dues, losses

and damages, and to exercise any other remedy from the bidder jointly and severally, which may be available under the applicable laws. We have gone through Clause 10.4 and 10.5 of the RFP and we find that under Clause 10.4, the bidder has to provide performance security within 15 days of issuance of the LoA and the bidder may seek extension of time for a period of 15 days on payment of damages for such extended period in a sum calculated at the rate of 0.1% of the contract price for each day until the performance security is provided. It has also been stated clearly that the agreement shall be deemed to be terminated on expiry of additional 15 days time period.

32. The petitioner did not ask for any extension of time in any of the letters written by it to the Authority. The damages that have been calculated for the delay in submitting of performance security are of more than Rs.7 lakhs and the petitioner while submitting the performance security eventually on 05.08.2024 by way of bank guarantee, only submitted Rs.14.30 lakhs. In the show cause notice dated 03.06.2024, mention was made of taking action as per provisions of Clause 10.5 of the RFP and other relevant provisions in case of failure to submit performance security in terms of Clause 10.4 of the RFP and acknowledgment of the LoA. Clause 10.5 is being quoted here in below: –

*"Notwithstanding anything to the contrary contained in **this agreement**, the parties agree that in the event of failure of the consultant to provide the performance security in accordance with the provisions of clause 10.1 within the time specified there in or such extended period, as may be provided by the Authority, in accordance with the provisions of clause and thereupon all rights, privileges, claims, and entitlement of the Consultant under or arising out of **this Agreement**, shall be deemed to have been waived by, and to have ceased with the concurrence of the Consultant, and the LoA shall be deemed to have been withdrawn by mutual agreement of the parties. Authority may take action debarring such firm for future projects for a period of 1 to 2 years."*

The initial Show Cause Notice dated 03.06.2024 mentioned the likelihood of the Authority taking action against the consultant in case of failure to comply with the various clauses of the RFP Under clauses 10.4 and 10.5.

33. We have also gone through the notice dated 28.06.2024 which also mentioned in detail the reply submitted on 17.05.2024 by the petitioner and it reiterated that neither the bidder had acknowledged the LoA nor had submitted any performance security. It had also not sought any extension of time in terms of clause 10.4 of the RFP. Therefore, the bidder was liable for action under Clause 10.5 of the RFP. Clause 10.5 of the RFP was quoted in paragraph 14 of the Show Cause Notice and reference was made of clause 10.5 and the likelihood of Debarment from participation in future tenders for a period of two years in paragraph 16 and 17 and 18 of this Show Cause Notice. Reference was also made of the deeming provision in clause 10.5 regarding withdrawal of the Letter of Acceptance by the Authority. The words 'debarment' and that of the Letter of Acceptance being deemed to have been withdrawn have been clearly mentioned in the notice dated 28.06.2024.

34. The petitioner asked for personal hearing, which was given on 10.07.2024

and on the petitioner giving consent for revaluation of tender of all five shortlisted bidders, it was informed by Show Cause Notice dated 26.07.2024, that in the personal hearing that was given the petitioners representative was shown Appendix C-1, the financial proposal submitted by the petitioner company, and such fact was also admitted by the petitioner's representative. The financial proposal as per appendix C-1 submitted by the petitioner was admitted by the petitioner's representative as being only Rs.4.76crores.

Paragraph 4 onwards of the notice dated 26.07.2024 are relevant and are being quoted hereinbelow: –

*4. Your representative was shown Appendix C-1 Financial Proposal submitted by your company, which was admitted by your representative. The Financial Proposal as per Appendix C-1 by your company was admitted by your representative as Rs.4,76,69,970.00 (Rs. Four Crore Seventy Six Lakh Sixty Nine Thousand Nine Hundred Seventy only)*

*5. Reference is made to para 1.8 of your letter dated 13.07.2024 wherein, you have submitted that "….The fact remains that the error is not on the part of the selected Bidder Consultant but in the format of financial proposal which was downloaded by us from the E-tender portal. Authority never countered that the error was not there in its format as uploaded on E-tender Web Portal".*

*(i) The submission made by you under para 1.8 of your letter is completely false and denied and it is reiterated that no error has been committed by Authority in its format. The Financial proposal sheet was duly uploaded on tender portal vide corrigendum dated 05.02.2024. In your letter dated 08.07.2024 para 1.2, it has been stated that "In this file from the E-tender portal format, one component amount is not added in the total sum, and the calculation works to Rs.4,76,69,970/- only which should be Rs.6,08,70,030/-. However, NHAI had issued a corrigendum subsequently thereby revising the file which was not in our notice". It may please be noted that corrigendum was issued before the last date of submission of bid.*

*(ii) It is admittedly accepted by you that the corrigendum was not noticed by you. The bidder is required to submit his bid duly considering all corrigendum issued before bid due date and any prudent bidder cannot take any excuse of not noticing the corrigendum.*

*iii) This office vide letter dated 03.06.2024 and para-08 stated that, "your financial proposal as submitted in Electronic form for requirement of Clause 3.1 of Section 2 of RFP has been duly considered as per Clause 3.6 of Section 2 of RFP. Accordingly, you financial proposal as per Appendix-C-1 Financial Proposal Submission from you have categorically offered you financial proposal for the sum of Rs.4,76,69,970/-. The copy of your financial proposal Appendix-C-1 is enclosed for your reference".*

*iv) It is further to intimate that this office vide Corrigendum dated 05.02.2024 has uploaded excel sheet for financial offer on the E-Tender portal and accordingly remaining all other five bidders have submitted financial proposal in the excel sheet provided through corrigendum.*

*Thus it is clear that Authority had uploaded excel sheet for submitting Financial Proposal through Corrigendum dated 05.02.2024 and same has been used in submitting Financial Proposal with all*

*other 5 bidders. You have chosen to offer your Financial Proposal amounting to Rs.4,76,69,970.00 to win the bid as successful bidder.*

*6. Refer para 2 of your letter dated 13.07.2024, you have submitted that "It is further to submit that our representative; Mr. Malchand Choudhary from the Business Development Wing had attended your office on 10.07.2024 to explain and clarify that the said error was not on our part and shown the Electronic File which was having an error due to which Bid Price comes out to be Rs. 4,76,69,970/- as adopted by instead of Rs.6,08,70,030/- as was worked with our quoted Rates and accordingly we have issued a letter dated 11.07.2024 as desired by your good office".*

*The submission made by you regarding issuance of letter dated 11.07.2024 as desired by this office is denied. Your representative attended this office on 10.07.2024 in reference of personal hearing called by this office against show cause notice issued vide letter dated 28.06.2024 and nothing has been desired by this office to be submitted by the bidder. On asking by your representative that our management would like to further add, it was advised to your representative that if your company wants to add in defense of your submission the company may submit and we shall duly examine it. We have considered your submission dated 13.07.2024 for personal hearing inline of the advise and same has been duly reviewed, examined and clarified herein above paras.*

*7. You have requested for personal hearing to explain the matter in person. In this reference, as desired by you the opportunity for personal hearing is hereby granted inspite of already done personal hearing on dated 10.07.2024 and it is requested to appear on 31.07.2024 in the office of undersigned.*

*8. Your other submissions are repetition of the previous submissions and same has already been replied after due examination vide this office letters referred herein above and same are not being repeated for the sake of brevity. This letter be read as in continuation of Show Cause Notice dated 28.06.2024 without prejudice to Authority's right to claim damages and/ or realize any dues, losses, damages and or to exercise any other remedy from successful bidder(s) jointly and severally, which are available under the RFP or the applicable laws."*

35. As is evident from the perusal of the contents of the Show Cause Notices, one of which has been quoted hereinabove the respondents have provided enough opportunity of hearing to the petitioner at every stage. Merely because the Show Cause Notice was issued after referring to the contents of the financial proposal and Appendix C-1 of the Format submitted by the petitioner itself and also referring to the provisions of Clause 10.4 and 10.5 of the RFP, by itself cannot be said that the order of blacklisting was predetermined. The correspondence undertaken by the respondent with the petitioner can only be said to be a proposed decision to initiate proceedings for blacklisting. The notices specifically mentioned that action can be taken for blacklisting. It is evident that before any Show Cause Notice is issued for any action, when a tentative decision is taken, it cannot be said that subsequent decision followed by a Show Cause Notice, and even by giving personal hearing, can be said to be predetermined. Before initiation of any proceeding for blacklisting, there can be a tentative decision on the basis of material available,

forming a tentative/prima facie opinion that action in such terms is required. Before the blacklisting order was actually issued three Show Cause Notices were issued to the petitioner. Twice personal hearing was also given to the petitioner. Reference was also made specifically to Clause 10.4 and 10.5 of the RFP. The respondents considered every reply submitted by the petitioner and also referred to the proceedings relating to personal hearing of the petitioners' representative in its correspondence with the petitioner. It cannot be said therefore that such correspondence undertaken by the Respondents was with a predetermined mind; reference can be made in this respect to the observations made by the Hon'ble Supreme Court, in paragraph 17 onwards of its judgement in State of Odisha and others versus Panda Infraproject limited, 2022 (4) SCC 393. In Erusian Equipment and Chemicals Ltd versus State of West Bengal and another, 1975 (1) SCC 70, the Supreme Court had observed that-

*".....where the State is dealing with individuals in transactions of sales and purchase of goods (services also), the two important factors are that an individual is entitled to trade with the government and an individual is entitled to fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations, but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the government for the purpose of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist…"*

36. The judgement in Erusian Equipment (supra) has been reiterated in Gorkha Securities (supra), the Supreme Court had observed that "the fundamental purpose behind the serving of a show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations, detailing out alleged breaches and default he has committed, so that he gets an opportunity to rebut the same. Another requirement is the nature of action which is proposed to be taken for such a breach."

37. In *Grosons Pharmaceuticals Pvt Ltd versus State of U.P.* 2001 (8) SCC 604; the Supreme Court had observed that it was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. The Court had observed that the contractor was given an opportunity to show cause and its reply was also considered, therefore, the procedure adopted by the Government while blacklisting the contractor was in conformity with the principles of natural justice.

38. As per law lay down by the Supreme Court in its various judgements, debarment is recognised and often used as

an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission. It is for the State or the appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case.

39. In *Kulja Industries Limited versus Chief General Manager, Western Telecom Project, Bharat Sanchar Nigam Ltd and others*, 2014 (14) SCC 731; the Supreme Court observed that Debarment is never permanent and the period of Debarment would invariably depend upon the nature of the offence committed by the contractor. In the said decision the court had emphasised on prescribing guidelines for determining the period for which blacklisting should be effective. It had observed that while determining the period for which the blacklisting should be effective, for the sake of objectivity and transparency, it is required to formulate broad guidelines to be followed. It had further observed that different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines.

40. In the instant case, we find that although the Authority has been given power to debar a consultant for period extending up to two years, debarment in the case of the petitioner has been made only for a period of six months. This period we find reasonable as once the Letter of Acceptance issued to the petitioner is deemed to be withdrawn, fresh tenders would have to be issued. It is apparent from the conduct of the petitioner that he has not been honest and upfront with the Authority and also it has not been honest with this Court as the case set up by it was with regard to incorrect calculation being made by the Tender Evaluation Committee in Appendix C-1. However, we have found on basis of pleadings on record and Annexures to the petition that the petitioner had itself filled up appendix C-1 and the Tender Evaluation Committee was not at fault in mentioning Rs.4.76 crores as the financial proposal of the petitioner. Such financial proposal was given by the petitioner only for the purpose of winning the contract as a Consultant for supervision and monitoring in terms of the Notice Inviting Tender. It gave such a low and attractive bid which the Competent Authority could not refuse, thus ousting other shortlisted bidders. Now the Authority will have to carry out the entire process of issuance of Tender and finalization of bidders afresh, which would lead to time over run and cost over run also.

41. The Supreme Court in the case of *BTL EPC Limited versus Macawber Beekay Pvt Ltd and others* reported in 2023 SCC OnLine SC 1223, has observed that in contracts involving complex technical issues, the Court should exercise restraint in exercising the power of judicial review. Even if a party to the contract is 'State' within the meaning of Article 12 of the Constitution, and as such is amenable to jurisdiction of the High Court or the Supreme Court, the Courts should not readily interfere in commercial or contractual matters. The Supreme Court relied upon observations made by it in Tata Motors Limited versus Brihan Mumbai Electric Supply & Transport (BEST) and others, 2023 SCC OnLine Supreme Court 671, where the Supreme Court had observed in paragraph 48 as follows:-

*"48. This Court being the guardian of Fundamental Rights is duty bound to interfere when there is*

*arbitrariness, irrationality, malafides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or malafides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of Superior Courts, but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues, the Courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give fair play in the joints to the Government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to public exchequer."*

42. In *Michigan Rubber (India) Limited versus State of Karnataka*, 2012 (8) SCC 216, the Supreme Court held that a court while interfering in tender or contractual matters, in exercise of power of judicial review, should itself pose the following questions:

*(i) Whether the process adopted or decision made by the authority is Mala fide or intended to favour someone;*

*or*

*whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible Authority, acting reasonably, and in accordance with relevant law could have reached?; And*

*(ii) whether the public interest is affected?.*

43. We find that neither of the aforesaid two questions as we pose them to ourselves can be answered in favour of the petitioner.

44. Consequently, the writ petition stands ***dismissed.***

45. Interim order, if any, shall stands discharged.

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**(2024) 10 ILRA 195**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

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

Writ C No. 10523 of 2024

**Mohd. Muslim & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Dhananjai Rai, Vibhu Rai

**Counsel for the Respondents:**
Azad Rai, C.S.C., Sudhir Kumar Singh Parmar

**(A) Revenue Law / Procedural Law - The U.P. Revenue Code, 2006 - Section 210 - Revisional Powers, Section 144 – Declaratory Suits, Section 146 - Injunction, Revision is maintainable only if the impugned order amounts to a "suit or proceeding decided" and no appeal lies against it - Jurisdictional error must exist - An order withdrawing an earlier injunction does not dispose of the interim application and hence cannot be termed as a "proceeding decided" under Section 210.(Para - 23 to28 ,35 to 37)**

Petitioners are tenure holders of land - recorded in revenue records - Private respondents-initiated litigations - filed an application for interim injunction- rejected - Petitioners instituted a declaratory suit - sought an injunction - Ex parte status quo was granted - later withdrawn by Sub-Divisional Magistrate - Private respondents filed a revision against the withdrawal order- allowed - Petitioners challenged revisional order - asserting not maintainable – hence petition. (Para 5 to 11)

**HELD: -** Order against which the revision has been entertained and also allowed, cannot be said to be an order relating to a 'suit' or proceeding decided. Revisional order passed by Commissioner legally unsustainable. Impugned order set aside. Interim application to be decided expeditiously, preferably within two months. (Para 37,39-44)

**Petition Allowed.** (E-7)

**List of Cases cited:**

1. Paltoo Ram Vs St. of UP & ors., WRIT C No. 10192 of 2023

2. Riyasat Ali Vs Deputy D.D.C. & ors., WRIT - B No. - 85 of 2022

3. Rishi Kumar Vs St. of U.P. & ors., Writ-C No.36341 of 2015

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

1. On an oral prayer, counsel for the petitioners is permitted to correct the array of parties.

2. Heard Sri Vibhu Rai, learned counsel for the petitioners, Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State-respondents and Sri Surendra Kumar Chaubey holding brief of Sri Sudhir Kumar Singh Parmar, learned counsel for respondent nos.5 and 6.

3. The present petition has been filed seeking to assail the order dated 20.01.2024 passed by respondent no.2, Commissioner, Prayagraj Division, Prayagraj in Revision No.1369 of 2022 (Computer Case No.C202202000001369, Mohd. Salim and another Vs. Mohd. Muslim and others), under Section 210 of the UP Revenue Code, 20061.

4. The factual matrix of the case, as laid down in the writ petition, is as follows.

5. The petitioners herein claim to be tenure holders of land bearing arazi no.410 situate at Village Beli Kachhar, Phaphamau, Prayagraj, and that their names are duly recorded in the
revenue records.

6. It is stated that in regard to the land in question there have been litigations between the petitioners and the private respondents, in the past. Reference has been made to a civil suit being Original Suit No.374 of 2020, instituted by the private respondents, which is said to be pending. It is stated that the application for interim injunction in the aforesaid suit has been rejected.

7. It has been asserted that concealing the fact of pendency of the aforesaid civil suit, the petitioners instituted a declaratory suit under Section 144 of the Revenue Code, registered as Case No.T202002030304753 in the Court of Sub-Divisional Magistrate, Soraon, Prayagraj.

8. An application for injunction under Section 146 was also moved in the aforesaid suit.

9. Upon the aforesaid application, the Sub-Divisional Magistrate is said to have passed an ex parte order of *status quo* dated 17.10.2022, whereupon detailed objections were filed by the petitioners herein, and the earlier order granting *status quo* was thereafter withdrawn/recalled by means of an order dated 01.11.2022.

10. The aforesaid order, recalling the earlier order, was assailed in a revision filed by the private respondents, before the Commissioner, Prayagraj Division, Prayagraj under Section 210 of the Revenue Code, which has been allowed by means of an order dated 20.01.2024, which is now being assailed by means of the present petition.

11. The principal ground on which the order dated 20.01.2024 passed by respondent no.2, is sought to be challenged is by seeking to raise a contention that the order dated 01.11.2022 passed by respondent no.7 in the declaratory suit, against which the revision had been filed, did not finally dispose the application for injunction, and as such a revision would not lie against the said order. Accordingly, it is contended the order passed by the revisional court is without jurisdiction and is legally unsustainable.

12. In support of the aforesaid contention, reliance has been placed on the decisions of this Court in **Paltoo Ram Vs. State of UP and others2 and Riyasat Ali Vs. Deputy Director of Consolidation and others3**.

13. Counsel appearing for the contesting respondents has refuted the aforesaid submissions by contending that in terms of the order dated 01.11.2022, the interim order granted earlier on 17.10.2022 having been withdrawn, it cannot be said that the revision would not be maintainable against the said order.

14. Learned counsel has placed reliance upon the decision in Rishi Kumar Vs. State of UP and others4 to support his submissions.

15. Rival contentions now fall for consideration.

16. The provision with regard to declaratory suits finds place under Chapter IX of the Revenue Code. Section 144 is with regard to declaratory suits by the tenure holders and the same reads as follows:-

"**144. Declaratory suits by tenure holders.—** (1) Any person claiming to be a bhumidhar or asami of any holding or part thereof, whether exclusively or jointly, with any other person, may sue for a declaration of his rights in such holding or part.

(2) In every suit under sub-section (1) instituted by or on behalf of—

(a) a Bhumidhar, the State and the Gram Panchayat shall be necessary parties;

(b) an asami, the land-holder shall be a necessary party."

17. Section 144 contains the provision for declaratory suits by tenure holders and in terms thereof any person claiming to be a *bhumidhar or asami* of any holding or part thereof, whether exclusively or jointly with any other person, may sue for a declaration of his rights in such holding or part thereof.

18. Section 146 contains the provision for injunction, and the same reads as follows :-

"**146. Provision for injunction**.─If in the course of a suit under Section 144 or 145, it is proved by affidavit or otherwise ─

(a) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or

(b) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court may grant a temporary injunction, and where necessary, also appoint a receiver."

19. Section 146 contains the provision for injunction and in terms thereof, if in the course of a suit under Section 144 or 145 it is proved by affidavit or otherwise : i.e. (i) that any property, trees or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any party to the suit; or (ii) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court is empowered to grant a temporary injunction, and where necessary, also appoint a receiver.

20. Section 210 relates to the revisional powers of the Board or the Commissioner to call for the records of any suit or the proceeding decided by the subordinate revenue court in which no appeal lies. Section 210 reads as follows:-

**"210. Power to call for the records.**—(1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any subordinate Revenue Court in which no appeal lies, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding; and if such subordinate court appears to have—

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction of vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity;

the Board, or the Commissioner, as the case may be may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

Explanation.—For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them."

21. The language of Section 210 indicates that the powers of revision may be exercised in respect of any order passed in a suit or 'proceeding decided'. The word 'proceeding' though not defined under the Revenue Code, when applied to a suit, is

generally used, to express the separate steps taken in the course of a suit.

22. Section 210 of the Revenue Code which provides the remedy of a revision empowers the Board or the Commissioner to call for the record of 'any suit or proceeding decided' by any subordinate Revenue Court in which no appeal lies for the purpose of satisfying itself as to the legality or propriety of any order passed in suit or proceeding.

23. A plain reading of Section 210 of the Revenue Code indicates that a revision would be entertainable on the cumulative satisfaction of the following circumstances:

I. (i) impugned order amounts to a 'suit or proceeding decided';

(ii) such an order must have been passed by any Revenue Court subordinate to the Board of Revenue or Commissioner;

(iii) such an order must not be appealable.

II. there must be an assertion with regard to jurisdictional error by the subordinate revenue court, i.e. to say:

(i) exercise of jurisdiction not vested in it by law, or

(ii) failure to exercise a jurisdiction so vested, or

(iii) acting in the exercise of such jurisdiction illegally or with material irregularity.

24. The section comprises two parts, the first prescribes the condition under which jurisdiction of the Board or the Commissioner arises, i.e. there is a 'suit or proceeding decided' by a subordinate Revenue Court in which no appeal lies, the second sets out the circumstances in which the jurisdiction may be exercised.

25. The former concerns the power to call for records of courts subordinate to it by the Board or the Commissioner and relates to existence of condition precedent on the basis of which such exercise of jurisdiction under Section 210 depends. The latter relates to spelling out the circumstances under which the jurisdiction under Section 210 may be exercised.

26. The **maintainability of a revision** would therefore depend on **two conditions; first,** that it must relate to a suit or proceeding decided by any Revenue Court subordinate to the Board or Commissioner and **second,** it must be in connection with any 'suit or proceeding decided', against which no appeal lies.

27. It would be upon a cumulative satisfaction of the aforementioned two conditions that a revision would be entertainable. The jurisdiction of the revisional court would depend on the existence of both the conditions – in a case where either of the conditions is not present, the revision would not be entertainable.

28. The order against which the revisional jurisdiction is proposed to be invoked must amount to a ‘suit or proceeding decided’. This would be the necessary pre-condition which must exist before the revisional court can assume jurisdiction in a particular case.

29. The word 'proceeding', in the expression 'proceeding decided' occurring in Section 210 of the Revenue Code is to be construed in a manner so as to include any suit, appeal or application.

30. In order for a revision to be entertainable the impugned order must amount to a 'suit or proceeding decided'.

31. In addition, the order must have been passed by any revenue court subordinate to the Board of Revenue or Commissioner, and such order must not be appealable.

32. The expression 'proceeding decided', in the context of maintainability of a revision under Section 210 of the Revenue Code, has been discussed *in extenso* in a recent judgment of this Court in **Paltoo Ram Vs. State of UP and others2**, wherein it has been held that one of the conditions precedent for the entertainability of a revision is that the impugned order must amount to a 'suit or proceeding decided'.

33. The decision in the case of Riyasat Ali Vs. Deputy Director of Consolidation and others3, relied upon by the petitioner, has reiterated the legal position that a revision would not be entertainable against an interlocutory order.

34. In the case of **Rishi Kumar Vs. State of UP and others4**, sought to be relied upon by the counsel appearing for the contesting respondent, the application filed under Section 229-D of the UPZA and LR Act, 19505, seeking injunction, had been rejected, and in the said circumstances it was held that the remedy thereagainst was to file a revision under Section 333 of the 1950 Act. The aforesaid judgment would therefore be distinguishable on facts, as it was a case where the application for injunction had been disposed, whereas in the present case the same is pending.

35. In the facts of the present case, there can be no manner of doubt that the order dated 01.11.2022 passed by the Sub-Divisional Magistrate, in terms of which the earlier ex parte order dated 17.10.2022 granting *status quo*, has been withdrawn, does not dispose the application for injunction filed under Section 146 of the Revenue Code. The aforesaid application still remains pending before the court concerned.

36. The application for injunction, under Section 146, in the course of the suit under Section 144 of the Revenue Code, having not been disposed in terms of the order dated 01.11.2022, it would not be covered within the ambit of 'proceeding decided', and in view thereof a revision would not lie against the said order under Section 210.

37. In this view of the matter, the order against which the revision has been entertained and also allowed, cannot be said to be an order relating to a 'suit or proceeding decided'.

38. The condition precedent for the entertainability of a revision under Section 210 of the Revenue Code, having thus not been fulfilled, the submissions raised on behalf of the petitioners with regard to the revision being not entertainable, are held to be sustainable.

39. The order dated 20.01.2024 passed by respondent no.2, Commissioner, Prayagraj Division, Prayagraj in Revision No.1369 of 2022 is, therefore, held to be legally unsustainable, on the point of entertainability of the revision.

40. The writ petition is therefore **allowed**, and the impugned revisional order dated 20.01.2024, passed by respondent no.2 is set aside.

41. Counsel for the contesting respondents, at this stage, submits that a

direction be issued to the concerned respondent authorities to decide the interim application in the pending suit
at an early date.

42. Counsel appearing for the petitioners has no objection to the aforesaid prayer.

43. Learned Additional Chief Standing Counsel for the State-respondents has submitted that efforts would be made to decide the aforesaid interim application in the pending suit at an early date, and that an endeavour would be made to dispose of the application within a period of two months from date.

44. In view of the aforesaid, it may be observed that the court concerned would be expected to make an endeavour to decide the application for interim relief, in the suit stated to be pending before it, in accordance with law, expeditiously and preferably within a period of two months from the date of production of a certified copy of the instant order, without granting any unnecessary adjournments to either of the parties, provided there is no other legal impediment.

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**(2024) 10 ILRA 201**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 01.10.2024**

**BEFORE**

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

Writ Tax No. 226 of 2024

**M/S Archita Tour and Travels ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Manish Misra, Bhavini Upadhyay, Dileep Pandey, Gaurav Upadhyay

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

**Civil Law- Code of Civil Procedure-1908- Order XLI Rule 17-** Deciding a case ex parte on merits without giving reasonable opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits. **(Para 11)** (E-15)

**List of Cases cited:**

1. Benny D'Souza & ors.Vs Melwin D'Souza & ors.; S.L.P. (C) No.23809 of 2023

2. Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India, (1976) 2 SCC 981

3. M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs The Commissioner of Trade Tax, U.P, Lucknow; 2003 NTN (Vol.22)- 341

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

1. Heard Shri Manish Misra, learned counsel for the petitioner as well as Sri Sanjay Sarin, learned Standing Counsel for the respondent and perused the record.

2. By means of the present writ petition, the petitioner has challenged the order dated 18.12.2023 passed by the Additional Commissioner, Grade ? II (Appeal ? 5), Commercial Tax, whereby he has rejected the appeal of the petitioner and upheld the order of adjudicating authority dated 26.07.2021.

3. Learned counsel for the petitioner has submitted that the impugned order dated 18.12.2023 has been passed ex-parte

by the appellate authority on the ground that on the date fixed, the counsel of the appellant could not appear before the appellate authority and neither did anyone appear on behalf of the State and the appeal was decided on merits. The appellate authority has further recorded that despite information and service being sufficient upon the appellant, no one had appeared and accordingly the appellate authority proceeded to decide the case on merits.

4. The question raised by the petitioner in the present writ petition is as to whether in absence of counsel of the appellant, the appellate authority can proceed to consider and decide the appeal 'ex parte' in absence of the appellant. He submits that the principles with regard to appearance of the plaintiff or defendant and order to be passed thereon and as to how the court could proceed in the matter of suits and appeals has been provided under the Code of Civil Procedure.

5. He submits that Order IX, Rule 6(1)(a) of the Code of Civil Procedure provides that, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then when summons duly served, if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte. He submits that it is open for the court to continue the hearing of the proceedings in absence of defendant on the merit of the case and suit may proceed ex parte, but according to the Order IX Rule 8 of the Code of Civil Procedure, where defendant only appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof.

6. He further placed reliance on the Order XLI Rule 17 of the Code of Civil Procedure, where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

7. It is in the aforesaid circumstances, it was submitted that in case the appellant does not appear and only the State appeared before the Commercial Tax Tribunal, the Tribunal should have dismissed the appeal in default rather to proceed to pass an order on merits of the case. He further relied upon the judgement of the Supreme Court in the case of Benny D'Souza & Ors. Vs. Melwin D'Souza & Ors.; S.L.P. (C) No.23809 of 2023, wherein though the Supreme Court was interpreting the provisions of Order XLI Rule 17 of the Code of Civil Procedure, and was of the view that where the appellant does not appear, the court can only dismiss the appeal for want of prosecution and not consider the case on merits.

8. The observation of the Supreme Court in the aforesaid judgement is quoted herein-below:

*"Leave granted.*

*The appellants herein are the plaintiffs who were the appellant in RSA No.196/2022. The only grievance of the appellants herein is with regard to the dismissal of the said appeal vide order dated 26.09.2023 on merits although the appellants were not represented inasmuch as there was no counsel who appeared for the appellants and the junior counsel for the appellants submitted that the senior counsel engaged in the matter, was not available as his cousin had passed away.*

*Therefore, on account of a bereavement in the family of the arguing counsel there was no representation on behalf of the appellants before the High Court.*

*Learned senior counsel appearing for the appellants submitted that the High Court could have dismissed the appeal for non prosecution in terms of the order XLI Rule 17 CPC and particularly the Explanation thereto instead of dismissing the appeal on merits by stating that no substantial question of law was made out. Therefore, the learned senior counsel submitted that the impugned judgment may be set aside and the matter may be remanded to the High Court for consideration on the merits of the appeal.*

*Per contra, learned counsel appearing for the respondent supported the impugned judgment and contended that the appellants consistently failed to appear before the High Court and therefore, the High Court had no option but to pass the impugned judgment and that there is no merit in the appeal.*

*Having heard learned senior counsel for the appellants and learned counsel for the respondents, at the outset, we extract Order XLI Rule 17 of the CPC which reads as under:*

*"17. Dismissal of appeal for appellant's default :- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.*

*Explanation. - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."*

*The Explanation categorically states that if the appellant does not appear when the appeal is called for hearing it can only be dismissed for non-prosecution and not on merits.*

*However, the impugned judgment is a dismissal of the appeal on merits which is contrary to the aforesaid provisions and particularly the Explanation thereto. On that short ground alone the appeal is allowed the impugned order is set aside.*

*The RSA No.196/2022 is restored on the file of the High Court.*

*The parties are at liberty to advance arguments on the merits of the case.*

*All contentions are left open. The appeal is allowed and disposed of in the aforesaid terms.*

*No costs.*

*Pending application(s), if any, shall stand disposed of."*

9. With the above principle in mind, we have looked at Section 107 of the UP GST Act. Sub-section (8) of Section 107 requires the Appellate Authority to give an opportunity of hearing to the appellant and sub-section (9) also empowers the Appellate Authority to adjourn the hearing at the request of the appellant, if sufficient cause is shown for the prayer made. The proviso to sub-section (9) ensures that the Appellate Authority has sufficient powers to refuse such adjournment, if it has been granted three times previously. Sub-section (10) empowers the Appellate Authority to permit the appellant to argue any ground, not set forth in the grounds of appeal, if the omission was not willful or unreasonable. We specifically extract sub-section (11) and (12) of Section 107, without the two proviso under sub-section (11) :-

*"(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming,*

*modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:*

*xxx xxx*

*xxx xxx*

*(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision."*

10. The specific statutory mandate is that after hearing the appellant, the Appellate Authority is to make further enquiry, if found necessary and pass such orders as it thinks just and proper, *confirming, modifying or annuling the decision or order appealed against.* Such affirmation, modification or annulment shall not be an empty formality nor can it be mechanical, without the consideration of the grounds of appeal. We observe so, specifically when the Appellate Authority is empowered to refuse the prayer for adjournment made by an appellate, if on three prior occasions, such adjournment has been allowed, in which case also the Appellate Authority cannot absolve itself from the obligation to conduct such further enquiry as is mandated under sub-section (11) of Section 107. Sub-section (12), it has to be further emphasized, also requires the order of the Appellate Authority disposing of the appeal to be in writing and specifically stating the points for determination, the decision thereon and the reasons for such decision. When an appeal is dismissed for reason only for absence of the appellant or lack of effective prosecution, then the Tribunal should be found to have abdicated its powers and not followed the statutory mandate.

11. Even otherwise, deciding a case ex parte on merits without giving reasonable opportunity to the parties is blatant violation of rule of "Audi alterum partem". In absence of the appellant, the Commercial Tax Tribunal had the authority to dismiss the appeal in default as provided in the Order XLI Rule 17 of the Code of Civil Procedure, 1908 rather than hearing it ex parte and deciding it on merits.

12. In this regard, the Supreme Court in the case of **Siemens Engineering & Manufacturing Company of India Ltd. v. Union of India, (1976) 2 SCC 981**, gave directions to the administrative authority and tribunals exercising quasi-judicial powers. The Court observed as under:

*"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process."*

13. The other concern raised before us was that there is no provision for setting aside the ex parte order in such a situation where the Tribunal proceeds to allow the appeal ex parte in absence of the defendant. In this regard, reliance was placed upon a judgement of a Coordinate Bench of this Court passed in **M/s Ram Sewak Coal Depot, Deori, Mirzapur Vs. The Commissioner of Trade Tax, U.P,**

**Lucknow; 2003 NTN (Vol.22)- 341,** wherein interpreting the provisions of Section 22 of the U.P. Value Added Tax Act, 2008, which is pari materia with provision of Section 31 of the U.P. Value Added Tax Act, 2008, which provides for rectification, this Court has held that wherein an appeal is decided ex parte, it shall be open for moving an application for rectification of such a situation. Accordingly, adequate reasons are given for the defendant for non appearance and judgement is rendered ex parte, but recall of order, exercise of rectification has been provided under Section 31 of the U.P. Value Added Tax Act, 2008.

14. In light of the above, the impugned order dated 18.12.2023, whereby the appellate authority has proceeded to decide the appeal preferred by the petitioner in his absence, is held to be illegal and arbitrary and accordingly set aside and the matter is remitted back to the appellate authority to decide the matter afresh after affording an opportunity of hearing to the parties and considering the fact that much time due to pendency of the aforesaid proceedings, has elapsed, the appellate authority is directed to expedite the appeal and decide the same within three months from the date of production of a certified copy of this order, in accordance with law.

15. With the aforesaid observations, the revision is **allowed.**

16. The petitioner undertakes to cooperate in the proceedings before the appellate authority.

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**(2024) 10 ILRA 205**
**APPELLATEJURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 24.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

Special Appeal Defective No. 436 of 2024

**Amardeep Kashyap ...Appellant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
Om Prakash Mani Tripathi

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

**(A) Service Law - Compassionate Appointment - Uttar Pradesh Dying-in-Harness Rules, 1974 - Indian Evidence Act, 1872 - Section 107 - Burden of proving death of person known to have been alive within thirty years, Section 108 - Burden of proving that a person is alive who has not been heard of for seven years -Presumption of Civil Death after 7 years of disappearance – A declaration of civil death by the civil court under Section 108 of the Indian Evidence Act, 1872 would not lead to a presumption with regard to date and time of death unless proven with evidence - Compassionate appointment can only be claimed if the death occurred during service.(Para - 12,19,20,24)**

Appellant's father, employed as a peon, went missing on 25.06.2012 - formal complaint was lodged on 27.06.2012 - Despite efforts, he could not be traced - reached age of superannuation on 30.11.2013 - Appellant filed suit for declaration of civil death under Section 108 - civil court declared his father's civil death on 22.04.2022 - but no specific date mentioned - Subsequently appellant sought compassionate appointment - which was rejected by authorities - hence present appeal. (Para 2-7,12)

**HELD: -** Appellant's request for compassionate appointment was rightly rejected since his father, presumed dead only after a seven-year period and a civil court declaration, had already

reached the age of superannuation by then. Thus, the compassionate grounds could not be invoked post-superannuation. (Para 24-26)

**Special Appeal dismissed.** (E-7)

**List of Cases cited:**

1. L.I.C. of India Vs Anuradha, (2004) 10 SCC. 131

2. Ram Singh Vs Board of Revenue, U.P. Allahabad, AIR 1964 All. 310

3. Smt. Narbada & anr. Vs Ram Dayal, A.I.R. 1968 Rajasthan 48

4. Subhash Ramchandra Wadekar Vs U.O.I., AIR 1993 Bombay 64

5. Sou. Swati W/o Abhay Deshmukh and ... Vs Shri. Abhay S/O. Purushottam Deshmukh, Nagpur Bench of

6. Bombay High Court in Second Appeal No.18 of 2016

7. U.O.I. represented by its Secy. & ors. Vs Polimetla Mary Sarojini & Anr.) Division Bench Judgment of the A.P. High Court in Writ Petition No.34859/201

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Sri Om Prakash Mani Tripathi, learned counsel for the appellant and Sri Gopal Kumar Srivastava, learned Standing Counsel for State-respondents.

2. The present Special Appeal stems out of an order dated 05.04.2024 and dated 12.07.2024 ('Impugned orders') passed by learned Single Judge of this Court in Writ A No.2731 of 2024 (Amardeep Kashyap Vs. State of U.P. and Others) and Civil Misc. Review Application Defective No.117 of 2024 respectively. Apparently, vide the said impugned order, the learned Single Judge did not find any illegality in the order dated 03.02.2023 passed by the Deputy Commissioner, Industries, Gonda wherein the claim of the appellant for compassionate appointment was rejected by the Deputy Commissioner.

3. The factual matrix of the case lies in a narrow compass. The appellant's father, Sri Ghanshyam Kashyap was working as a peon/Anuchar at Jila Udyog Kendra, Gonda, Uttar Pradesh and went missing on 25.06.2012, which although was reported by his family on the same day, however a formal missing complaint came to be filed on 27.06.2012. Apparently, despite extensive efforts to trace Sri Ghanshyam Kashyap they were futile. In the intervening period, since record reveal that the date of birth of the appellant's father Sri Ghanshyam was 08.11.1953, he attained the age of 60 years on 30.11.2013. No retirement benefits were extended by the respondent-Zila Udyog Kendra, Gonda in the absence of clarity of status of Sri Ghanshyam as confirmed by them vide letter dated 19.12.2019 wherein the representation of the mother of the appellant was rejected for providing of any financial help or compassionate appointment before the completion of seven years from the date of missing.

4. Subsequently, after a lapse of period of seven years, the family of the appellant filed a suit on 16.10.2019, seeking a declaration of Sri Ghanshyam's civil death, which came to be allowed by the learned Civil Judge, Senior Division, Gonda vide a judgment dated 22.04.2022 and during the pendency of the said suit, the mother of the appellant, Mrs. Urmila Devi also died on 07.05.2021.

5. It is claimed by the appellant that

after declaration of civil death by the court, he received an appointment letter dated 28.05.2022 for the position of chowkidar from the Deputy Commissioner, Zila Udyog and Protsahan Kendra, Gonda. However, when he went to join on the said position, he was not allowed to join for extraneous reasons and even his original appointment letter was taken away by the said respondent and was directed to produce death certificate of his father. The appellant thereafter obtained a death certificate issued by the Registrar of Birth and Death, which mentioned the date of death of the appellant's father to be 16.10.2019.

6. Thus, being aggrieved, the appellant filed Writ A No.6138 of 2022 for payment of dues and emoluments of late Sri Ghanshyam to his family as well as for seeking compassionate appointment for the appellant. However, the said Writ was disposed of vide an order dated 20.09.2022, directing the appellant to file a detailed representation raising all his grievance and correspondingly the respondent was directed to dispose the said representation within a time bound manner by a reasoned and speaking order.

7. However, the said representation was rejected on 03.02.2023 by the respondent authority, which came to be challenged by the appellant vide Writ A No.2731 of 2024 seeking quashing/setting aside of the order dated 03.02.2023 and praying for appointment to the appellant on the compassionate ground under the Dying in Harness Rules, 1974. The learned Single Judge after hearing the appellant, while dismissing the Writ Petition vide order dated 05.04.2024 came to observe as herein below:-

*"5. ..... It is the petitioner's case that his father had gone missing on 30.06.2012. As per the provisions of law, he shall be presumed to be dead seven years after the date on which he went missing, which comes in the year 2019. The petitioner's father would have attained the age of superannuation on 30.11.2013. Therefore, from the material available on record, it cannot be said that the petitioner's father had died in harness and, therefore, the petitioner cannot claim compassionate appointment in place of his father.*

*6. The learned counsel for the petitioner has submitted that the petitioner had been issued an appointment letter on the post of Chawkidar but the same was cancelled subsequently. However, the order of cancellation has not been assailed by way of this writ petition and, therefore, the issuance of appointment letter and cancellation thereof would not confer any rights on the petitioner or any ground to claim compassionate appointment, unless the petitioner is otherwise entitled to be appointed on compassionate basis. "*

8. Apparently, after the dismissal of the aforesaid Writ, the appellant preferred another Writ A No.3831 of 2024 before the learned Single Judge of this Court. However, the said Writ Petition was dismissed as withdrawn and liberty was granted to the appellant to file Review of the order dated 05.04.2024 passed in Writ A No.2731 of 2024. Thus, the appellant preferred Civil Misc. Review Application No.117 of 2024, which also came to be dismissed vide order dated 12.07.2024. It is this order dated 12.07.2024 passed in the Review Application as well as the order dated 05.04.2024 passed in the Writ A

No.2731 of 2024, which have been sought to be challenged in the present appeal.

9. The learned counsel for the appellant argued that the Review Application was wrongly dismissed by the learned Single Judge, inasmuch as the same was filed on the ground of discovery of new and important material and evidence of oral cancellation of his compassionate appointment. He further contended that the Review Application was filed after liberty having been sought by the appellant in Writ A No.3831 of 2024 on 16.05.2024, wherein he had sought implementation of his appointment order dated 28.05.2022. According to him, the said appointment was on compassionate ground as his father had gone missing since 25.06.2012 and he has not been allowed to join for extraneous consideration. Learned counsel for the appellant further submitted that there is a dichotomy in the stand of the respondent as on the one hand they have rejected the representation for compassionate appointment vide order dated 03.01.2023 and 03.02.2023 whereas on the other hand he has been issued a compassionate appointment vide order dated 28.05.2022. The learned counsel relied on the judgment of this Court in Civil Misc. Writ Petition No.17395 of 2011 to contend that there is no distinction between the civil death and natural death for the purpose of grant of compassionate appointment. Learned counsel has admitted the fact that the date of death as 16.10.2019 instead of 25.06.2012 has been given by the Nagar Palika and not in the declaratory suit filed by the appellant seeking declaration of the civil death of his father.

10. On the contrary, learned counsel for the respondent has supported the impugned order. According to the learned counsel, the date of death of the missing employee has to be construed on the date of declaration of the civil death by the competent court. According to him, in the present case, the father of the appellant although went missing on 25.06.2012, but his civil death came to be declared by the civil court only on 22.04.2022 on a suit filed by the appellant on 16.10.2019 and by which time the appellant's father would had already attained the age of superannuation on 30.11.2013. Thus, according to him the appellant was not entitled for compassionate appointment and there was no question of issuance of any appointment letter dated 28.05.2022 or its alleged oral cancellation.

11. Having heard learned counsel for the parties, this Court is of the view that the moot question to be determined by this Court is as to whether a person who is unheard of for a period of seven years, is to be presumed to have died on the date he went missing or soon thereafter or at the close/end of period of seven years. Thus, which date would be presumed as the date of death of Sri Ghanshyam Kashyap, father of the appellant? The answer to the said question would hold a key to his compassionate appointment as admittedly the appellant can be granted appointment only in case his father died in harness or died during his service period.

12. Admittedly, father of the appellant went missing on 25.06.2012 and he would have superannuated on 30.11.2013 based on the date of his birth referred earlier. Thus, in case it is found that his father died in harness during the period from 25.06.2012 to 30.11.2013 he can lay his claim to compassionate appointment.

13. While this moot question has drawn attention of several Courts on

various occasions, the Courts have tried to resolve the aforesaid controversy by considering the extent and scope of Section 107 and 108 and other provisions of Indian Evidence Act, 1872, as such, before dealing with the case laws on the subject, it would be apt to examine the provisions of Section 107 and 108 of the Indian Evidence Act, 1872, which have material bearing with the question in controversy involved as under:-

*"107. Burden of proving death of person known to have been alive within thirty years.*

*When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*

*108. Burden of proving that a person is alive who has not been heard of for seven years.*

*[Provided that when] [Substituted by Act 18 of 1872, Section 9, for "When".] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] [Substituted by Act 18 of 1872, Section 9, for "on".] the person who affirms it."*

14. Thus, Section 107 is about the burden of proving death of a person known to have been alive within thirty years, whereas Section 108 is about the burden of proving that the person has not been heard of for seven years.

15 . The Hon'ble Supreme Court in the case **of L.I.C. of India Vs. Anuradha; (2004) 10 SCC. 131**, observed in paragraph 12 to 15 as quoted herein below:-

*"12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.*

*13. A presumption assists a party in discharging the burden of proof by taking advantage or presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in 'Manual of the Law of Evidence' (Eleventh Edition at p.77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most*

*presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law which has gained recognition in statute or by successive judicial pronouncements spread over the years cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the Judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.*

*14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.*

*15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed.*

16. On same lines is the judgment of this Court in **Ram Singh Vs. Board of Revenue, U.P. Allahabad, AIR 1964 All. 310,** while dealing with the content and scope of provision of Section 108 of Indian Evidence Act and it was held that all that one can presume under Section 108 is that the person concerned is dead but one can not fix the time of person's death under the

provision of said section. Section 108 however, is not exhaustive on the question of presumption as regards the death of a person. The Court may in the circumstances of each case make suitable presumption even regarding the time of death of person concerned. In the said case Hon'ble Mr. Justice V.G. Oak, as he then was, observed as under :

*"Section 108, however, is not exhaustive on the question of presumption as regards death of a person. The Court may make a suitable presumption in accordance with the circumstances of each case :-*

*(1) Suppose a man sails in a ship, and the ship sinks. Thereafter the man is never seen alive. Under such circumstances, it is reasonable to assume that the person died in the ship wreck.*

*(2) When a person goes for pilgrimage he or she ordinarily returns home in six months or in a year. In the present case, Smt. Rukmini left for Gangasagar Yatra 17 years ago. Since then she has not been heard of. It is reasonable to assume that, she died in some accident or of some disease during the journey or at Gangasagar."*

17. Likewise is the judgment in **Smt. Narbada and another Vs. Ram Dayal, A.I.R. 1968 Rajasthan 48**, wherein it was held that presumption about the death of a person who is unheard of for seven years under Section 108 of Evidence Act can earliest be drawn when the dispute in which the question as to whether a person is alive or dead is raised and is brought to the court. The presumption cannot be given a further retrospective effect for the reason that the occasion for drawing a presumption under the provision arises only when the dispute regarding the death of a person who has been unheard of for seven years is raised in a court of law and it is only then that the question of burden of proof would arise under the Evidence Act. Section 108 relates to the question of burden of proof in a matter before a Court of law. Further while dealing with the question that as to when the death of a person who has not been heard of for seven years or more than seven years should be deemed to have taken place in para 14 of the aforesaid decision the Rajasthan High Court observed as under:

*"(14). This question as to when the death of the person who has not been heard of for seven years or more than seven years should be deemed to have taken place came up for consideration of this Court in ILR (1959) 9 Raj 276 and the learned Judge, after considering certain authorities, including the Privy Council case, came to the conclusion that although there is a presumption of death at the expiration of a period of not less than seven years in duration, there is no presumption that the death occurred at the end of seven years or at any other particular time during the period a person has not been heard of. Where a party relies on a specific date of death of a person, who has not been heard of for seven years or more, he must prove the specific date. It was also laid down that where a person is not heard of for seven years or more and no specific date of death has been or can be presumed, the earliest date on which it can be presumed that such a person was not alive shall be the date on which the suit was filed and it cannot be given a further retrospective effect.*

18. In **Subhash Ramchandra Wadekar Vs. Union of India, AIR 1993**

**Bombay 64,** the question arose for consideration as to what was the presumed date of death of Ramchandra Arjun Wadekar who had left the home on 9th January 1984 and was not heard of by the petitioner and other relative since then. While dealing with the said question, the learned High Court in para 12 made a very important observation, which is worth noting, as under :-

*12. If Section 108 of Evidence Act, 1872 were to be interpreted literally, it would have to be held that law presumes death of a person unheard of for seven years but is silent in respect of date of presumed death. It is therefore, a possible view that the date of presumed death must be proved by the party concerned as a fact by leading reliable evidence. This aspect of the matter is not very clear and one comes across conflicting observations in several decided cases on the subject. In light of authorities cited by the learned Counsel on both sides referred to in later part of this Order, I have reached the following conclusions;-*

*(1) Ordinarily a person unheard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier.*

*(2) Section 108 of Indian Evidence Act, 1872 is not exhaustive. It is permissible for the Court to raise a suitable presumption regarding date of presumed death depending upon the attendant circumstances and other reliable material on record. In other words, no rule of universal applicability can be spelt out regarding presumed date of death. In my opinion, proposition No. 1 must operate subject to proposition No. 2.*

19. Thus, it is clear as broad daylight from the aforesaid judgments that a declaration of civil death by the civil court under Section 108 of the Indian Evidence Act, 1872 would not lead to a presumption with regard to date and time of death. Essentially, the said declaration is based on a statutory presumption, which comes into play only after the lapse of seven years and not prior. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised even on expiring of six years and 364 days or at any time short of it. Further, the essential criteria or rather the condition precedent for the raising of the said presumption is expiry of seven years and most importantly, the occasion for raising the presumption would arise only when the question is raised in a court, tribunal or before an authority who is called upon to decide as to whether the person is alive or dead, by placing reliance on the said presumption.

20. However, it is also clear that the presumption of Section 108 is not the only mechanism for declaration of death. As held by the Hon'ble Supreme Court, suppose an individual does not wish to rely on the presumption as provided under Section 108 of the Indian Evidence Act, 1872, he is well within his/her right to prove by cogent evidence that the date and time of death is prior to seven years. The Hon'ble Court has clearly held that; if an issue arises as to date or time of death the same shall have to be determined on evidence direct or circumstantial and not by assumption or presumption. The burden of proof would lie on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim, prior to the lapse of seven years.

21. From a perusal of records, it is apparent that no doubt the appellant had filed a suit seeking declaration of civil death of his father, however, it is seen that the appellant did not seek declaration as to any specific date of death of his father and no evidence was adduced for proving a specific date or time of death. The order dated 22.04.2022 of the learned Civil Court is purely based on the presumption of death as provided under Section 108 of the Indian Evidence Act, 1872. In fact, there is no specific date of death mentioned, what to talk of any date prior to the order of declaration, which could have given an impetus to the claim of compassionate appointment to the appellant. Further, the learned Civil Court has also observed that the order would become automatically inoperative/ineffective, in case the father of appellant, Ghanshyam Kashyap is found to be alive, which also as a corollary meant that the learned Civil Court did not specify any date and time of death as it was not proved based on any evidence with any amount of certainty that the father of the appellant died on a specific date and time.

22. Further, in view of the above, this Court is also not impressed by the submission of learned counsel for the appellant that the death certificate of the appellant's father issued by the Registrar of Birth and Death, mentioned the date of death of the appellant's father to be 16.10.2019 merely because the suit was filed on 16.10.2019 and that date should be construed as 27.06.2012, the date on which the missing complaint was filed.

23. A learned Single Judge of this Court, in almost an identical situation was dealing with the rejection order passed for compassionate appointment by U.P. Rajya Vidhut Utpadan Ltd., Lucknow, wherein the declaration of civil death was granted by the civil court on 07.07.2018, and by that time, the father had already superannuated on 30.05.2010. The learned Single Judge after noting various precedents relied by the parties, including the judgment **of (I) L.I.C. of India Vs. Anuradha (Supra), (II) Nagpur Bench of Bombay High Court in Second Appeal No.18 of 2016 (Sou. Swati W/o Abhay Deshmukh and ... vs Shri. Abhay S/O. Purushottam Deshmukh) decided on 26.02.2016 and (III) Division Bench Judgment of the Andhra Pradesh High Court in Writ Petition No.34859/2016 (Union of India represented by its Secretary and Others Vs. Polimetla Mary Sarojini And Another) decided on 31.01.2017**, dismissed the petition on the ground that presumption would not arise unless a specific date of death if proved by evidence in the given facts since the date of death was neither disclosed nor was proved, the writ petition was rejected *[see order dated 04.12.2019 passed in Writ A No.19124 of 2019 (Vivek Kumar Verma Vs. Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited And 02 Others].*

24. In view of the above discussions, as the father, if alive would have attained the age of superannuation on 30.11.2013. Whereas, in view of the law on the subject, his civil death cannot be presumed on a date prior to 16.10.2019 when the suit was filed for such declaration, the petitioner's claim for compassionate appointment is not sustainable on aforesaid law.

25. For all the aforesaid reasons, this Court does not find any infirmity in the impugned orders dated 05.04.2024 and 12.07.2024 passed by the learned Single Judge of this Court in Writ A No.2731 of

2024 and Civil Misc. Review Application Defective No.117 of 2024 respectively.

26. As a sequel to the above, the present Special Appeal is **dismissed**.

27. There shall be no order as to the costs.

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**(2024) 10 ILRA 214**
**APPELLATEJURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 21.10.2024**

**BEFORE**

**THE HON'BLE ATTAU RAHMAN MASOODI, J.**
**THE HON'BLE SUBHASH VIDYARTHI, J.**

Special Appeal Defective No. 551 of 2024

**Surya Prakash Mishra ...Appellant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
Tanay Hazari, Alka Verma, Jhanak Bhawnani

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

**Civil Law – Constitution of India,1950 – Article 226 – UP Intermediate Education Act, 1921 – Section 16-G-(3)-** Special Appeal - against dismissal of Writ Petition – filed by the appellant, who is a Teacher in a private School, challenging the impugned order of termination of his services - learned Single Judge dismissed the writ petition on the ground of maintainability of writ petition in view of law laid down by Apex court in ***St. Mary's Education Society'*** *case* - while relying upon another judgment rendered by High Court of Madhya Pradesh at Indore in ***Vinita's*** *case*, plea has been taken that, ***St. Mary's Education Society's*** case deals only with the non-teaching employees and the ratio laid down in that case would not apply to the appellant who was a teacher – court while relying upon the judgment of Apex court in ***Army Welfare Education Society's*** case which dealt with both teachers and members of non-teaching staff, held that, writ petition filed for challenging the termination of service contract of a teacher working in a private institution will not be maintainable. (Para – 19, 20)

**Appeal Dismissed.** (E-11)

**List of Cases cited:**

1. St. Mary's Education Society Vs. Rajendra Prasad Bhargava & ors. (2023 4 SCC 498),

2. Vinita Vs U.O.I.(2022 SCC online MP 3745),

3. Devesh Verma Vs Christ Church College (2023 SCC online All 7),

4. Army Welfare Education Society, New Delhi Vs Sunil Kumar Sharma (2024 SCC online SC 1683).

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

**(Order on C.M. Application No. I.A. 1 of 2024)**

1. Heard Smt. Alka Verma, the learned counsel for the appellant and the learned Standing Counsel for the State.

2. This is an application for condonation of delay in filing the special appeal against the judgment and order dated 21.3.2024 passed by the Hon'ble Single Judge of this Court in Writ A No. 2377 of 2024.

3. In the affidavit filed in support of the application, it has been stated that the appellant is based at New Delhi and is suffering from chronic fever. It is also stated in the affidavit that after termination of his service, the appellant was facing financial crisis. The learned Standing

Counsel has not seriously opposed the application for condonation of delay.

4. The application for condonation of delay is allowed and the delay in filing the Special Appeal is condoned.

**(Order on Appeal)**

5. The instant appeal is directed against the judgment and order dated 21.03.2024 passed by the Hon'ble Single Judge in Writ A No. 2377 of 2024, which was filed challenging termination of the appellant's service on the post of Teacher in D.A.V. Public School, Ambedkar Nagar, Uttar Pradesh, which is a private school.

6. The Hon'ble Single Judge dismissed the Writ Petition as non-maintainable in view of the law laid down in the case of **St. Mary's Education Society versus Rajendra Prasad Bhargava and others:** (2023) 4 SCC 498. The learned counsel for the appellant ably attempted to distinguish the case on the ground that the judgment in the case of **St. Mary's Education Society** (Supra) pertains to non-teaching staff whereas the appellant was working on the post of the Teacher. However, the Hon'ble Single Judge held that in **St. Mary's Education Society** (Supra), the Supreme Court has clearly held that the employees of a private institution would not have the right to invoke the jurisdiction under Article 226 of the Constitution of India in respect of the matters relating to service contracts, where they are not governed or controlled by any statutory provisions and also that an educational institution may be performing myriad functions touching upon various facets of public duty but a contract of service being an offer and acceptance of terms between two private entities would not fall within the realm of public functions regulated by public law.

7. Smt. Alka Verma, the learned counsel for the appellant has submitted that the judgment in **St. Mary's Education Society** (Supra) deals with the non-teaching employees and the ratio laid down in that case would not apply to the appellant who was a teacher. She has relied upon a decision rendered by a Single Judge Bench of the High Court of Madhya Pradesh at Indore in **Vinita v. Union of India, 2022 SCC OnLine MP 3745** wherein it has been held that the judgment of **St. Mary's Education Society** (Supra) would not apply to teachers of private institutions.

8. A perusal of the judgment in the case of **Vinita** (Supra) indicates that the Madhya Pradesh High Court has noted the preliminary objection that the writ petition was not maintainable in view of the judgment passed by the Apex court in the case of **St. Mary's Education Society** (Supra) and while dealing with this preliminary objection the Madhya Pradesh High Court has merely stated that the "applicability of this judgment has already been considered by Single Bench as well as by Division Bench, therefore, there is no need to reconsider the issue while deciding this petition finally".

9. The judgment in which the Single Judge and the Division Bench judgments referred to in Vinita Nair (supra), wherein the question of applicability of St. Mary's Education Society (supra) was considered, have not been placed before this Court.

10. **St. Mary's Education Society** runs a private unaided educational institution. Respondent 1 in the appeal -

Rajendra Prasad Bhargava, was serving as an office employee of the society. He had filed a Writ Petition challenging termination of his services. A Single Judge Bench of Madhya Pradesh High Court dismissed the Writ Petition as not maintainable but a Division Bench set aside the judgment and order and held that a writ petition filed by an employee of a private unaided minority educational institution seeking to challenge his termination from service is maintainable. The following two pivotal issues fell for consideration of the Hon'ble Supreme Court: -

(*a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?*

*(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution?*

11. The Hon'ble Supreme Court answered the aforesaid questions in the following words: -

*"75.1. An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.*

*75.2. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ.* ***Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.***

*75.3. It must be consequently held that* ***while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions****. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the*

*Constitution,* ***the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognized as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.***

*75.4. Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case,* ***the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the Court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.***

*75.5. From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character."*

(Emphasis added)

12. The learned Counsel for the appellant has emphasized that paragraph 75.4 of the judgment in St. Mary's case indicates that the Hon'ble Supreme Court has only held that a Writ Petition regarding service contract of a member of non-teaching staff of a private educational institution will not be maintainable whereas the teachers are engaged to impart education, which is a public duty performed by the school. Therefore, the service of the petitioner – teacher involved a public law element and consequently termination of services of a teacher of a private educational institution can be challenged by filing a writ petition.

13. The learned counsel for the appellant has further submitted that the school in question is recognized by the Board of Secondary Education and is governed by its rule and regulation. It is performing public duties and therefore the writ petition would be maintainable in respect of the service dispute between the appellant and the school in question.

14. Although para 75.4 of the judgment in **St. Mary's Education Society** (Supra) makes a mention of teachers, the principles of law mentioned in paras 75.1 to 75.3 relate to all employees of private educational institutions, without any distinction between teachers and members of non-teaching staff.

15. In **Devesh Verma v. Christ Church College**, 2023 SCC OnLine All 7, the appellant had filed a Writ Petition

challenging his removal from the post of Lecturer in Christ Church College, Lucknow, on the ground that the removal was done in violation of Section 16 G (3) of the U.P. Intermediate Education Act, 1921. The Writ Petition was dismissed by a Single Judge Bench as not maintainable. In appeal, a coordinate Bench of this Court considered numerous precedents on the issue and held that from a reading of the judgments, the law as summarized in St. Mary's (Supra) is that the employees of a private educational institution would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matters relating to service where they are not governed or controlled by the statutory provisions.

16. **In Army Welfare Education Society, New Delhi versus Sunil Kumar Sharma:** 2024 SCC OnLine SC 1683, a Single Judge of the High Court of Uttarakhand had allowed the writ petition by issuing a mandamus to the petitioners not to vary the service conditions of the teaching and non-teaching staff to their disadvantage. During pendency of the Intra Court Appeal, the Division Bench had passed an order was passed dated 06.01.2016, the relevant part whereof has been quoted in the judgment of the Hon'ble Supreme Court and which is being reproduced below: -

*"3. BEG has decided to run the institution as an Army School under the Army Welfare Education Society (AWES), which has also come up in appeal against the judgment. According to AWES, it is running 134 schools all over India. They have a complaint that, at present, for the past two years since 1st April 2012, they are collecting fees at the rates they are collecting in the other Army Public Schools and, yet, they have been compelled to pay the salary, which is being paid to the teachers earlier by St. Gabriel's, which was in fact collecting far more fees and there is a huge deficit. According to them, they will not terminate the services of the* ***teachers and non-teaching staff****, if AWES is permitted to take over; but, they will be paid the salary in terms of the standards, which they have in respect of the other Army Public Schools. It is their case that they are prepared to allow* ***the teachers and non-teaching staff*** *to continue, provided some modalities are complied with, relevance of which may not present itself immediately. According to the teachers and non-teaching staff, they have a right to continue as such.*

*4. We would think that the interest of justice requires that the arrangement, which has been ordered by the Court in Writ Petition No. 776 of 2015 (M/S) must be modified. Accordingly, we modify the order and direct that AWES can take over the management of the school and the* ***teaching and other non-teaching staff*** *will be allowed to continue, however, with the modification that the pay will be such as they would be entitled to treating it as another Army Public School. This arrangement will be provisional and subject to the result of the litigation and without prejudice to the contentions of the parties. The Committee will handover the management to the AWES upon production of a certified copy of this order. The accounts, etc., will also be handed over to the Principal of the school. We record the submission of the learned counsel appearing for St Gabriel's that they will handover the amount representing gratuity, earned leave encashment and the installment of the sixth pay commission directly to the teachers and other*

*nonteaching staff. We make it clear that the school can be run in terms of the Rules of AWES otherwise. The payment of salary as per AWES can commence from 1st January, 2016."*

17. On behalf of the petitioners, it was submitted before the Hon'ble Supreme Court that the teaching and non-teaching staff were employees of St Gabriel's Academy and since the erstwhile management has ceased to conduct the school, the staff would have no claim as against AWES which is conducting the school, at present. The following two questions of law fell for consideration of the Hon'ble Supreme Court: -

*a. Whether the appellant Army Welfare Education Society is a "State" within Article 12 of the Constitution of India so as to make a writ petition under Article 226 of the Constitution maintainable against it? In other words, whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated upon in a writ petition filed under Article 226 of the Constitution?*

*b. Even if it is assumed that the appellant Army Welfare Education Society is a body performing public duty amenable to writ jurisdiction, whether all its decisions are subject to judicial review or only those decisions which have public law element therein can be judicially reviewed under the writ jurisdiction?*

18. The Hon'ble Supreme Court extensively quoted passages from the judgment in **St. Mary's Society** (Supra) and following the same, it was concluded that: -

*"In view of the aforesaid, nothing more is required to be discussed in the present appeals. We are of the view that the High Court committed an egregious error in entertaining the writ petition filed by the respondents herein holding that the appellant society is a "State" within Article 12 of the Constitution. Undoubtedly, the school run by the Appellant Society imparts education. Imparting education involves public duty and therefore public law element could also be said to be involved. However, the relationship between the respondents herein and the appellant society is that of an employee and a private employer arising out of a private contract. If there is a breach of a covenant of a private contract, the same does not touch any public law element. The school cannot be said to be discharging any public duty in connection with the employment of the respondents."*

19. The judgment in the case of **Army Welfare Education Society** (Supra) dealt with both teachers and members of non-teaching staff. Therefore, the submission of the learned Counsel for the appellant that the principles laid down in the case of **St. Mary's Education Society** would not apply to teachers, has no force. The service contract was also not shown to us protected under any statutory provision enabling us to extend the arm of remedy by virtue of Article 226 of the Constitution of India.

20. In view of the aforesaid discussions, we find ourselves in complete agreement with the view taken by the Hon'ble Single Judge in the order dated 21.03.2024 passed in Writ Petition 2377 of 2024, that a Writ Petition filed for challenging the termination of service

contract of a teacher working in private institution will not be maintainable.

21. The special appeal lack merit and the same is ***dismissed***.

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**(2024) 10 ILRA 220**
**APPELLATEJURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 15.10.2024**

**BEFORE**

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

Special Appeal No. 937 of 2024

**Ajay Kumar Pandey ...Appellant**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Appellant:**
Km. Anjana, Sri Sarveshwari Prasad

**Counsel for the Respondents:**
C.S.C, Sri Grijesh Tiwari, Sri Nitin Chandra Mishra.

**A. Education – Admission – LLB three year course – Eligibility –As per Brochure, a student in order to be eligible should possess the graduation degree relatable to the academic session 2016 or thereafter – However, the Law College took admission of 55 students, who did its graduation in the year 2008 – Admittedly no fraud was played by the students to take admission – Fault of the College found proved – Adequate compensation – Determination – Held, the Law College has acted not only in a careless and reckless manner but also exhibited a conduct other than bona fide just in order to enroll and admit students in order to charge fees playing with their future – Division Bench enhanced the monetary compensation from Rs. 30,000/- to Rs. 5,00,000/-. (Para 16 and 17)**

**Special Appeal disposed of.** (E-1)

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This intra-court appeal is against the judgment and order of the learned Single Judge dated 28.08.2024 passed in Writ-C No. 33767 of 2022, whereby the writ petition preferred by the appellant-writ petitioner challenging the orders dated 01.11.2021 and 04.01.2021 of the Registrar, Deen Dalay Upadhyay Gorakhpur University, Gorakhpur, second respondent and Executive Examination Controller, Deen Dayal Upadhyay Gorakhpur University, Gorakhpur, third respondent was dismissed.

2. The case of the appellant before the writ court was that there happens to be an institution by the name of Prabha Devi Bhagwati Prasad Vidhi Mahavidhayalay, Anantpur, Harpur-Budhahat, Gorakhpur, fourth respondent (in short 'Law College') affiliated to Deen Dayal Upadhyay Gorakhpur University, Gorakhpur (in short 'University').

3. A notification came to be published by the University on 15.10.2019 for the grant of admission in LLB three years course for the academic session 2019-20. As per the notification, the last date for submission of the application form was 23.10.2019. According to the appellant-writ petitioner in order to secure admission, the relevant documents were to be submitted before the Law College and therefrom, the same were to be transmitted to the University. As per the appellant-writ petitioner the required documents was though submitted before the last date i.e. 23.10.2019 before the Law College but the same stood transmitted to the University on 10.06.2020. Thereafter, an online examination form came to be issued. The appellant writ petitioner was accorded

admission and he was allowed to appear in the first semester examination of the LLB course for the year 2019-20 and the results were declared on 26.05.2020. Since the marks for LLB first semester examination 2020 were not awarded as per the expectation of the appellant-writ petitioner so he preferred **Writ-C No. 20136 of 2020** in which on 08.12.2020, the following orders were passed.-

"This writ petition has been filed for the following relief;

"(i) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to produce the answer-sheet of LLB Ist Semester Exam 2020 revaluate the same within stipulated period as fixed by this Hon'ble Court."

Counsel for the petitioner submits that marks given to the petitioner in LLB Ist Semester Examination are far less than expectation of the petitioner. He further states that the petitioner has not applied for and has not been given a copy of the said examination.

Considering the facts and circumstances of the case, the petitioner is granted liberty to apply for giving copies of LLB 1st Semester Examination for which the petitioner may submit requisite fee with the respondent-University.

Sri Rohit Pandey, Advocate appears on behalf of Respondents No. 2 and 3 and assured this Court that in case the petitioner approached the University by filing any such application, the same shall be supplied to the petitioner within a period of three weeks from the date of moving the application.

The writ petition is disposed of with liberty above so granted."

4. It is also the case of the appellant-writ petitioner that the answer sheets of the appellant writ petitioner was re-evaluated and with respect to paper No. 146 the marks stood enhanced from 36 to 42. As per the appellant-writ petitioner though he was entitled to appear in the second semester viva voce examination which was scheduled on 24.01.2021 but he was not allowed to appear. The same led to filing of representation on 24.01.2021 and 25.01.2021 and thereafter, Writ-C No. 5242 of 2021 which was entertained by this Court while seeking response from the respondents herein. Thereafter, a counter affidavit came to be filed by the University coming up with a stand that consequent to the holding of the inquiry by a committee constituted by the University by order dated 20.12.2020 a report came to be submitted on 01.01.2021 holding that the admissions accorded to 55 students including the appellant-writ petitioner was illegal since the writ petitioner along with the 54 others were not eligible to be accorded admission as according to the brochure for P.G. Entrance examination-2019 (academic session 2019-20) a student in order to be eligible should possess the graduation degree relatable to the academic session 2016 or thereafter and since the appellant-writ petitioner did its graduation in the year 2008, thus, he was not eligible to be accorded admission. Thereafter, on the basis of the report of the committee dated 01.01.2021 the University took a decision to cancel the admission of the appellant-writ petitioner along with 54 candidates on 04.01.2021.

5. Questioning the said orders, the appellant-writ petitioner preferred **Writ-C**

**No. 33767 of 2022 (Ajay Kumar Pandey Vs. State of U.P. & Others)** which post exchange of affidavits came to be dismissed on 28.08.2024 while observing as under:-

"12. In view of the above, as the Rules for admission for LLB is not challenged, so this Court would rely upon the same and there is no illegality in the order passed by the authorities cancelling the admission of the petitioner. Hence the writ petition is devoid of merit and is accordingly dismissed.

13. At this stage, learned counsel for the petitioner has submitted that for the fault of the college that the respondent No.4 who had given admission to the petitioner against the rules and wasted an year of the petitioner who shall be liable for the same.

14. The learned counsel for the respondent no.4 has submitted that it is the petitioner who is responsible as he had shown himself to have graduated in the year 2015 whereas it was in the year 2008. So it was the petitioner who mislead the college for taking admission in the LLB course. None the less, the college i.e. respondent No.4 would also be accountable to have granted admission to the petitioner even though the petitioner had placed the mark-sheet of having graduated on the record. The college should have also taken note of the same. In such circumstances the equity demands that the petitioner may not financially suffered, therefore, the college is directed to pay a sum of Rs.30,000/- to the petitioner which includes the amount of Rs.6000/- deposited as fee by the petitioner within a period of four weeks from today."

6. Assailing the order of the learned Single Judge, the present appeal has been preferred.

7. Km. Anjana, learned counsel for the appellant has sought to argue that the judgment and order of the learned Single Judge cannot be sustained for a single moment as the learned Single Judge has misconstrued the entire controversy and has adopted an incorrect approach. Elaborating the said submission, it has been argued that it was only on account of the fault of the Law College which created such a situation, as the appellant-writ petitioner had completed all the formalities as prescribed therein and also submitted the entire documents with the Law College and as per the admission procedure, it is the Law College which corresponded with the University in question and not only this the appellant-writ petitioner was accorded admission in LLB first year for the academic session 2019-20 and he also was declared successful in LLB in the first semester examination in LLB course. However, owing to awarding of less marks, a writ petition also came to be preferred by the appellant-writ petitioner, Writ-C No. 20136 of 2020 which came to be disposed of on 08.11.2020 requiring the University to do the needful and thereafter marks stood re-evaluated to the betterment of the appellant-writ petitioner while enhancing them from 36 to 42 in paper No. 146.

8. Submission is that though as per clause 5 of the brochure published by the University for the grant of admissions for the academic session 2019-20, a student was required to possess graduation degree of the year 2016 or onwards but mere possession of graduation degree of the year 2008 would not be of any detriment particularly when the appellant-writ

petitioner was allowed to pursue the first semester of LLB three years programme.

9. In a nutshell the submission is that on account of the fault of the Law College the entire academic career of the appellant-writ petitioner has been jeopardized and looking into the fact that the appellant-writ petitioner is a meritorious student and there is nothing adverse against him, the learned Single Judge erred in not allowing the writ petition while setting aside the orders impugned before it. It is, thus, prayed that the order of the learned Single Judge as well as the decision of the University be set aside and the writ petitioner be permitted to pursue the second semester of the LLB three years programme.

10. Countering the submission of the learned counsel for appellant-writ petitioner, Sri Nitin Chandra Mishra who appears for the respondent University and Sri Grijesh Tiwari who appears for the Law College have submitted that the order of the learned Single Judge needs no interference in the present proceedings. It is contended that the appellant-writ petitioner right from the very inception was conversant with the terms and conditions specified in the Brochure for the admissions of the LLB three years course which required possession of the degree of graduation for the year 2016 or onwards for the academic session 2019-20 but, the appellant-writ petitioner made interpolations and projected that he had obtained graduation in the year 2015 despite the fact that he was a graduate of the year 2008 and procured an admission. Submission is that the conduct of the appellant-writ petitioner disentitles him of any relief particularly when on account of the fault of the appellant-writ petitioner neither the Law College nor the university can be said to be at any fault.

11. Sri Rajiv Gupta, learned Additional Chief Standing Counsel has adopted the submission of the learned counsel for the University and the Law College.

12. We have heard the learned counsel for the parties and perused the record.

13. Facts are not in issue. It is not in issue that the University issued a notification on 15.10.2019 for submitting online examination form for admission in three years LLB programme for the academic session 2019-20, last date whereof was 23.10.2019. It is also not in dispute that the Brochure came to be published by the University setting out the modalities according to which the admissions are to be accorded of the LLB three years course for the academic session 2019-20. Parties are in agreement that clause 5 of the brochure in question stipulated that with regard to eligibility for being accorded admission in the LLB three years course for the academic year 2019-20 a students should have a graduation degree of the year 2016 or onwards. Apparently, the appellant-writ petitioner possesses graduation degree of the year 2008 though he has projected in his application form that the same was of the year 2015.

14. The bone of contention between the parties is as to who is at fault. On a pointed query being raised to the learned counsel for the Law College, Sri Grijesh Tiwari has made a statement that as per the procedure set out therein the entire documents including the testimonials are to be submitted by a student to the Law

College and thereafter the records are transmitted to the University. It has also come on record that as many as 55 students' admissions stood cancelled. Interestingly, in the present case in hand the appellant-writ petitioner was accorded admission in the first semester of the LLB three year course, however, he was not allowed to appear in the LLB second year examination. Records further reveal that the University had constituted a committee with regard to the illegalities committed in the admission of the students in the Law College relatable to LLB three years course of the academic session 2019-20 whereafter, it revealed that not only the appellant-writ petitioner but also other students were illegally accorded admissions. Learned Single Judge on a challenge raised to the decision of the University in the writ petition proceeded to pass a detailed order on 29.04.2024 which reads as under:-

"1. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondent No. 1, Mr. Nitin Chandra Mishra, learned counsel appearing for the Respondents No. 2 & 3 and Mr. V.K. Singh leaned Senior Advocate assisted by Mr. Grijesh Tiwari, learned counsel appearing for the Respondent No. 4.

2. It has been contended on behalf of the petitioner that 120 students were allowed admission in L.L.B. three year course for the academic session 2019-20 in Prabha Devi Bhagwati Prasad, Vidhi Mahavidyalaya, Anantpur, Gorakhpur. The students continued to pursue their studies, they appeared in the examinations of the first semester and later on they were given admission in the second semester course but before the examinations of the second semester, Examination Controller of the University wrote a letter on 01.10.2020 whereby principal of the institution was directed to take decision in respect of admissions of 55 students as University has found that the said admissions are against the provisions made in the brochure issued for the purposes of admission. After the aforesaid letter was issued by the University, Respondent No. 4 issued notice to the 55 students and thereafter has cancelled admissions of 52 students.

3. This court finds that brochure issued by the University for admission in L.L.B. course categorically provided that only those students will be given admission in L.L.B. three year course who have passed out their graduation examination after 2015. The Respondent No. 4, out of the total 120 students, allowed admissions of 55 students who have completed their graduation prior to the year 2015.

4. Learned counsel appearing for the petitioner has argued that a bare perusal of the provisions made in the brochure for admission, it is patently manifest that there is categorical provision that students will be given admission in L.L.B. three year course only after due verification of their original testimonials.

5. Prima facie this court is of the view that such a large number of illegal admissions could not have been made by the college authorities without their involved. It also appears to the court that University had just done the formality and once the college authorities have cancelled the admissions no further action has been taken by the University in the matter. Even this is also apparent from the record that no serious inquiry on the part of the University was conducted in the matter to ascertain, as

to what was the role of the college authorities in grant of illegal admissions to 55 students out of the total 120 students.

6. Since it is the matter of career of the students, it cannot be handled with reluctance rather it is obligatory on the University to hold a full fledged inquiry in the matter and to ascertain, as to who was responsible for these 55 illegal admissions.

7. Accordingly, keeping this writ petition pending, as an interim measure this court directs the Registrar of the Deen Dayal Upadhyay University, Gorakhpur to hold an inquiry in the matter and to ascertain as to who are responsible for 55 illegal admissions in L.L.B. three year course and further what action is needed against the erring persons.

8. Let aforesaid inquiry be completed within a period of six weeks from today and report of inquiry be placed on record of this writ petition.

9. List this matter on 02.07.2024."

15. Though according to the learned counsel for the appellant-writ petitioner, since, he had been accorded admission in first semester of LLB three years course, so he cannot be denied permission to appear in second semester is concerned, the same is neither here nor there particularly when appellant-writ petitioner was not eligible as he had a graduation degree of the year 2008 and not of the year 2016 or onwards. Since the conditions stipulated in clause 5 of the brochure for admission for the academic session 2019-20 for LLB three years course is not under challenge, thus, we are not required to delve into the aspect relating to the legality of the same. Thus, the relief sought for permitting the appellant-writ petitioner to appear in the second semester of LLB three years course is declined.

16. Now the next question which arises for our consideration is whether the appellant-writ petitioner has been adequately compensated or not and is entitled to enhance compensation. Interestingly, the finding of the learned Single Judge that the Law College was responsible in granting admission to the appellant-writ petitioner on the face of the fact that all the documents/testimonials was submitted by the appellant-writ petitioner and he is entitled to monetary compensation of Rs. 30,000/- has not been questioned by the Law College. We have been informed that the Law College has not preferred an appeal against the said findings and the directions and the same has attained finality. Moreover, the report of the committee dated 01.01.2021 and the decision of the University dated 04.01.2021 clearly holds that the Law College had committed illegality in granting admission to the students. Since it has not been disputed before us and rather admitted by Sri Grijesh Tiwari, learned counsel for the Law College that the documents submitted by the respective students to the Law College are routed through the Law College to the University with its recommendation, thus, looking to the overall circumstances, it becomes highly inconceivable and improbable that the Law College was vigilant and not at fault. It is rather amazing that the Law College has acted not only in a careless and reckless manner but also exhibited a conduct other than bona fide just in order to enrol and admit students in order to charge fees playing with their future. The Chapter did not close at that juncture, however, admission was accorded to the appellant-writ petitioner for the academic session 2019-20 and he cleared the first semester on 26.05.2020. A decision cancelling admission

of the appellant-writ petitioner has been taken in the month of January, 2021. As per the affidavit of the appellant-writ petitioner he is now 35 years of age.

17. Looking into the aforesaid facts and circumstances, we expressed our mind for enhancing the monetary compensation from Rs. 30,000/- to Rs. 5,00,000/- while giving an opportunity to Sri Grijesh Tiwari, learned counsel for the Law College to make his submissions in that regard.

18. Sri Grijesh Tiwari, learned counsel for the Law College could not dispute the fact that it was on account of the fault of the Law College the appellant-writ petitioner was accorded admission, however, on the question of enhancement of compensation, he only requested that the amount of Rs. 5,00,000/- to be awarded as compensation to the appellant-writ petitioner is excessive and the Law College is not in a position to make the said payment. He also apprehends that, in case, the compensation of Rs. 5,00,000/- is awarded to the appellant-writ petitioner then the remaining 54 students would approach this Court.

19. We have bestowed our consideration on the said aspect and we find that once it is admitted to the Law College that the appellant-writ petitioner had not practised fraud and he submitted all the relevant documents and was accorded admission due to the fault of the Law College then in order to compensate the appellant-writ petitioner for jeopardizing his academic career the amount of Rs. 5,00,000/- to be awarded as monetary compensation is reasonable and not excessive.

20 . Accordingly, the order of the learned Single Judge insofar as it seeks to uphold the decision of the University dated 04.01.2021 negating the claim of the appellant-writ petitioner to be permitted to pursue second semester of the LLB three years programme for the academic session 2019-20 needs no interference. However, we modify the order of the learned Single Judge dated 28.08.2024 passed in Writ-C No. 33767 of 2022 while enhancing the monetary compensation from Rs. 30,000/- to Rs. 5,00,000/- which shall be paid by the Law College to the appellant-writ petitioner within a period of six weeks from today.

21. In the eventuality, the Law College does not make the said payment within the stipulated period then the same shall be recovered as arrears of land revenue and paid to the appellant-writ petitioner.

22. With the aforesaid observations, the present intra-court appeal is **disposed of**.

23. Though we have disposed of the appeal, however, an affidavit of compliance shall be filed by the Law College before the Registrar General of this High Court within six weeks.

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**(2024) 10 ILRA 226**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 18.10.2024**

**BEFORE**

**THE HON'BLE MANISH KUMAR NIGAM, J.**

Writ-C No. 6354 of 2022

**Nagendra Sharma & Anr. ...Petitioners**
**Versus**
**Court Of Prin. Judge Family Court Gonda & Anr. ...Respondents**

**Counsel for the Petitioners:**
Amarendra Kumar Bajpai, Tejaswini Bajpai

**Counsel for the Respondents:**

Amrendra Nath Tripathi, Meena Singh (Kathayat)

**Civil Law - Family Court Act,1984 -Section 10-**Writ of prohibition restraining the respondent Family Court to proceed with Rule 13 C.P.C.- initiated by respondent no. 2- claiming that Family Court has no jurisdiction to entertain a petition under Order IX Rule 13 read with Section 151 of C.P.C;- Section 10 of the Family Court Act provides that the Civil Procedure Code are applicable in proceedings before the Family Court- the Family Court has jurisdiction to entertain an application under Order IX Rule 13 C.P.C. and therefore, no writ of prohibition can be issued to respondent no. 1.

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Rabindra Singh Vs Financial Commissioner Co-operation Punjab & ors. reported in 2008 7 SCC 663

2. East India Commercial Co. Ltd. Vs Collector of Customs reported in AIR 1962 SC 1893

3. Govind Menon Vs U.O.I. (AIR) 1967 SC 1274 (1967)

4. Roopa Vs Santosh Kumar reported in 2004 SCC OnLine All 1157

5. Munna Lal and etc. Vs St. of U.P. & anr. etc. reported in 1990 SCC OnLine All 119

6. Ranvir Kumar Vs Judge, Family Court, Moradabad & ors. reported in MANU/UP/0598/1998

7. Deep Mala Sharma Vs Mahesh Sharma reported in MANU/UP/0283/1991

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard Shri Amrendra Kumar Bajpai, assisted by Ms. Tejaswini Bajpai, learned counsel for the petitioners, Shri Ashok Mishra, Advocate holding brief of Shri Amrendra Nath Tripathi, learned counsel for respondents.

2. This petition has been filed for the following relief:

*"I. To issue a writ, direction or order in the nature of Prohibition to refrain the O.P. no. 1 from acting beyond jurisdiction by initiating proceedings under Order XI Rule 13 read with Section 151 C.P.C. in Case No. 52 of 2019-Smt. Sarla Sharma Vs. Nagendra Sharma & Another for recalling the judgment dated 16.01.2019.*

*II. To issue a writ, direction or order in the nature of Certiorari to quash / set asdie the ex-parte orders dated 29.05.2019 (Annexure Nos. 1 & 2) and order dated 22.08.2022 (Annexure No. 13) passed by the O.P. no. 1 in Case No. 52 of 2019- Smt. Sarla Sharma Vs. Nagendra Sharma & Another."*

3. Learned counsel for the respondent submitted that since question of jurisdiction is involved in the present writ petition, therefore, he does not intend to file counter affidavit and matter may be heard and decided to which learned counsel for the petitioner has no objection. Therefore, matter is decided with the consent of the parties without calling for a counter affidavit.

4. Before considering the merits of the case it will be useful to refer the brief facts of the case. The petitioner No. 1 was married to the respondent no. 2 on 13.03.1996 and out of their wedlock two children were born on 06.06.1999 and 28.09.2002. Thereafter, certain differences arose between the parties which led to

filing of certain cases against the petitioner, details of which is given in paragraph no. 4 to 8 of the writ petition. The petitioner no. 1 thereafter filed an application under Section 13 of the Hindu Marriage Act for divorce being Case No. 1006 of 2017 (Nagendra Sharma v. Smt. Sarla Sharma) in the court of Principal Judge, Family Court, Gonda on 06.11.2017 and after exchange of pleadings between the parties, the application filed by the petitioner no. 1 under Section 13 of Hindu Marriage Act was allowed by judgment and decree dated 16.01.2019 and 28.01.2019 passed by Principal Judge, Family Court, Gonda. On 29.05.2019 the respondent no. 2 filed an application under Order 9 Rule 13 C.P.C. read with Section 151 C.P.C. against the judgment and decree dated 16.01.2019 and 28.01.2019 passed by the Principal Judge, Family Court, Gonda in Case No. 1006 of 2017 along with an application under Section 5 of Limitation Act for condoning the delay in filing the application under Order IX Rule 13 C.P.C. and stay application for staying the judgment and decree dated 16.01.2019 and 28.01.2019. The Principal Judge, Family Court by order dated 29.05.2019 has stayed the implementation of the judgment and decree dated 16.01.2019 and 28.01.2019 and issued notices to the petitioner no. 1 fixing 17.07.2019.

5. The petitioner has prayed a writ of prohibition restraining the respondent no. 1 to proceed with proceedings under Order IX Rule 13 C.P.C. initiated by respondent no. 2 on the ground that in view of Section 19 & 20 of the Family Court Act, 1984, the Principal Judge, Family Court has no jurisdiction to entertain a petition under Order IX Rule 13 read with Section 151 of C.P.C. and the orders passed in the aforesaid proceedings are without jurisdiction.

6. Per contra, learned counsel appearing for respondents has submitted that the respondent no. 1 was well within the jurisdiction to entertain a petition under Order IX Rule 13 C.P.C. read with Section 151 C.P.C. and has committed no illegality in entertaining the same.

7. Before considering the rival submission, it would be relevant to quote the relevant provisions of law as well as the nature and scope of writ of prohibition:

*"Prohibition is an extraordinary prerogative writ of a preventive nature, its proper function being to prevent courts, other tribunals, officers or persons exercising judicial or quasi-judicial powers from usurping jurisdiction or exercicing jurisdiction not vested in them.*

*In Halsbury's Laws of England, it is stated: "The order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or an inferior temporal court or to the Crown Court, which forbids that court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land."1*

*Thus, prohibition is a judicial writ, issued by a superior court directing a subordinate court or an inferior tribunal from exercising jurisdiction not vested in it or from acting in excess of jurisdiction. Under the Constitution of India, a writ of prohibition has been specifically recognized both under Article 32 and Article 226. It is directed either by the*

*Supreme Court or by a High Court to any subordinate court or inferior tribunal prohibiting it from proceeding with the matter over which it has no jurisdiction or in excess thereof.*

8. In case of ***East India Commercial Co. Ltd. v. Collector of Customs reported in AIR 1962 SC 1893,*** the Supreme Court at page no. 1903 of the judgment held that a writ of prohibition is a judicial writ. It can be issued against a judicial or quasi judicial authority, when such authority exceeds its jurisdiction or tries to exercise jurisdiction not vested in it. It is an order directed to the inferior court or tribunal forbidding it from continuing with proceedings therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to laws of the land statutory or otherwise.

9. The paramount object of prohibition is to prevent encroachment of jurisdiction. Its function is to restrain courts, tribunals and officers or authorities exercising judicial or quasi-judicial powers from usurping jurisdiction not vested in them or from exceeding their authority by confining them to the exercise of powers conferred on them.

10. Writ of prohibition is not a proceeding between the private litigants at all. In fact, it is a proceeding between two courts, a superior court and a inferior court and as the means whereby the superior court exercises its power of superintendence over an inferior court by keeping the later within the limits of the jurisdiction conferred on it by law.

11. In case of absence or total lack of jurisdiction, a writ of prohibition would be available against a judicial or quasi-judicial authority prohibiting it from exercising jurisdiction not vested in it. Again, a distinction must be drawn between lack of jurisdiction and the manner or method of exercising jurisdiction vested in a court or tribunal. Prohibition cannot lie to correct the course, practice or procedure of an inferior court or a tribunal or against a wrong decision on merits (Govind Menon v. Union of India (AIR) 1967 SC 1274 (1967). Therefore, when a tribunal has jurisdiction to make an order, but court or tribunal in exercise of that jurisdiction commits a mistake whether of fact or of law, the said mistake can only be corrected by an appeal, revision or proceedings under Article 227 of Constitution of India and not by a writ of prohibition.

12. Learned counsel for the petitioners contended that in view of Section 19 & 20 of the Family Court Act, 1984, it is apparent that the Principal Judge, Family Court exercising jurisdiction under the Family Court, 1984 has no jurisdiction to entertain an application under Order 9 Rule 13 read with Section 151 C.P.C.

13. Section 19 & 20 of the Family Court Act, 1984 are quoted as under:

*"**19. Appeal**-(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code or Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgement or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.*

*(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an*

*order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):*

*Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991].*

*(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement or order of a Family Court.*

*[(4) The High Court may, of its own motion or otherwise, call for an examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.]*

*[(5)] Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.*

*[(6)] An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.*

***20. Act to have overriding effect**.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

14. Per contra, learned counsel appearing for the respondents contended that in view of Section 10 of the Family Court Act, 1984, the provisions of Civil Procedure Code, 1908 shall apply to the suits and proceedings before a family court subject to other provisions of the Family Court Act or the rules made thereunder, therefore, an application under Order 9 Rule 13 read with Section 151 C.P.C. is maintainable before the Family Court. It has been further contended by learned counsel for the respondents that from the perusal of the application filed by respondent no. 2 under Order 9 Rule 13 C.P.C., it is apparent that the petitioner by committing fraud on the court has got filed a written statement with forged signature of the respondent no. 2 on 08.01.2018. The respondent no. 2 never came to Gonda on 08.01.2018 nor engaged any counsel nor has signed any vakalatnama and on 08.01.2018 and respondent no. 2 was at Lucknow in her school. The respondent no. 2 has no information of the mediation proceedings before the court below and never appeared in Gonda and entire proceedings were conducted by the petitioner by committing fraud. It is also submitted that since the judgment and decree passed by the family court is because of fraud committed upon the court by the petitioner no. 1, therefore, the same can be looked into by the court in exercise of its inherent powers.

15. Section 10 of the Family Court Act is quoted as under:

***"10. Procedure generally**.- (1)Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal*

*Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court*

*(2)Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.*

*(3)Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."*

16. A close scrutiny of Section 10 of Family Court Act clearly provides that subject to the other provisions of this Act and the Rules the provisions of Code of Civil Procedure, 1908 and of any other law for time time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.

17. It is evident from perusal of Section 10 of Family Courts Act that provisions of Civil Procedure Code are applicable to the proceedings before the Family Courts. It would be pertinent to observe here that provisions encoded in Civil Procedure Code are based on principle of natural justice and fair play, hence all the provisions of Civil Procedure Code are made applicable to the proceedings before Family Courts within the meaning of Section 10 of the Family Courts Act.

18. In case of ***Roopa v. Santosh Kumar*** reported in ***2004 SCC OnLine All 1157,*** the Division Bench of this Court was considering a question as to whether the Family Court has the power to adjourn the case on an application moved by a party. The Family Court rejected the adjournment application on the ground that in the Family Court Act, there is no provision for moving an application for adjournment or exemption of appearance and thereafter passed final order rejecting the application under Section 13-B of Hindu Marriage Act. In paragraph nos. 8, 9, 12 & 13, the Division Bench of this Court has held as under:

*"8. Learned counsel for the appellant pointed out that Court had completely misdirected itself in rejecting adjournment application (6 Ga) on the ground that there was no provision under law for moving such an application under Family Courts Act.*

*9. Learned counsel referred to Section 10 of Family Courts Act which is relevant for our purpose reads :*

*" (1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purpose of the said provisions of the Code, Family Court shall be deemed to be a civil court*

*and shall have all the powers of such Court.*

*(2).....*

*(3) Nothing to the other provisions of this Act and the Rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings or at the truth of the facts alleged by the one party and denied by the other."*

*12. Considering the averments contained in the divorce petition under Section 13B, Hindu Marriage Act/Annexure-1 to the affidavit, Family Court was under an obligation to afford opportunity to the concerned parties to prosecute consent divorce petition."*

*13. Family Court has necessary powers, including those under Order IX Rule 13, CPC by virtue of Section 10, Family Court Act.*

19. Thus, the Court was of the view that Family Court has all necessary powers including those under Order IX, Rule 13 C.P.C. by virtue of Section 10 of the Family Court Act.

20. In case of ***Munna Lal and etc. v. State of U.P. and another etc***. reported in ***1990 SCC OnLine All 119,*** the Division Bench of this Court was considering a question whether Section 24 of the Civil Procedure Code, 1908 will apply to Family Court constituted under the Family Courts Act, 1984. In paragraph nos. 3, 5, 6 & 7, this Court has held as under:

*"3. Common question, which has been argued in these three cases, is as to whether High Court has jurisdiction to transfer the case from one Family Court to another Family Court in exercise of the powers of transfer under C.P.C. and Cr.P.C. Section 7 of the Act, which deals with the jurisdiction of the Family Court is quoted below :*

*"7. Jurisdiction : (1) Subject to the other provisions of this Act, a Family Court shall-*

*(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation : and*

*(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. In connection with the suits and proceedings referred to in the explanation to sub-sec. (1) of Section 7 of the Act a Family Court exercises jurisdiction exercisable by any district or any subordinate civil court and for the purpose of exercising such jurisdiction be deemed to be a district court or subordinate civil court, as the case may be and in respect of the matter relating to Chapter IX of the Cr.P.C. Family Court exercises the jurisdiction exercisable by a Magistrate 1st Class under Chapter IX of the Code.*

*5. By virtue of Section 10 of the Act, provisions of C.P.C. and of any other law for the time being in force shall apply to suits and proceedings before a Family Court and for the purpose of these provisions of the Code. Family Court shall*

*be deemed to be a civil court and so far as proceedings under Chapter IX of the Cr.P.C. are concerned, the provisions of the Cr.P.C. have been made applicable.*

*6. Family Court, as such, is a substitute of a civil court in respect of the matters referred to in the explanation to sub-section (1) of Section 7 of the Act and has been declared to be a district court or the subordinate civil court as the case may be. When exercising powers under Chapter IX of the Cr.P.C. Family Court is a substitute of a Magistrate Ist Class and exercises all the powers, which are exercisable by those Magistrates. By S. 10 of the Act, C.P.C. has been made applicable to matters dealt with in the explanation to sub-section (1) of Section 7 of the Act and Family Court when dealing with these matters, has been declared to be a civil court. Likewise, Code of Criminal Procedure has been made applicable to proceedings under Chapter IX of the Cr.P.C.*

*7. Family Court, when exercising powers and jurisdiction relating to the matters referred to in explanation to sub-section (1) of Section 7 of the Act is a civil court, and as such, High Court has the jurisdiction to transfer the cases from one Family Court to another under Sections 22, 23 and 24 of the C.P.C. Similarly, when Family Court is exercising the powers and jurisdiction under Chapter IX of the Cr.P.C., it is criminal court equivalent, to the Magistrate 1st Class and High Court will have the powers to transfer the case from one Family Court to another under Section 407 of the Cr.P.C".*

21. In case ***of Ranvir Kumar v. Judge, Family Court, Moradabad and others*** reported in ***MANU/UP/0598/1998,*** this Court was considering a question whether against an order passed by the Family Court allowing an application under Order IX Rule 13 C.P.C. an appeal would lie under Section 19 of the Family Court Act or a writ petition could be filed to challenge the order. This Court held that an order passed by Family Court allowing an application under Order IX Rule 13 C.P.C. will amount to a final order and not an interlocutory order, therefore, an appeal will lie under Section 19 of the Family Court Act. Paragraph no. 7 of the Ranvir Kumar v. Judge, Family Court, Moradabad (Supra) is quoted as under:

*"7. In the cloister of the above authorities, I feel pursuaded to the view that the order setting aside the ex parte decree of divorce is no doubt fraught with the effect of restoring the status quo ante qua the main issues involved in the divorce petition and reviving the issues which were settled by the ex parte decree but, the expression "interlocutory order" seems to have been used in Section 19(1) of the Act in the sense of orders passed on miscellaneous applications during the pendency of the main case, divorce petition in the instant case, which do not have the effect of the case itself being finally disposed of, if once the main case is decided, an order setting aside the decision and restoring the case for decision afresh would not be treated as one interlocutory order for restoration proceeding is an independent proceeding. The decision on the issues raised in the restoration application will have the complexion of a final decision qua the restoration application. The order allowing or rejecting restoration application, is therefore, not an interlocutory order within the ambit of Section 19(1) of the Family Courts Act. 1984, and is clearly appealable*

*under the said provisions. Order XLI11, Rule 1 of the Code of Civil Procedure envisage an appeal against an order rejecting an application under Order IX. Rule 13, C.P-C. while Section 19 of the Act provides for an appeal against any Judgment and order not being an interlocutory order. This carves out the distinction between the two provisions and, therefore, submissions made by the learned counsel for the petitioner that no appeal lay under Section 19 of the Act against the order allowing restoration application, does not commend itself for acceptance."*

22. In case of ***Deep Mala Sharma v. Mahesh Sharma*** reported in ***MANU/UP/0283/1991***, while interpreting the provisions of Section 10 of the Family Court Act, a Division Bench of this Court held that provision of Limitation Act 1963, will be applicable to the proceedings under the Family Court Act. In case of Deep Mala Sharma (Supra), in paragraph no. 9, Division Bench of this Court has held as under:

*"9. As regards the second point as to whether the provisions of Limitation Act were applicable, under Section 10 of the Family Court's Act it has been provided that subject to other provisions of the Act and Rules the provisions of the Code of Civil procedure, 1908 and "of any other law for the time being in force" shall apply to suits and proceedings before a Family Court (other than proceedings under chapter IX of the Code of Criminal Procedure, 1973) and for the purposes of such provisions of the code, the Family Court shall be deemed to be a civil Court and shall have all the powers of such Court. The Limitation Act, particularly Section 5 thereof provides that when sufficient cause has been shown the delay in preferring appeal or application can be condoned. The provisions of the Code of Civil Procedure and "of any other law for the time being in force" have been made applicable to the suits and proceedings before a Judge Family Court which has been declared to be deemed to be a civil Court having all the powers of such Court. The expression "of any other law for the time being in force" under Section 10 of the Family Courts Act is comprehensive enough to include the provisions of Limitation Act, 1963 to be made applicable to proceedings under the Family Courts Act.*

*There would be no justification in restricting the meaning of the expression of any other law for the time being in force", which is couched in a language having a very wide sweep. The provisions of a statute dealing with social and beneficient provisions should not be interpreted in a rigid manner, rather a broader view must be taken consistent with the object of legislation. The object and reasons of the establishment of Family Courts were to emphasise conciliation and achieving the socially desirable results and adherence to rigid rules of procedure and evidence were to be eliminated. In case the provisions of Section 5 of the Limitation Act were not made applicable, there might be so many cases where, particularly in a country like ours, where a sizable Section of society suffers from illiteracy, it would not be proper to adjudicate matters pertaining to marriage, restitution of conjugal rights and maintenance and divorce etc. without providing some opportunity to file an application or appeal beyond the period of limitation of 30 days, by taking a rigid view of limitation, rather there may be bonafide lack of knowledge or compelling circumstances like illness, death of a family*

*member and similar other matters on account of which any person may be prevented from preferring appeal or any application within the prescribed period."*

23. In view of the judgments noted above, the position of law as emerges is that in view of Section 10 of the Family Courts Act, 1984, provisions of Civil Procedure Code, 1908 are applicable in proceedings before the Family Court.

24. In case of **Rabindra Singh vs. Financial Commissioner Co-operation Punjab and others reported in 2008 7 SCC 663,** Hon'ble the Supreme Courty has held that all the Courts in a situation of the present nature have incidental power to set aside ex parte order on the ground of violation of the principles of natural justice. Thus, even in the absence of any express provision, having regard to principles of natural justice in such a proceeding, the Courts will have ample jurisdiction to set aside an ex parte decree, subject of course of statutory interdict.

25. Fact of the case in case of Rabindra Singh (Supra) were that a partition suit was filed before the Revenue Court which was decreed ex parte against the defendants. An application under Order IX Rule 13 read with Section 151 CPC was filed by the respondents which was dismissed by the Courts below holding therein that the Revenue Court has no jurisdiction to entertain application under Order IX Rule 13 and the remedy of the defendant in the aforesaid proceedings was to file an application for review. The Supreme Court set aside the orders and allowed the appeal. For reference, paragraph Nos.18, 19, 20 21 & 22 of the aforesaid judgment are quoted as under :-

*"18. The Tehsildar, in his judgment, has resorted to a peculiar logic. According to him, the provisions of review were attracted and not under Order IX Rule 13 for setting aside the ex-parte proceeding. Even if that be so, the ex-parte decree, in our opinion, could have been set aside. He could have exercised his power of review. The commentary on which reliance was placed, was made on the basis of a decision of the Financial Commissioner in Hukam Chand & ors. v. Malak Ram & ors. (1932 ) 11 Lah LT 42]. The said decision, with respect, does not lay down the correct law. All courts in a situation of this nature have the incidental power to set aside an ex parte order on the ground of violation of the principles of natural justice. We will deal with this aspect of the matter a little later.*

*19. A defendant in a suit has more than one remedy as regards setting aside of an ex parte decree. He can file an application for setting aside the ex parte decree; file a suit stating that service of notice was fraudulently suppressed; prefer an appeal and file an application for review.*

*20. In Bhanu Kumar Jain v. Archana Kumar [(2005) 1 SCC 787] this Court held : (SCC p. 797, para 26)*

*"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed*

*by the trial court merges with the order passed by the appellate court, having regard to Explanation I appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."*

*21. What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict.*

*22. In Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420] this Court has held that an Industrial Tribunal has the requisite jurisdiction to recall an ex parte award. [See also Sangham Tape Co. v. Hans Raj (2005) 9 SCC 331 and Kapra Mazdoor Ekta Union v. Birla Cotton Spg and Wvg. Mills Ltd. (2005) 13 SCC 777]"*

26. Contention of the learned counsel for the petitioner that in view of Section 19 & 20 of the Family Courts Act, 1984, the petitioner has only remedy of filing an appeal against the ex-parte judgment, is misconceived. Learned counsel for the petitioner could not point out any provision of Family Court Act or Rules made thereunder which prohibits the application of C.P.C.

27. Thus, in my considered opinion contention of the learned counsel for the petitioner that writ of prohibition can be issued restraining the Family Court from proceeding with the application filed by the respondent under Order IX Rule 13 C.P.C. is wholly misconceived as I have already held that in view of Section 10 of the Family Court Act, the provisions of Civil Procedure Code are applicable in proceedings before the Family Court. The Family Court has jurisdiction to entertain an application under Order IX Rule 13 C.P.C. and therefore, no writ of prohibition can be issued to respondent no. 1.

28. Learned counsel for the petitioner also tried to assail the order passed by respondent no. 1 on merits. In a writ of prohibition such a challenge cannot be entertained. Once, it is held that the court has competence/jurisdiction to entertain an application, the manner of exercise of the said jurisdiction cannot be seen while considering a writ of prohibition. The petitioner can challenge the same before the appropriate forum, if so advised but not in the present petition.

29. In view of the above discussion, the instant writ petition is not maintainable, and is accordingly **dismissed.**

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**(2024) 10 ILRA 236**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2024**

**BEFORE**

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

Writ-C No. 7164 of 2024

**C/M Ram Bharose Maiku Lal Inter College Thru Manager Sri Shree Kant Sahu & Anr. ...Petitioners**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**

Mahendra Bahadur Singh, Vikas Singh

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

**A. Civil Law - Constiution of India,1950-Article 226-U.P. Intermediate Education Act,1921-Section 16(-D(4)-allegations of commercial activities on the educational institution's premises-show cause notices issued with subsequent replies submitted by the petitioner-the final order was passed by Special Secretary who conducted inspection and submitted report-report relied upon by the state government were not shared with the petitioners, denying them an opportunity to respond-Held, the High court quashed the State Government's order appointing an authorized controller to manage the affairs of the petitioner institution –the decision-making authority must provide a fair hearing to the affected party, and the order must be passed by the authority that heard the matter-In this case, the order was passed by the Special Secretary, who neither heard the arguments nor provided the petitioner access to relevant reports,creating procedural impropriety and violating natural justice-The Special Secretary acted as both investigator and adjudicator, this dual role breached the principle of nemo judex in causa sua(no person shall be a judge in their own cause), rendering the decision void due to apprehension of bias-the appointment of an authorized controller under section 16(D)(4) requires quasi-judicial decision-making, therefore adherence to procedural fairness and impartiality is mandatory-The impugned order is set aside and matter remanded to the State Government for a fresh decision in compliance with natural justice within three months.(Para 1 to 47)** .(E-6)

**List of Cases cited:**

1. Chandashekhar Tiwari Vs St of UP & 5 Ors , SPLA No. 70 of 2023

2. C/M, Gautam Buddha Inter College & anr. Vs St. of UP & 4 Ors (2016) ALJ 126

3. A.K. Kraipak Vs U.O.I. (1969) 2 SCC 262

4. U.O.I., Thr. Its Secy. Ministry of Railway Vs Naseem Siddiqui (2004) SCC OnLine MP 678

5. Rattan Lal Sharma Vs M/C , Dr. Hari Ram (Co-Ed.) Higher Secondary School & ors.(1993) 4 SCC 10

6. A.U. Kureshi VS HC of Guj. (2009) 11 SCC 84

7. Ashok Kumar Yadav VS St. of Har. (1985) 4 SCC 417

8. Md. Yunus Khan Vs St. of U.P. (2010) 10 SCC 539

9. St. of Ori. Vs Binapani Dei (1967) 2 SCR 625: AIR 1967 SC 1269: (1967) 2 LLJ 266

10. U.O.I. Vs P.K. Roy (1968) AIR SC 850

11. Secy. to Govt., Trans. Deptt. Vs Munuswamy Mudaliar (1988) Supp SCC 651

12. St. of U.P. Vs Md. Nooh (1958) SCR 595: AIR 1958 SC 86

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

1. Heard Sri J.N. Mathur, learned Senior counsel assisted by Sri M.B. Singh, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. By means of present writ petition, the petitioners have challenged the order of the State Government dated 24.07.2024 wherein in exercise of powers contained in Section 16-D(4) of the Intermediate Education Act, 1921 (hereinafter referred to as 'Act of 1921') an authorized controller has been appointed to manage the affairs of the petitioner institution.

3. Two applications for impleadment have been filed on behalf of one Motilal Gupta who was the complainant in the present case and on whose complaint present proceedings have been initiated. While the second application has been filed on behalf of one Diwaker Sahu who is the member of Committee of Management claiming that he has sufficient interest to prosecute the said case against the petitioners.

4. Objections to the application for impleadment has been filed by the petitioner but after arguing the matter at some length, it was submitted that petitioner would not have any objection in case the applicants were heard as intervenors.

5. Accordingly, the applications are allowed to the extent that they are permitted to intervene in the present case. Accordingly, Sri L.P. Mishra, learned counsel as well as Sri Bhupendra Nath Tripathi, have been heard on behalf of the intervenors.

6. It has been submitted by learned Senior Counsel for petitioner that a show cause notice under Section 16-D(2) Act of 1921 was issued on 28.03.2022 wherein it was stated that certain commercial establishments were operating in the educational institution run by the petitioners and accordingly the same was contrary to the purposes for which recognition was granted to the petitioner.

7. The second allegation was in regard to the fact that the the last elections to the petitioner society were held on 25.05.2018 and their term which is of three years was expired on 18.05.2021 and accordingly the Committee of Management has become time barred and cannot be permitted to run the affairs of the society and on these two grounds it was proposed that the authorized controller be appointed to run the affairs of the petitioner educational institution.

8. On receipt of the show cause notice the petitioner had submitted a reply dated 05.06.2022. Immediately after submission of the said reply, another show cause notice was received by him on 25.08.2022.

9. It has been stated that in the subsequent notice dated 25.08.2022, the petitioner was asked to respond with regard to the allegations against the petitioner society which according to the petitioner are proceedings which could not have been undertaken in exercise of powers under Section 1-D(3) of Act of 1921 which pertain only to the educational institution run by the petitioner society. The petitioners had submitted a detail reply on 12.10.2022. It is in the aforesaid circumstances that an order dated 15.11.2022 was passed in exercise of powers under Section 16-D(4) of Act of 1921 referring the matter to the State Government to initiate proceedings against the petitioners for appointment of an authorized controller.

10. The petitioner being aggrieved by the order dated 15.11.2022 passed by the Additional Director of Education, Uttar Pradesh preferred a representation to the State Government stating that the reply submitted by him has not been considered and the order has been passed without giving any opportunity of hearing and accordingly the State Government concurred with the objections raised by the petitioners and by means of his order dated

16.02.2023 directing the Director of Education to pass a fresh order after giving due opportunity of hearing to the petitioner. While remanding the matter to the Director of Education, specific directions were issued that the land records of the petitioner be duly inspected before any finding is returned on the allegations levelled against the petitioners. It is in pursuance of the order dated 16.02.2023 that proceedings were initiated afresh by Director of Education and the petitioner again submitted a detail reply on 10.05.2023. While submitting his reply, the petitioner had taken a specific plea that the parent society was different from the committee of Management which is running the educational institution.

11. He has submitted that for running the educational institutions certain land records were submitted to the Education Department for seeking recognition and educational institution is running only on the land on which due permission was accorded by the State Government. It was further submitted that in the meanwhile the parent society had purchased certain other lands of which they are the owners and it is on this land that commercial activities going on. It was stated in detail that two lands are separate and distinct one on which the educational institution is running while the second is the land which is owned by the society and has no relation to the educational institution.

12. It has been submitted that the Director after submission of the reply by the petitioner passed an order dated 27.07.2023 under Section 16-D(3) of Act of 1921, referring the matter of the petitioner to the State Government. It is the case of the petitioners that the order dated 27.07.2023 was never supplied to the petitioner and it is only in the counter affidavit the same has been annexed by the State Government. The State Government taking cognizance of the report submitted by the Director on 27.07.2023, issued notice to the petitioners wherein it was stated that the matter would be heard by the Special Secretary, Government of Uttar Pradesh, Sri Alok Kumar. The petitioners were asked to submit their reply and also to be present on 25.09.2023 in case they wish to be heard in person. Subsequently, the matter was fixed on 06.10.2023 where again the petitioners had submitted a detail reply replying to the two issues on which previously the show cause notice was issued to the petitioners.

13. After submission of the reply of the petitioners on 06.10.2023 and 10.10.2023 by means of order dated 07.11.2023, it was the Special Secretary Government of Uttar Pradesh who was hearing the matter thought it fit that the report with regard to the land use, he referred to the District Magistrate, Lucknow seeking a reply as to whether the land of the educational institution has been utilized for commercial activities while with regard to the status of the Committee of management of the educational institution the Director of Education was submitted to submit his reply as to whether the society has become time barred.

14. Before the aforesaid reports could be submitted, the petitioner received an order dated 07.03.2024 wherein it was stated that the hearing would now be conducted by the Additional Chief Secretary, Department of Secondary Education and the petitioners were directed to be present before him on 14.03.2024. In response to the order dated 07.03.2024, the

petitioners again filed a detailed reply on 14.03.2024 and also appeared before the Additional Chief Secretary. It was noticed at this stage that neither the report of the District Magistrate or the Director of Education as directed previously on 07.11.2023 were on record and accordingly the Special Secretary, Sri Alok Kumar who was hearing the matter previously was directed to submit his report. It is in pursuance of direction of the Additional Chief Secretary that Sri Alok Kumar, Special Secretary inspected the petitioners' premises on 30.05.2024 and submitted its report. Again at this stage, it has been informed that the report dated 30.05.2024 was never supplied to the petitioners.

15. It has further been stated that the report was not submitted by the District Magistrate or by the Director of Education which is evident from the fact that by means of letter dated 21.05.2024, the said fact was brought on record and a reminder was sent to the authorities concerned to see that the aforesaid reports are submitted to the State Government for taking a decision in the said matter. It is after the aforesaid that the impugned order dated 24.07.2024 has been passed wherein the authorized controller has been appointed to run the petitioners institution and the finding with regard to both the allegations has attained finality where it has been held that commercial activities is being run on the petitioner institutions and also that the petitioner's society has become time barred.

16. Learned Senior Counsel while assailing the aforesaid orders has submitted that the order is hit by the principles of bias inasmuch as firstly Sri Alok Kumar, Special Secretary, Government of Uttar Pradesh who had himself inspected the premises and submitted his report has relied upon his own report dated 30.05.2024 while passing the impugned order. He has submitted that in fact the matter was heard by the Additional Chief Secretary and no hearing took place before the Special Secretary, Sri Alok Kumar while a perusal of the entire order would indicate that he has referred the hearing which took place before the Additional Chief Secretary and the documents which were filed before him relying upon the said findings he has passed the impugned order.

17. It has further been submitted that a perusal of the entire impugned order would indicate that though the response of the petitioners has been recorded but no submissions or contentions or facts raised by the petitioners has been considered in the entire judgment and accordingly the said order has been passed without any application of mind and is in violation of principle of natural justice inasmuch as the entire order has been passed relying upon the reports which has never been supplied to the petitioner prior to passing of the impugned order.

18. Learned counsel for respondents on the other hand has opposed the writ petition.

19. It has been vehemently submitted by Dr. L.P. Mishra, that there is no doubt with regard to the fact that commercial establishment and shops are being run on the educational institution and the same activities are prohibited and accordingly the Committee of Management is acting in gross violation of the statutory provisions and accordingly supported the impugned order wherein the authorized controller has been appointed. He has further submitted that even if the impugned order cannot be set aside merely on the

basis that there was violation of principle of natural justice. He submits that even if the petitioners were in fact afforded an opportunity of hearing still they would be unable to prove that the commercial establishments were running on the educational institution and it was an established fact that the petitioners were running commercial establishment in the educational institutions and hence submits that the present order cannot be set aside on the basis of violation of principle of natural justice.

20. I have heard learned counsel for parties and perused the record.

21. From the facts as narrated herein-above are not disputed with the parties concerned and accordingly they need not be reiterated. It is noticed that the Director of Education had concluded the proceedings under Section 16(D)-3 after giving an opportunity of hearing to the petitioner where he recorded his prima facie satisfaction and referred the matter to the State Government for passing appropriate order for appointment of authorized controller in exercise of powers under Section 16-D(4). This Court presently concerned in the present case with the proceedings which had undertaken by the State Government in exercise of powers under Section 16-D(4) of Act of 1921. It is in the said proceedings that initially the petitioners were informed that the matter would be heard by the Special Secretary, Government of Uttar Pradesh Sri Alok Kumar. Proceedings were in fact held by Sri Alok Kumar before whom the petitioners had filed their response and he considering the dispute in the present case had thought it proper to seek the report of the District Magistrate as well as the Director of Education with regard to two issues which were to be decided in the present case.

22. The District Magistrate was directed to submit his report with regard to the land use made by the petitioners' educational institution and report as to whether the commercial establishments were running on the said educational institution. While on the other hand the Director of Education was required to submit a report with regard to the status of the petitioners' Committee of Management and inform as to whether it was time barred Committee of Management or regular elections had taken place in accordance with law.

23. Again there is dispute with regard to the fact that none of these two reports were submitted till the time of passing of the impugned order. Though report of the District Magistrate was never received but it seems that Director of Education submitted its report on 04.04.2024 which was considered by the State Government while passing the impugned order.

24. A plea has been taken that even the report dated 14.04.2024 was never given to the petitioners.

25. I have considered the rival submissions and perused the record. The 1st issue which was considered by this court is with regard to the violation of principles of natural justice during the hearing before the State government. Bias been alleged by the petitioner in as much as the final hearing a taken place on 14/03/2024 before the Additional Chief Secretary, Secondary Education ,subsequent to which the final orders were passed by Sri Alok Kumar, Special

Secretary before whom no hearing had taken place.

26. The State government has been given the powers to appoint and authorised controller in excise of powers under section 16-D(4) Of the U.P Intermediate Education Act, 1921. The Director Education as to record his satisfaction with regard to the existence of grounds mentioned in section 16-D(3)(i) to (vii) of the act of 1921, before forwarding his recommendations to the State government. At the stage of section 16-D(3) principle of natural justice are incorporated as part of the statutory provision itself, in as much as the Director of Education is mandated to give a show cause notice before forwarding his recommendations. It is on the recommendations of the Director of Education, order is passed by the State government for appointment of the authorised controller. The question as to whether the state government has to afford opportunity of hearing to the committee of management before passing any order in exercise of powers under section 16-D(4) of the act of 1921 was considered by division bench of this court in the case **of Chandashekhar Tiwari vs State of UP and 5 others in Special Appeal No. 70 of 2023** where this court relied upon the judgement of single judge in the case of **Committee of Management, Gautam Buddha Inter College and another vs State of UP and 4 others (2016) ALJ 126** wherein it has been held that although the statute provides for opportunity of hearing at the stage of enquiry by the director but in case there is recommendation by Director to supersede the committee of management, it is implicit in the provision that State government would accord hearing to the affected party before it supersede the committee of management. It was held that, the fact that decision-making authority is a State government and is enjoined for duty to record reasons.

27. It was further observed that the purpose of affording hearing to provide opportunity to the committee of management to place its defence in context of recommendations made by the Director of Education. It would get opportunity to impress upon the state government that on the basis of material available on record, the law does not warrant appointment of an authorised controller.

28. Accordingly, a perusal of the statutory scheme as well as the judgement of this court in the case of **Chandashekhar Tiwari (Supra)** leaves no doubt that even the State government while taking a decision to consider the recommendations of the director, is required to give an opportunity of hearing to the committee of management and also give reasons for its orders.

29. In the present case the the petitioners were informed by means of letter dated 27/07/2023 that the proceedings would be conducted before Special Secretary, Secondary Education, Mr Alok Kumar, and were required to be present before him on 14/03/2024. The petitioners appeared on the date fixed in also filed a response, but by means of letter dated 07/03/2024 they were required to be present before the Additional Chief Secretary, Secondary Education on 14/03/2024. Again, the petitioners appeared before the Additional Chief Secretary and filed their reply and the matter was also heard and argued on behalf of the petitioners. No date was fixed thereafter, and the order in the said case pursuant to the hearing before the Additional Chief

Secretary was pronounced by Special Secretary, Secondary Education, Mr Alok Kumar. In the aforesaid circumstances the question which was also in consideration is as to whether the order must be passed by the person before whom the hearing took place , or can be validly passed by another person or authority before whom no hearing took place, on a bare perusal of the record of proceedings.

30. To consider the aforesaid question it has to be determined as to whether the proceedings under section 16-D(4) of the act of 1921 are administrative in nature or quasi-judicial. In case the State government was deciding a lis between the parties, or deciding the rights, then it would be acting as an tribunal. In the present case the long list of contingencies provided for in section 16-D(3) of the act of 1921 all of which pertain to the inaction of the committee of management and circumstances where there were duty-bound to do otherwise. The allegations may also extend to financial impropriety and acting contrary to the scheme of administration. It is in the backdrop of the aforesaid provisions that this Court is of the considered view that while passing an order appointing authorised controller a definite finding has to be recorded against the committee of management for being guilty of the grounds contained in section 16-D(3) of Act of 1921, and therefore they have to give an opportunity of hearing to the committee of management, and record the reasons for appointing the authorised controller. While passing an order under section 16-D(4) of act of 1921 the State government is discharging quasi-judicial functions, and therefore they have to provide in opportunity of hearing to the committee of management and follow the principles of natural justice.

31. To exercise the power of the state government under section 16-D(4) of act of 1921 , it has to be delegated to an authority who would be exercising the powers on behalf of the state government. As already discussed while passing an order under section 16-D(4) the State government has to give opportunity of hearing to the committee of management, and the authority who is empowered to exercise the powers of the state government has to pass necessary orders after giving due opportunity of hearing. There is no doubt that in the present case the Additional Chief Secretary, Secondary Education has given an opportunity of hearing to the petitioners, but the order was passed by the Special Secretary Secondary Education before whom no hearing took place. The manner of decision-making in the present case where the decision-making process has been divided into 2 parts where one authority has given an opportunity of hearing, while another has passed the order, is alien to the concept of fair hearing, as one who decides does not hear the party, he does not get an opportunity of clearing doubt in his mind by reasoned arguments, and in such situation the opportunity of personal hearing becomes an empty formality.

32. The Supreme Court in the case **of Gullapalli Nageshwar Rao v. A. P. State Road Transport Corporation, AIR 1959 SC 308**, has observed "This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the argument and the party appearing to persuade the authority by reasoned argument to accept his point of

view. If one person hears and another decides, then personal hearing becomes an empty formality." Accordingly, in the instant case by the order has been passed by the Special Secretary is illegal and arbitrary and clearly violative of principles of natural justice.

33. The 2nd ground on which the impugned order has been assailed in the fact that the Special Secretary had himself conducted the enquiry on 30/05/2024 and submitted his report to the State government. It has submitted that during the hearing before the Additional Chief Secretary on 14/03/2024 it was recorded that the reports of the District Magistrate and the Director education were not on record, and in the above circumstances the special Secretary was directed to submit his report. The report dated 30/05/2024 was never supplied to the petitioner but has been relied by the State government while passing the impugned order dated 24/07/2024.

34. Considering the ground of bias as alleged by the petitioner it is relevant to note that "Bias" means an operative prejudice whether conscious or unconscious, in relation to party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a determination to decide the case in a particular manner, so much so that it does not leave the mind open. Accordingly, the rule strikes against those factors which may improperly influence as arriving at the decision in a particular case. A person for whatever reason, cannot take on objective decision on the basis of evidence on record, shall be said to be biased.

35. In ***A.K. Kraipak v. Union of India,*** **(1969) 2 SCC 262**, the Supreme Court held that the aim of rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice. Concept of natural justice has undergone a great deal of change. Initially recognized as consisting of two principles, i.e., no one shall be a Judge in his own cause and no decision shall be given against a party without affording him a reasonable hearing, a third rule is now envisaged i.e. quasi-judicial inquiries must be held in good faith, without bias and not arbitrarily.

36. In ***Union of India, Through Its Secretary, Ministry of Railway v. Naseem Siddiqui,*** **2004 SCC OnLine MP 678**, the Court held that one of the fundamental principles of natural justice is that no man shall be a Judge in his own cause and this principle in turn consists of seven well-recognized facets, one of them being 'the adjudicator shall be impartial and free from bias' and 'if any one of these fundamental rules is breached, the inquiry will be vitiated'. It was also held that a domestic inquiry must be held by an unbiased person so that he can be impartial and objective in deciding the subject matter of the inquiry and should have an open mind till the inquiry is completed. IO should neither act with bias nor give an impression of bias.

37. In ***Rattan Lal Sharma Vs. managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School & Ors, (1993) 4 SCC 10*** , the Supreme Court held that no one can be a Judge in his own cause, which is a common law principle derived from the Latin maxim 'nemo debet esse judex in propria causa'. In A. U. Kureshi v. High Court of Gujarat, (2009) 11 SCC 84, the Supreme Court referring to the said principle held that failure to adhere to this principle creates an apprehension of

bias on the part of the Judge and referred to the observations of Justice P.N. Bhagwati in Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417, as follows:—

*"...*

*One of the fundamental principles of our jurisprudence is that no man can be a judge in his own cause. The question is not whether the judge is actually biased or has in fact decided partially but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. If there is a reasonable likelihood of bias 'it is in accordance with natural justice and common sense that the judge likely to be so biased should be incapacitated from sitting'. The basic principle underlying this rule is that justice must not only be done but must also appear to be done."*

38. It was further held that failure to observe the principle that no person should adjudicate a dispute which he/she has dealt with in any capacity, creates an apprehension of bias on the part of the said person. Therefore, law requires that a person should not decide a case in which he is interested and the question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision. In ***Mohd. Yunus Khan v. State of Uttar Pradesh*, (2010) 10 SCC 539**, the Supreme Court observed that existence of an element of bias renders the entire disciplinary proceedings void and reiterated that apprehension of bias operates as a disqualification for a person to act as an adjudicator. Anyone who has personal interest in the disciplinary proceedings must keep himself away from such proceedings else the entire proceeding will be rendered null and void. I may quote an observation of the Supreme Court, as follows:—

"Principles of natural justice are to some minds burdensome but this price - a small price indeed - has to be paid if we desire a society governed by the rule of law".

39. In this context, it would be relevant to refer to a few passages from the judgment of the Supreme Court in ***Rattan Lal Sharma (supra),*** as follows:—

*"9. In Administrative Law, rules of natural justice are foundational and fundamental concepts and law is now well settled that the principles of natural justice are part of the legal and judicial procedures. On the question whether the principles of natural justice are also applicable to the administrative bodies, formerly, the law courts in England and India had taken a different view. It was held in Franklin v. Minister of Town and Country Planning [[1947] 2 All ER 289 (HL)] that the duty imposed on the minister was merely administrative and not being judicial or quasi-judicial, the principle of natural justice as applicable to the judicial or quasi-judicial authorities was not applicable and the only question which was required to be considered was whether the Minister had complied with the direction or not. Such view was also taken by the Indian courts and reference may be made to the decision of this Court in Kishan Chand Arora v. Commissioner of Police, Calcutta [(1961) 3 SCR 135 : AIR 1961 SC 705]. It was held that the compulsion of hearing before passing the order implied in the maxim 'audi alteram partem' applied*

*only to judicial or quasi-judicial proceedings. Later on, the law courts in England and also in India including this Court have specifically held that the principle of natural justice is applicable also in administrative proceedings. In Breen v. Amalgamated Engineering Union [[1971] 1 All ER 1148 (CA)] Lord Denning emphasised that statutory body is required to act fairly in functions whether administrative or judicial or quasi-judicial. Lord Morris observed (as noted by this Court in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 285 : (1978) 2 SCR 621] decision) that:*

*"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed."*

40. In **State of Orissa v. Binapani Dei *[(1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266]*** this Court also accepted the application of the principle of natural justice in the order which is administrative in character. It was observed by Shah, J.:

*"It is true that the order is administrative in character, but even an administrative order which involves civil consequences ... must be made consistently with the rules of natural justice."*

*Similar view was also taken in A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : (1970) 1 SCR 457] and the observation of Justice Hegde may be referred to : (SCC p. 272, para 20)*

*"... Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries."*

*There are number of decisions where application of principle of natural justice in the decision-making process of the administrative body having civil consequence has been upheld by this Court but it is not necessary to refer to all such decisions. Prof Wade in his Administrative Law (1988) at page 503, has very aptly observed that the principles of natural justice are applicable to almost the whole range of administrative powers.*

*10. Since the rules of natural justice were not embodied rules it is not possible and practicable to precisely define the parameters of natural justice. In Russell v. Duke of Norfolk [[1949] 1 All ER 109 (CA)] Tucker, L.J. observed:*

*"... There are, in my view, no words which are of universal application to every kind of inquiry and the every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."*

41. It has been observed by this Court **in Union of India v. P.K. Roy *[AIR 1968 SC 850]:***

*"The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."*

42. Similar view was also expressed in **A.K. Kraipak *case [(1969) 2 SCC 262 : (1970) 1 SCR 457].*** This Court observed as follows:

*"... What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the Inquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."*

*Prof. Wade in his Administrative Law has succinctly summarised the principle of natural justice to the following effect:*

*"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply : not as to their scope and extent. Everything depends on the subject-matter, the application for principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice depend on the facts and the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."*

43. One of the cardinal principles of natural justice is nemo debet esse judex in propria causa (no man shall be a judge in his own cause). The deciding authority must be impartial and without bias. It has been held by this Court in **Secretary to Government, Transport Department v. Munuswamy Mudaliar [1988 Supp SCC 651]** that a predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. Personal bias is one of the three major limbs of bias namely pecuniary bias, personal bias and official bias. A classic case of personal bias was revealed in the decision of this Court in **State of U.P. v. Mohd. Nooh [1958 SCR 595 : AIR 1958 SC 86].** In the said case, a departmental inquiry was held against an employee. One of the witnesses against the employee turned hostile. The officer holding the inquiry then left the inquiry, gave evidence against the employee and thereafter resumed to complete the inquiry and passed the order of dismissal. This Court quashed the order of dismissal by holding inter alia that the rules of natural justice were grievously violated.

44. In the instant case in paragraph 5 of the impugned order it has been stated that on 14/03/2024 a decision was taken to direct Sri Alok Kumar, Special Secretary Secondary Education to conduct a spot inspection along with other officials of the education department. The said spot inspection was conducted on 30/05/2024 and was submitted to the State government. Coincidentally, Sri Alok Kumar, Special Secretary Secondary Education was delegated the task of deciding the said issue on behalf of the state government and has proceeded to pass the impugned order relying upon his own report dated 30/05/2024. The report dated 30/05/2024 was never supplied to the petitioners. In the present case, the author of the impugned order i.e Sri Alok Kumar, Special Secretary Secondary Education having himself participated in making necessary enquiries and submitting the report in this regard could not have been asked to subsequently adjudicate the said issue and passed necessary orders on behalf of the state government. Needless to say, the petitioners had the right to object to the report submitted by Sri Alok Kumar, had the same been given to them, but the same authority contrary to the canons of principles of natural justice has proceeded to pass the impugned order relied on his own report while passing the impugned order, and accordingly there is no doubt that the impugned order is hit by the principle of "bias".

45. It is for the aforesaid reasons that this Court is of the considered view that the impugned order is illegal and arbitrary and violative of article 14 of the Constitution of India and accordingly deserves to be set aside. Though it was vehemently contended that even if the opportunity had been given to the petitioners it would have made no difference to the outcome, inasmuch as the society is time-barred and there is no doubt that they are conducting commercial activities on the premises of education institution. Going into the aforesaid aspect the present case, would lead us into the factual controversy involved in the present case, which should appropriately to be dealt with by the State government in exercise of powers under section 16-D (4) of the act of 1921 at the 1st instance. This Court is of the view that the manner in which the enquiry was conducted leading to the passing of the impugned order, has been in gross violation of the principle of natural justice and therefore the matter deserves to be remanded back to the State government for being considered afresh after following the natural justice. Accordingly at this stage we would not delve into the factual controversy to answer the objections raised by the counsel for the opposite parties and the intervenors.

46. In light of the above the impugned order dated 24/07/2024 is set aside. The matter is remanded back to the State government for taking a decision afresh in accordance with law and after following the principle of natural justice and affording full opportunity of hearing to the petitioners. It is expected that the State government shall proceed with expedition and within a period of 3 months from date a certified copy of the order is placed before them in accordance with law.

47. The writ petition stands **allowed**.

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**(2024) 10 ILRA 249**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 18.10.2024**

**BEFORE**

**THE HON'BLE MANISH KUMAR NIGAM, J.**

Writ-C No. 7170 of 2024

**Smt. Sangeeta Devi ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Rakesh Kumar Srivastava, Abhishek Durgesh Mishra

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

**Civil Law - U.P.Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 - Rule 6 & 7-** Impugned order-removal of the Petitioner from the post of Pradhan-passed on the basis of an enquiry report –which is a spot inspection report-enquiry conducted against the petitioner was in utter violation to the Rules 6 and 7 of the Rules of 1947-petitioner was never issued a charge sheet and was not called upon by the Enquiry Officers to submit his reply to the charge sheet-impugned order quashed.

**W.P. allowed.** (E-9)

**List of Cases cited:**

1. Quadri Begum Vs St. of U.P. & ors. reported in 2009 (4) AWC 3608 Allahabad

2. Sher Ali Vs St. of U.P. & ors. reported in 2013 (7) ADJ 736

3. Mahendra Singh Vs St. of U.P. & ors. reported in 2014 (1) ADJ 434

4. Pushpa Vs St. of U.P. & ors. reported in 2014(1) ADJ 205,

5. Mukesh Kumar Vs St. of U.P. & ors. reported in 2014 (1) ADJ 215

6. Shaukat Hussain Vs St. of U.P. reported in 2019 (7) ADJ 429

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for the State-respondents and perused the record.

2. This writ petition has been filed for following relief:-

*"1. Issue a writ, order or direction in the nature of Certiorari for quashing the Final Enquiry Report dated 14.03.2024, Show Cause Notice dated 12.04.2024 and the impugned order dated 26.07.2024 passed by opp. Party no. 2 i.e. District Magistrate Raibareli removing the petitioner from the post of Gram Pradhan pertaining to Gram Panchayat- Arakha, Block & Tehsil- Unchahar, Distt.- Raibareli, as contained in Anneuxres No.1, 2 & 3 to the writ petition."*

3. Brief facts of the case are that the petitioner was elected as a Pradhan of Gram Panchayat, Post-Arakha, Block & Tehsil- Unchahar, District- Raebareli. Certain complaints were made by the villagers, namely, Sunil Kumar son of Mewa Lal, Rakesh Kumar son of Late Ram Nath against the petitioner to the District Magistrate, Raebareli alleging therein the misappropriation of public money by the petitioner in carrying out the development work. The complaint made against the petitioner was got enquired by District Magistrate, Raebareli and preliminary reports dated 21.10.2022 and 29.10.2022 were submitted before the District Magistrate, Raebareli by the District Social

Welfare Officer, Raebareli and Deputy Labour Commissioner, Raebareli. After considering the preliminary enquiry reports, a show cause notice was issued to the petitioner by the District Magistrate, Raebareli on 04.11.2022 as to why proceedings under Section 95(1)(g) of U.P. Panchyat Raj Act, 1947 should not be initiated against the petitioner. Petitioner submitted his reply to the aforesaid show cause notice on 08.12.2022 to the District Magistrate, Raebareli. A copy of the reply has been annexed as Annexure No. 6 to the writ petition. By order dated 12.05.2023, the District Magistrate in exercise of its powers under Section 95(1)(g) of the U.P. Panchyat Raj Act, 1947 ceased the financial and administrative powers of the petitioner. By another order dated 16.06.2023 passed by District Magistrate, Raebareli, a three member committee was constituted for discharging functions of the Gram Pradhan and a final enquiry was also directed. District Programme Officer, Raebareli and Executive Engineer Khand 2 Lok Nirman Vibhag were appointed Enquiry Officers for conducting the final enquiry. The petitioner filed a writ petition being Writ C No. 8462 of 2023 (Sangeeta Devi Vs. State of U.P. and others) before this Court challenging the order dated 12.05.2023 passed by District Magistrate by which the financial and administrative powers of the petitioner were ceased. This Court by order dated 04.10.2023 directed the learned Standing Counsel to file a counter affidavit and the said writ petition is still pending. Copy of order dated 04.10.2023 is annexed as Annexure No. 9 to the writ petition. The aforementioned Enquiry Officers submitted a final enquiry report on 14.03.2024 which has been annexed as Annexure No. 1 to the writ petition. On the basis of final enquiry report dated 14.03.2024, the District Magistrate, Raebareli issued a show cause notice to the petitioner on 12.04.2024 directing the petitioner to submit his explanation within fifteen days from the date of receipt of the notice. The petitioner submitted a detailed explanation/ reply to the enquiry report on 02.05.2024 denying the charges levied against the petitioner relating to financial irregularities and misappropriation of public money. The petitioner also raised objections regarding the procedure adopted by the Enquiry Officers in conducting the final enquiry. Copy of the explanation submitted by the petitioner dated 02.05.2024 has been filed as Annexure No. 11 to the writ petition. The District Magistrate, Raebareli on 26.07.2024 passed an order removing the petitioner from the post of Post-Arakha, Block & Tehsil- Unchahar, District-Raebareli. Hence the present writ petition.

4. Contention of learned counsel for the petitioner is that the order impugned removing the petitioner from the post of Pradhan has been passed on the basis of an enquiry report dated 14.03.2024, which is nothing but a spot inspection report. It has also been contended by counsel for the petitioner that State of U.P. has framed U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 (hereinafter referred to as 'Rules of 1997') in exercise of powers conferred under Section 110 read with Clause (g) of sub-Section (1) of Section 95 of the U.P. Panchyat Raj Act, 1947. The procedure for holding final enquiry has been provided in Rules 6 and 7 of the Rules of 1997. It has been contended that the order impugned has been passed only on the basis of a spot inspection made by the Enquiry Officers and the enquiry conducted against the petitioner was in utter violation to the Rules 6 and 7 of the Rules of 1947.

5. Rule 6 and Rule 7 of the Rules of 1997 are quoted as under:-

***"6. Procedure for the enquiry***.- *(1) The substance of the imputations, and a copy of the complaint referred to in Rule 3, if any, shall be forwarded to the Enquiry Officer by the State Government.*

*(2) The Enquiry Officer shall draw up:-*

*(a) the substance of the imputations into definite and distinct articles of charge; and*

*(b) a statement of the imputations in support of each article of charge, which shall contain a statement of all relevant facts and a list of documents by which, and list of witnesses by whom, the articles are proposed to be sustained.*

*(3) The Enquiry Officer shall deliver or cause to be delivered to the person against whom he is to hold the enquiry, a copy of the articles of charge, the statement of the imputations and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require that person by a notice in writing, to submit within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person, and to appear before him on such day and at such time as may be specified.*

*(4) On receipt of the written statement of defence, the Enquiry Officer shall enquire into such of that articles as are not admitted and where all the articles of charge have been admitted in the written statement of defence, the Enquiry Officer shall record his findings on each charge after taking such evidence as he may think fit.*

*(5) If the person who has admitted any of the articles of charge in his written statement of defence, appears before the Enquiry Officer, he shall ask him whether he is guilty or has any defence to make and if he pleads guilty to any of the articles of charge, the Enquiry Officer shall record the plea, sign the record and obtain the signature of that person thereon, and return a finding of guilt in respect of those charges.*

*(6) If the person fails to appear within the specified time or refuses or omits to plead, the Enquiry Officer shall take the evidence, and if there is a complaint, require him to produce the evidence by which he proposes to prove the articles of charge, and shall adjourn the case to a later date not exceeding fifteen days, after recording an order that the said person may, for the purpose of preparing his defence:-*

*(a) Inspect within five days of the order or within such further time not exceeding five days as the Enquiry Officer may allow, the documents specified in the list referred to in sub-rule (2);*

*(b) submit a list of witnesses to be examined on his behalf;*

*(c) give a notice within ten days of the order or within such further time not exceeding ten days as the Enquiry Officer may allow, for the discovery or production of any documents that are relevant to the enquiry and are in the possession of the State Government, but not mentioned in the list referred to in sub-rule (2).*

*(7) The person against whom the enquiry is being held may take the assistance of any other person to present the case on his behalf, and the Enquiry Officer may appoint any person as a Presenting Officer to assist him in conducting the enquiry.*

*Provided that a legal practitioner shall not be engaged or appointed under this sub-rule.*

*(8) If the person applies orally or in writing for the supply of copies of the statements of witnesses mentioned in the list referred to in sub-rule (2), the Enquiry Officer shall furnish him with such copies as early as possible, and in any case, not later than three days before the commencement of the examination of the witnesses by whom any of the articles of charge is proposed to be proved.*

*(9) The Enquiry Officer shall, on receipt of the notice for the discovery or production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents by such date as may be specified in such requisition.*

*Provided that the Enquiry Officer may, for reasons to be recorded in writing, refuse to requisition such of the documents as are, in his opinion, not relevant to the case.*

*(10) On receipt of the requisition referred to in sub-rule (9), every authority having the custody or possession of the requisitioned documents shall produce the same before the Enquiry Officer.*

*Provided that if the authority having the custody or possession of the requisitioned documents is satisfied for reasons to be recorded in writing that the production of all or any of such documents would be against the public interest or security of the State, it shall inform the Enquiry Office accordingly and the Enquiry Officer shall, on being so informed, communicate the information to the person against whom the enquiry is being held and withdraw the requisition made by him for the production or discovery of documents.*

*(11) On the date fixed for the enquiry, the oral and documentary evidence by which the articles of charge are proposed shall be produced and the witness shall be examined by the Enquiry Officer by or on behalf of the complainant, if there is one, and may be cross-examined by or on behalf of the person against whom the enquiry is being held. The witnesses may be re- examined by the Enquiry Officer or the complainant, as the case may be, on any point on which they have been cross-examined, but not on any new matter, without the leave of the Enquiry Officer.*

*(12) The Enquiry Officer may allow production of evidence not included in the list given to the person against whom the enquiry is being held, or may itself call for new evidence or recall and re-examine any witness and in such case the said person shall be entitled to have if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the enquiry for three clear days before the production of such evidence, exclusive of the day of adjournment and the day to which the enquiry is adjourned. The Enquiry Officer shall give the said person an opportunity of inspecting such documents before they are taken on the record. The Enquiry Officer*

*may also allow the said person to produce new evidence, if he is of the opinion that the production of such evidence is necessary in the interest of justice.*

*Note-New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally.*

*(13) When the evidence for proving the articles of charge against the person against whom the enquiry is being held, is closed, the said person shall be required to state his defence orally or in writing as he may prefer. If the defence is made orally it shall be recorded, and the said person shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the complainant, if any.*

*(14) The evidence on behalf of the person against whom the enquiry is being held shall than be produced. The said person may examine himself in his own behalf if he so prefers. The witnesses produced by the said person shall then be examined and shall be liable to cross-examination, re-examination and examination by the Enquiry Officer, according to the provisions applicable to the witnesses for proving the articles of charge.*

*(15) The Enquiry Officer may, after the person against whom the enquiry is being held closes his case, and shall, if the said person has not examined himself, generally question him on the circumstances appearing in the evidence against him.*

*(16) The Enquiry Officer may, after the completion of the production of evidence, hear the complainant, if any and the person against whom the enquiry is being held, or permit them, or him, as the case may be, to file written briefs of their respective cases.*

*(17) If the person to whom a copy of the articles of charge has been delivered does not submit the written statement of defence on or before th date specified for the purpose or does not appear in person before the Enquiry officer or otherwise fails or refuses to comply with the provisions of this rule, the Enquiry Officer may hold the enquiry ex parte.*

*(18) Whenever the Enquiry Officer after having heard and recorded the whole or any part of the evidence in an enquiry, ceases to exercise jurisdiction therein and is succeeded by another Enquiry Officer, the Enquiry Officer so succeeding may act on the evidence so recorded by his predecessor or partly recorded by himself.*

*Provided that if the succeeding Enquiry Officer is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice he my recall, examine, cross- examine and re-examine any such witness as hereinbefore provided.*

*7. **Report of the Enquiry Officer**-- After the conclusion of the enquiry, the Enquiry Officer shall prepare a report, which shall contain-*

*(a) the articles of charge and the statement of the imputations;*

*(b) the defence of the person against whom the enquiry has been held;*

*(b) the assessment of the evidence in respect of each article of charge;*

*(d) the findings on each article of charge and reasons therefor.*

*Explanation.--If in the opinion of the Enquiry Officer the proceedings of the enquiry establish any article of charge different from the original articles of charge, he may record his findings on such article of charge.*

*Provided that the findings on such article of charge shall not be recorded unless the person against whom the enquiry has been held has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such articles of charge."*

6. It has been further contended by counsel for the petitioner that from the perusal of the Rules of 1997 framed for enquiry against the alleged misconduct by the Pradhan, Up-Pradhan and Members, it is apparent that the rules do not contemplate only a spot inspection by the Enquiry Officers but requires that Enquiry Officer shall brought the substance of imputation into definite and distinct articles of charge and a statement of imputations in support of each article of charge, which shall contain a statement of all relevant facts, list of documents and the list of witnesses by whom the articles are proposed to be sustained. Rule 6(3) of the Rules of 1997 also provides that the Enquiry Officer shall deliver or cause to be delivered to the person against whom he has to hold the enquiry, a copy of articles of charge, the statement of imputations and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall also require that person by a notice in writing to submit within such time as may be specified, a written statement of his defence and also to state whether he desires to be heard in person and appear before him on such day at such time as may be specified. Rule 6(4) of the Rules of 1997 provides that on receipt of written statement of defence, the Enquiry Officer shall enquire into such of that articles as are not admitted and where all the articles of charges have been admitted in the written statement of defence, the Enquiry Officer shall record his finding on each charge after taking evidence as he may think fit.

7. Counsel for the petitioner further submitted that from the perusal of order impugned passed by the District Magistrate, Raebareli dated 26.07.2024, it is apparent that the order has been passed only on the basis of spot inspection made by the Enquiry Officers. It has been further contended that the enquiry has been conducted in violation of Rules 6 and 7 of the Rules of 1997 as the petitioner was never issued a charge sheet and was not called upon by the Enquiry Officers to submit his reply to the charge sheet. It has also been pointed out by the learned counsel appearing for the petitioner that even from the perusal of the enquiry report, it is apparent that same does not mention regarding the compliance of Rules 6 and 7 of the Rules of 1997 but only mentions about the spot inspection conducted by the Enquiry Officers. There is no mention in the enquiry report that any charge sheet was issued to the petitioner, a reply was

called for from the petitioner, date and time were fixed for the enquiry. Thus, according to the petitioner, the order impugned has been passed in violation of Rules 6 and 7 of Rules of 1997 framed for the purpose of holding an enquiry.

8. In this regard, learned counsel for the petitioner relied upon judgments of this Court in case of **Quadri Begum Vs. State of U.P. And Others** reported in **2009 (4) AWC 3608 Allahabad, Sher Ali Vs. State of U.P. and others** reported in **2013 (7) ADJ 736, Mahendra Singh Vs. State of U.P. And Others** reported in **2014 (1) ADJ 434, Pushpa Vs. State of U.P. and Others** reported in **2014(1) ADJ 205, Mukesh Kumar Vs. State of U.P. and Others** reported in **2014 (1) ADJ 215 and Shaukat Hussain Vs. State of U.P.** reported in **2019 (7) ADJ 429.**

9. Per contra, learned Standing Counsel appearing for the State has vehemently submitted that enquiry was conducted in an impartial manner and after considering the reply submitted by the petitioner, the District Magistrate has found the petitioner guilty of financial misappropriation of the funds in carrying out the development work and therefore, no illegality has been committed and the principles of natural justice has been complied with before passing the order impugned as the show case notice was also issued by the District Magistrate to the petitioner to explain the allegations as made in the show cause notice.

10. A plain reading of the Rules indicates that the Legislature has given appropriate safeguards to check the arbitrary use of power by the authorities. The specific provision has been given in Rule 6 for inquiry.

11. In case of **Quadri Begum Vs. State of U.P. And Others (supra)** this Court in paragraph Nos. 6 and 7 has held as under:-

*"6. In the present case, on the basis of the record it appears that neither the inquiry Officer, i.e., the Executive Engineer nor the District Magistrate concerned, had complied with the provisions given in the Rules. The provisions contained in the Rules are statutory in nature and while holding a person guilty of misconduct it shall be incumbent upon the authorities to follow the provisions in letter and spirit.*

*7. The Pradhans who are elected and chosen by the people, should not be treated with undue hardship. In the present case, the false implication cannot be ruled out. The Rules contain detailed procedure with regard to holding of inquiry and for the submission of report by the Inquiry Officer. The principles of natural Justice is the part and parcel of Article 14 of the Constitution. Noncompliance of the Rules renders the inquiry report as well as the removal order illegal. The provisions contained in the Rules are mandatory in nature and should be adhered by the authorities while proceeding with the inquiry. The attention has not been invited towards any material on record by the respondents Counsel which may point out that Rules 5, 6 and 7 of the Rules have been followed in the inquiry proceedings. It is settled proposition of law that in case the authorities want to do anything, then that should be in the manner provided by the Act or Statute (Rules) and not otherwise vide, Nazir Ahmed v. King Emperor MANU/PR/0119/1936: AIR 1936 PC 253; Deep Chand v. State of Rajasthar MANU/SC/0118/1961: AIR 1961 SC 1527;*

*Patna Improvement Trust v. Smt. Lakshmi Devi and Ors. MANU/SC/0389/1962: AIR 1963 SC 1077; State of U.P. v. Singhara Singh and Ors. MANU/SC/0082/1963: AIR 1964 SC 358; Barium Chemicals Ltd. v Company Law Board MANU/SC/0037/1966: AIR 1967 SC 295 Para 34; Chandra Kishor Jha v. Mahavir Prasad and Ors. MANU/SC/0594/1999: 1999 (8) SCC 266; Delhi Administration v. Gurdip Singh Uban and Ors. MANU/SC/0515/2000: 2000 (7) SCC 296; Dhananjay Reddy v. State of Karnataka MANU/SC/0168/2001: AIR 2001 SC 1512; Commissioner of Income Tax, Mumbai v. Anjum M. H. Ghaswala and Ors. MANU/SC/0662/2001: 2002 (1) SCC 633; Prabha Shankar Dubey v. State of M.PAIR 2004 SC 486 and Ramphal Kundu v. Kamal Sharma MANU/SC/0059/2004: AIR 2004 SC 1657. In the present case, at the face of record, the procedure given in the Rules (supra) have not been followed. The writ petition deserves to be allowed."*

12. In case of **Mahendra Singh Vs. State of U.P. And Others (supra),** this Court in paragraph Nos. 3, 4 and 5 has held as under:-

*"3. The Court finds from a perusal of the inquiry report that no charge sheet was served upon the petitioner as per Rule 6 of the Rules of 1997, which stipulates that the inquiry officer is required to draw up the substance of the imputation or the imputation into different and distinct articles of charge and statement of the imputation in support of each article of the charge and list of the documents, list of the witnesses etc., which are relied upon are required to be indicated. Such charges are required to be served upon the Pradhan and, upon receipt of the evidence, the inquiry officer is required to conduct an oral inquiry into such charges, which are denied by the Pradhan. Witnesses are required to be examined and opportunity is required to be given for cross-examination of the witnesses. A date, time and place is required to be fixed, which in the instant case has been given a go bye.*

*4. The inquiry officer has not conducted the inquiry as per Rule 6 of the Rules and has proceeded in his own cavalier fashion conducting an ex-parte inquiry and submitting a report holding that the charges levelled as per the preliminary inquiry stood proved. The Court is of the opinion, that the inquiry report submitted is in gross violation of the provisions of Rule 7 of the Rules of 1997.*

*5. Consequently, the inquiry report cannot be sustained and the order of removal pursuant to the inquiry report is also erroneous and cannot be sustained. The impugned order is quashed."*

13. In case of **Pushpa Vs. State of U.P. and Others (supra),** this Court in paragraph Nos. 5, 6 and 7 has held as under:-

*"5. A final inquiry is required to be conducted in accordance with the procedure contemplated under Rule 6 of the Rules of 1997 and thereafter a report is required to be submitted under Rule 7 of the Rules of 1997. The procedure contemplated under Rule 6 is that the inquiry officer shall draw the articles of charges and the statements of imputation and serve such articles of charges along with the statements and relevant documents in support of such statements and the charges to the delinquent, who in the instant case is the Pradhan. Specific*

*charges are required to be framed by the inquiry officer, so that the Pradhan can give a proper reply to each of the charges. The procedure contemplated indicates, that where the charge is denied by the Pradhan, the inquiry officer is required to conduct an inquiry by taking oral and documentary evidence after giving an opportunity to the Pradhan to cross-examine such witnesses and only thereafter the inquiry officer is required to submit an inquiry report, which would contain the articles of charge and the statement of the imputation, the defence of the Pradhan and the assessment of the evidence in respect of each articles of charge and thereafter the findings on each article of charge and the reasons thereof.*

*6. In the instant case, the inquiry officer has done nothing as per the procedure provided under Rule 6 of the Rules of 1997. He has neither framed the charge nor the statement of the imputation nor the list of documents or the list of witnesses that was to be relied upon by the prosecution. All that the inquiry officer has done is to hold an inquiry which is nothing but a preliminary enquiry and is not an enquiry contemplated under Rule 6 of the Rules of 1997. The Court finds from a perusal of the record that pursuant to the submission of the report, a show cause notice dated 26.7.2013 was issued by the District Magistrate, which contained the charges and upon receipt of the reply a final order has been passed. The Court finds that the procedure adopted was patently illegal. The charges so framed by the District Magistrate were not proved nor was the inquiry held in accordance with Rule 6 of the Rules of 1976. The entire exercise was wholly illegal and against the clear provisions of Rule 6 of the Rules of 1997. The inquiry report was in violation of the provisions of Rule 7 of the Rules of 1997.*

*7. Since no charges were framed against the petitioner nor any inquiry was made in accordance with Rule 6 of the Rules of 1997, which is a mandatory requirement, the impugned order dated 8.10.2013 removing the petitioner under Section 95(1)(g) of the Act was wholly illegal and in violation of the principles of natural justice. The impugned order cannot be sustained and is quashed."*

14. In case of Mukesh Kumar Vs. State of U.P. and others (supra) this Court in paragraph Nos. 4, 5, 6 and 7 has held as under:-

*"4. Having heard the learned counsel for the parties and having perused the impugned order as well as the enquiry report, which has been filed by respondent no.7 in his counter affidavit, the Court finds that the impugned order cannot be sustained.*

*5. An elaborate procedure has been prescribed under Rule 6 of the Rules. Rule 6(2) of the Rules clearly indicates that the Enquiry Officer shall draw the substance of the imputations into definite and distinct articles of charge and that a statement of the imputations in support of each article of charge, shall also be drawn up, which shall contain statement of all relevant facts and the list of documents and list of witnesses and which are all required to be indicated and supplied to the Pradhan. The procedure thereafter as provided under Rule 6 of the Rules is required to be followed.*

*6. Without going into the details, the Court finds that the Enquiry Officer has*

*submitted a five line report and held that the imputations mentioned in the preliminary enquiry was inquired and the charges have been found to be true. The Court is of the opinion that the Enquiry Officer has not even read the procedure, which he is required to follow under Rule 6 of the Rules. A very shoddy and careless enquiry has been done by the Enquiry Officer and, on that basis, a Pradhan, who has been given a constitutional status has been removed. No charge was framed by the Enquiry Officer nor any statement of imputation was made nor list of documents or list of witnesses were indicated. Since no charge has been framed, the question of such charge been proved does not arise .*

*7. In the light of the aforesaid, the Court finds that the impugned order cannot be sustained and is quashed. The writ petition is allowed."*

15. In case of **Sher Ali Vs. State of U.P. and others (supra**), this Court in paragraph Nos. 12, 13 and 15 has held as under:-

*"12. From a perusal of Rule 6 of the Rules of 1997, it is clear that a detailed procedure has been envisaged for holding an enquiry. This procedure is not applicable while holding a preliminary enquiry under Rule 4, and consequently, a definite charge has to be framed under Rule 6. The documents relied upon by the prosecution has to be made known and specified in the charge sheet. The charge is required to be proved against the charged person. It is a full fledged enquiry, which is required to be followed precisely in the manner, in which it has been envisaged under Rule 6 of the Rules of 1997. A preliminary enquiry does not envisage this procedure under Rule 4, and therefore, the respondents committed a manifest error in holding that since a preliminary enquiry was conducted, there was no need to hold a final enquiry with regard to the same charges.*

*13. In the light of the aforesaid, the Court finds from a perusal of the impugned order that the respondents did not issue any chargesheet to the petitioner nor conducted an enquiry as per Rule 6 of the Rules of 1997. Consequently, the enquiry report and the orders passed pursuant thereto are patently erroneous in gross violation of the procedure and Article 14 of the Constitution, which cannot be sustained.*

*15. In the light of the aforesaid, the impugned order cannot be sustained and is quashed. The writ petition no. 35371 of 2013 is allowed."*

16. The same view has been taken by this Court in case of Shaukat Hussain Vs. State of U.P.(supra).

17. I have perused the enquiry report as well as the order passed by the District Magistrate dated 26.07.2024 and I am of the opinion that though a spot inspection was made by the Enquiry Officers appointed by the District Magistrate but the enquiry was not conducted in accordance with provisions of Rules 6 and 7 of the Rules of 1997 as there is no whisper of even issuing charge sheet, calling for an explanation from the petitioner, recording of evidence of witnesses and fixing date and time for enquiry in the impugned order and in the enquiry report.

18. Democracy in our country begins at the grass root level with elections

of Gram Pradhans in villages and the same is the very foundation of our democracy. No doubt, the District Magistrate has the power to either cease the financial and administrative powers or oust the democratically elected Gram Pradhan under Section 95(1)(g) of the Act, but the said power is to be exercised only in exceptional and extra ordinary cases, and should be exercised with utmost caution and not in a routine manner at the whims and fancies of the administrative authorities, without following the procedure prescribed under the Act and the Rules. The present case is a glaring example where action has been taken in gross violation of the Act and the Rules of 1997 framed thereunder and a democratically elected Pradhan has been wrongly kept away and deprived of his elected office for several months.

19. Rules 6 and Rule 7 of Rules 1997 contemplates a formal enquiry as per the provisions made in the aforesaid rules. No order can be passed for removal of Pradhan by the District Magistrate only on the basis of a spot inspection made by the Enquiry Officer without complying with the provisions of Rule 6 and 7 of the Rules 1997.

20. Learned Standing Counsel could not point out either from the order impugned or from the enquiry report that the enquiry was conducted in consonance with the procedure as laid down in Rules 6 and 7 of Rules of 1997. Though, learned Standing Counsel vehemently contended that the Enquiry Officers have gone on spot and verified the work, which was undertaken by the petitioner for which the complaint was made and found that irregularities have been committed by the petitioner. Learned Standing Counsel submitted that no useful purpose would be served in calling for a counter affidavit. Order dated 26.07.2024 and report dated 14.03.2024 be set aside and liberty be given to the District Magistrate to initiate fresh enquiry in accordance with Rules of 1997 and pass a fresh order.

21. To this proposition, learned counsel for the petitioner has no objection, therefore, with the consent of parties, the writ petition is decided at admission stage without calling for counter affidavit.

22. Thus, in view of discussions made above and stand of learned counsel for the parties, I am of the considered opinion that final enquiry conducted against the petitioner is not in consonance with the procedure prescribed in Rules 6 and 7 of the Rules of 1997 and therefore, the enquiry is vitiated. No reliance can be placed on the said enquiry for passing an order of removal by the District Magistrate and consequently, the order dated 26.07.2024 passed by the District Magistrate, is quashed and the writ petition is allowed.

23. However, it will be open for the respondents to initiate a fresh enquiry against the petitioner in consonance with the provisions of U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997. The District Magistrate is directed to conduct an enquiry afresh under Rule 6 of the Rules of 1997 after appointing a fresh enquiry officer under Rule 5 of the said Rules. The enquiry would be completed expeditiously, preferably, within three months from the date of production of a certified copy of this order. During this period, the three

member committee appointed by the District Magistrate will continue to discharge their functions.

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**(2024) 10 ILRA 260**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-C No. 8666 of 2024
And
Writ-C No. 8680 of 2024

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

**Counsel for the Petitioner:**
Amrendra Nath Tripathi, Sant Prasad Singh

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

**A. Civil Law – Contents of the show-cause notice – Purpose of serving of show-cause notice is to make the noticee understand the precise case set up against him, which he has to meet. Show-cause notice must contain the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. It is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. A show-cause notice should meet the following two requirements, viz.: (i) The material/grounds to be stated which, according to the department, necessitates an action; (ii) Particular penalty/action which is proposed to be taken. (Para 13)**

**B. Indian Stamp Act, 1899- Section 47-A – Show-cause notice – In the instant case, two cases under Section 47-A of the Indian Stamp Act, 1899, were instituted on the basis of two similarly worded notices dated 07.10.2022, stating that sale deeds were executed in favour of the petitioner and it had come to light that there was a deficiency in payment of the sale. Nothing further was stated in the notices regarding the basis of satisfaction that there was a deficiency in the payment of stamp duty. The notices do not even mention the amount of deficiency in the payment of stamp duty or any other particulars. Held – The show-cause notice does not serve any purpose, as, in the absence of the particulars in the notice, the noticee cannot submit a proper reply to the notice. (Para 14)**

**C. Stamp Duty – Recovery of deficient stamp duty – Uttar Pradesh Stamp (Valuation of Property) Rules, 1997, Rule 7(3)(c) – Collector may inspect the property after due notice to parties to the instrument. Report of any inspection which has not been conducted in accordance with the provisions of Rule 7(3)(c) of the 1997 Rules cannot form the basis of an order for recovery of deficient stamp duty. (Para 16)**

**D. Indian Stamp Act, 1899 – Recovery of deficiency in payment of registration fee – There is no provision in the Indian Stamp Act, 1899 empowering the authorities to order recovery of any deficiency in payment of registration fee, and in absence of any statutory provision, the authorities cannot pass any order for recovery of deficiency of registration fee in proceedings instituted under the Indian Stamp Act. (Para 17)**

**Allowed.** (E-5)

**List of Cases cited:**

*Gorkha Security Services Vs Govt. of NCT of Delhi & ors.* (2014) 9 SCC 105

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

1. Heard Sri Amrendra Nath Tripathi and Sri Sant Prasad Singh Advocates, the learned counsel for the petitioner, Sri Hemant Kumar Pandey, the learned Standing Counsel for the State and perused the records.

2. Writ C No.8666 of 2024 has been filed challenging validity of an order dated 24.01.2024 passed by the Additional District Magistrate (Finance and Revenue), District - Ambedkar Nagar in Case No.1226 of 2022, under Section 47-A of the Indian Stamp Act, 1899, whereby a deficiency of Rs.39,080/- in payment of Stamp Duty and Rs.7,240/- in payment of registration fee has been imposed regarding Document No. 1549/2022. Besides ordering for recovery of the amount of deficiency in payment of Stamp Duty and registration fee, a penalty of Rs.10,000/- has been imposed and the entire amount has been ordered to be recovered from the petitioner along with interest at the rate of 1.5% per month. The petitioner had filed an appeal under Section 56 (1-A) of the Indian Stamp Act, bearing Case No.581 of 2024, which has been dismissed by means of a judgment and order dated 26.07.2024 passed by the Additional Commissioner (Stamp), Ayodhya Division, Ayodhya and the petitioner has challenged validity of the aforesaid order also.

3. Writ C No. 8680 of 2024 has been filed challenging validity of an order dated 24.01.2024 passed by the Additional District Magistrate (Finance and Revenue), District - Ambedkar Nagar in Case No.1228 of 2022, under Section 47-A of the Indian Stamp Act, 1899, whereby a deficiency of Rs.1,81,100/- in payment of Stamp Duty and Rs.36,220/- in payment of registration fee has been imposed regarding document no. 1548/2022. Besides ordering for recovery of the amount of deficiency in payment of Stamp Duty and registration fee, a penalty of Rs.50,000/- has been imposed and the entire amount has been ordered to be recovered from the petitioner along with interest at the rate of 1.5% per month. The petitioner had filed an appeal under Section 56 (1-A) of the Indian Stamp Act, bearing Case No.579 of 2024, which has been dismissed by means of a judgment and order dated 26.07.2024 passed by the Additional Commissioner (Stamp), Ayodhya Division, Ayodhya and the petitioner has challenged validity of the aforesaid order also.

4. Common questions of facts and law are involved in both the Writ Petitions and, therefore, both the petitions are being decided by a common judgment. As the petitions are proposed to be decided without going into the merits of the case, the learned Counsel for the parties have consented for final disposal of the petition without filing of counter affidavits.

5 . Case Nos.1226 of 2022 and - 1228 of 2022, under Section 47-A of the Indian Stamp Act, 1899 were instituted on the basis of two similarly worded notices dated 07.10.2022 issued by the Additional District Magistrate (Finance and Revenue), Ambedkar Nagar to the petitioner stating that sale deeds have been executed in favour of the petitioner and it had come to light that there is deficiency in payment of the sale deeds. The petitioner was asked to appear on 14.10.2022 and submit her objections along with evidence.

6. The petitioner submitted detailed objections in response to the

aforesaid two notices and thereafter the impugned orders have been passed.

7. Sri. Amrendra Nath Tripathi, the learned counsel for the petitioner, has submitted that the petitioner had purchased three separate plots of land through three separate sale deeds executed on 02.07.2022. Immediately after execution of the sale deeds, the petitioner came to know that the sale deeds had been executed by some impostor. The petitioner filed a First Information Report bearing Case Crime No.0092 of 2022, under Sections 419, 420, 467, 468, 471 and 120-B of the Indian Penal Code in Police Station – Maharua, District – Ambedkar Nagar on 18.07.2022. After investigation, a charge-sheet has been submitted in that case. The petitioner filed a suit for cancellation of the three sale deeds on 15.07.2022. The defendant –the true owner of the property, entered into a compromise with the plaintiff. The suit was decreed in terms of the compromise on 13.08.2022 and the sale deeds were cancelled. After cancellation of the sale deeds, the petitioner applied for return of the stamp duty whereupon the notices dated 07.10.2022 were issued.

8. Assailing the validity of impugned orders, Sri. Amrendra Nath Tripathi, the learned counsel for the petitioner has submitted that the notices merely state that it has come to light that there is a deficiency in payment of Stamp Duty in the sale deeds. Nothing further has been stated in the notices regarding the basis of satisfaction that there is deficiency in payment of stamp duty. The notices even do not mention the amount of deficiency in payment of stamp duty or any other particular. In support of his contention, the learned counsel for the petitioner has relied upon the case of **Gorkha Security Services versus Govt. of NCT of Delhi & others:** (2014) 9 SCC 105.

9. Replying to the aforesaid submissions, Sri. Hemant Kumar Pandey, the learned Standing Counsel for the State of U.P., has submitted that the notice directed the petitioner to submit her reply/objections along with evidence. He has submitted that the petitioner had full opportunity to raise all the pleas in response to the notice and she has availed that opportunity by submitting three separate detailed replies dated 21.11.2022, all of which were similarly worded. The point of any defect in the notice dated 07.10.2022 was not raised in any of the replies submitted by the petitioner. The learned Standing Counsel has contended that when the petitioner did not raise any objection in her replies regarding any illegality / deficiency in the notices. The validity of the notice was not assailed even in the memo of appeal filed by the petitioner. He has submitted that as the petitioner has failed to take this ground in reply to the notice and in the memo of appeal, she cannot be permitted to raise this ground for the first time before this Court in this petition. In support of his submission, the learned Standing Counsel has relied upon a decision of the Hon'ble Supreme Court in the case **of Deepak Tandon and others verses Rajesh Kumar Gupta** reported in (2019) 5 SCC 537, wherein Hon'ble Supreme Court held that if a plea is not taken in the pleadings by the parties and no issues on such plea was framed and no finding was recorded either by the trial court or the first appellate court, such plea cannot be allowed to be raised by the parties for the first time in third Court in appeal, revision or writ as the case may be, for want of any factual foundation for the finding.

10. The facts in the case of **Deepak Tandon** (Supra) were that an application under Section 21(1) (a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 had been filed for eviction of the tenant on the ground of bona fide need. The respondent-tenant filed his reply and the Prescribed Authority allowed the application. The appeal filed against the eviction order was dismissed by the District Judge. However, a petition filed under Section 227 against the appellate order was allowed by this Court and the order passed by the Prescribed Authority and the Appellate Court were set aside on the ground that the application under Section 21(1)(a) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 was not maintainable. The Hon'ble Supreme Court found that the High Court committed a jurisdictional error as the question of maintainability of the application under Section 21 (1)(a) of the Act of 1972 had not been raised in the written statement filed before the Prescribed Authority and, therefore, the Prescribed Authority had rightly did not decide this issue. The issue of maintainability was not raised even before the first appellate court.

11. The Hon'ble Supreme Court had laid down the aforesaid principle in the aforesaid factual background and had further added that

*"15. In our considered opinion, the High Court committed jurisdictional error in setting aside the concurrent findings of the two courts below and thereby erred in allowing the respondent's writ appeal and dismissing the appellants' application under Section 21(1)(a) of the 1972 Act as not maintainable. This we say for the following reasons:*

*15.1. First, it is not in dispute that the respondent (opposite party) had not raised the plea of maintainability of the appellants' application under Section 21(1)(a) of the 1972 Act in his written statement before the Prescribed Authority.*

*15.2. Second, since the respondent failed to raise the plea of maintainability, the Prescribed Authority rightly did not decide this question either way.*

*15.3. Third, the respondent again did not raise the plea of maintainability before the first appellate court in his appeal and, therefore, the first appellate court was also right in not deciding this question either way.*

*15.4. Fourth,* ***it is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was, therefore, framed and no finding was recorded either way by the trial court or the first appellate court, such plea cannot be allowed to be raised by the party for the first time in third court whether in appeal, revision or writ, as the case may be, for want of any factual foundation and finding.***

***15.5****. Fifth,* ***it is more so when such plea is founded on factual pleadings and requires evidence to prove i.e. it is a mixed question of law and fact and not pure jurisdictional legal issue requiring no facts to probe.***

***15.6****. Sixth,* ***the question as to whether the tenancy is solely for residential purpose or for commercial purpose or for composite purpose i.e. for both residential and commercial purpose, is not a pure question of law but is a***

***question of fact, therefore, this question is required to be first pleaded and then proved by adducing evidence. It is for this reason, such question could not have been decided by the High Court for the first time in third round of litigation in its writ jurisdiction simply by referring to some portions of the pleadings.*** *In any case and without going into much detail, we are of the view that if the tenancy is for composite purpose because some portion of tenanted premises was being used for residence and some portion for commercial purpose i.e. residential and commercial, then the landlord will have a right to seek the tenant's eviction from the tenanted premises for his residential need or commercial need, as the case may be.*

*15.7. Seventh, the High Court exceeded its jurisdiction in interfering with the concurrent findings of fact of the two courts below while allowing the writ appeal entirely on the new ground of maintainability of the application without examining the legality and correctness of the concurrent findings of the two courts below, which was impugned in the writ appeal.*

*15.8. Eighth, the High Court should have seen that the concurrent findings of facts of the two courts below were binding on the writ court because these findings were based on appreciation of evidence and, therefore, did not call for any interference in the writ jurisdiction.*

(Emphasis added)

12. The aforesaid principles were laid down in the factual background where the tenant had raised a new ground for the first time before the High Court which ground was based on a mixed question of fact and law, which could only be decided after examining the leadings and evidence of the parties and, therefore, in absence of the ground raised in the pleading and evidence having been led in its support, the High Court could not examine the new plea which was raised for the first time. The plea of notices dated 07.10.2022 being vague, is apparent on the face of the record and no question of fact is involved which needs any evidence to enable this Court to examine the validity of the notice dated 07.10.2022. Therefore, the principles of law laid down in the case of **Deepak Tandon and others** (Supra) would not create a bar against this Court examining the validity of the notice dated 07.10.2022.

13 . In the case of **Gorkha Security Services versus Govt. of NCT of Delhi & others:** (2014) 9 SCC 105, wherein the Hon'ble Supreme Court held as follows: -

*"Contents of the show-cause notice*

*21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken.* ***The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same.*** *Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of*

*are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.*

*22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:*

*(i) The material/grounds to be stated which according to the department necessitates an action;*

*(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.*

*We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."*

(Emphasis added)

14. As the proceedings have been instituted on the basis of the notices dated 07.10.2022, which do not contain any factual averment to make out a deficiency in payment of Stamp Duty and it does not even disclose the amount of deficiency, the date of sale deed or any other particular of instrument, it does not serve any purpose, as in absence of the particulars in the notice, the noticee cannot submit a proper reply to the notice.

15. Moreover, the impugned orders refer to an inspection of the property in question having been carried out by the authorities, but there is nothing on record to establish that the inspection was carried out after giving notice to the petitioner.

16. Rule 7 (3) (c) of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 provides that the Collector may inspect the property after due notice to parties to the instrument. The report of any inspection which has not been conducted in accordance with the provisions of Rule 7 (3) (c) of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997, cannot form the basis of an order for recovery of deficient stamp duty.

17. Further, there appears to be no provision in the Indian Stamp Act, 1899 empowering the authorities to order recovery of any deficiency in payment of registration fee and in absence of any statutory provision, the authorities cannot passed any order for recovery of deficiency of registration fee in proceedings instituted under the India Stamp Act.

18. Without going into any further factual details, as this Court has come to a conclusion that the proceedings have been instituted on the basis of the notices, which are not sustainable in law, all the proceedings held in furtherance of the two notices dated 07.10.2022 and the orders passed therein are unsustainable in law and are liable to be set aside.

19. Therefore, the petitions are **allowed.** Both the notices dated 07.10.2022 issued to the petitioner alleging deficiency in the stamp duty on the two sale-deeds executed in favour of the petitioner are set aside. Consequentially, the orders dated 24.01.2024 passed by the Additional District Magistrate (Finance and Revenue), District - Ambedkar Nagar in Case Nos.1226 of 2022 and 1228 of 2022, under Section 47-A of the Indian Stamp Act, 1899, as also the orders dated 26.07.2024 passed by the Additional Commissioner (Stamp), Ayodhya Division, Ayodhya in Case Nos.581 of 2024 and 579 of 2024 under Section 56 (1-A) of the Indian Stamp Act and the recovery certificates issued in furtherance of the aforesaid notices and orders, are also set aside.

20. As the proceedings have been set aside by this Court because of defect in notice, a liberty is granted to the opposite parties to issued fresh notices to the petitioner in accordance with law, keeping in view the observations made in this judgment.

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**(2024) 10 ILRA 266**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.10.2024**

**BEFORE**

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

Writ-C No. 24737 of 2023

**Mahatam Sharma ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Manu Mishra

**Counsel for the Respondents:**
C.S.C., Sri Munna Tiwari,Sri Sudhir Bharti, Sri Aniruddha Chaturvedi

**Civil Law – Land Revenue Act, 1996 - Sections 48 & 49 - The Uttar Pradesh Land Revenue (Survey and Record Operations) Rules, 1978 - Area under record or survey operation - An order passed by the Assistant Record Officer in an appeal under Rule 27(3) of the Survey Rules, 1978, against the order of the Survey Naib Tahsildar under Rule 26(1), can be challenged by filing a statutory revision under Section 219 of the Land Revenue Act before the Record Officer. Such an order of the Assistant Record Officer in an appeal under Rule 27(3) cannot be challenged in a revision before the Commissioner. In matters related to survey and record operations, the Commissioner has no role. The scheme of the Act with regard to revision of maps and records as contained under Chapter IV of the Land Revenue Act does not contemplate any control over the record operations by the Divisional Commissioner. Under Section 49, it is the Record Officer appointed by the State Government who is in charge of the record operations so long as the area is under the record or the survey operations upon notification having been issued under Section 48. (Para 28)**

**Disposed off.** (E-5)

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

1. Heard Sri Manu Mishra, learned counsel for the petitioner, Sri Munna Tiwari, appearing along with Sri Aniruddha Chaturvedi, learned counsel appearing for the respondent Nos. 5 and 6 and Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State respondents.

2. The present petition has been filed seeking quashing of order dated 26.08.2021/27.08.2021, passed by the Survey Nayab Tahsildar, the order dated 25.05.2022, passed by the Assistant Record Officer, and the order dated 02.06.2023, passed by the Additional Commissioner (Judicial) IInd, Gorakhpur Division, Gorakhpur.

3. The facts of the case, as pleaded in the writ petition, are being set out hereinbelow.

4. The property in dispute is described as an agricultural property being Khata No. 364, Gata No. 103 to 109, area measuring 0.92 hectares, situate in Village Uttarashot, Tehsil Sadar, District Gorakhpur.

5. It is stated that after the death of the original tenureholder, Smt. Maharaji, the name of the father of the petitioner, namely, Naresh, was recorded in the revenue records as 'Sirdar' on 29.03.1973.

6. Thereafter, pursuant to an order dated 26.08.2021, passed by the Survey Naib Tahsildar, the name of one Sambhu, the respondent No. 5, was mutated in the revenue records, on 27.08.2021.

7. In the meantime, the father of the petitioner, namely, Naresh, died and against the order dated 26.08.2021, passed by the Survey Naib Tahsildar, the petitioner preferred an appeal before the Assistant Record Officer, Gorakhpur, registered as Appeal No. 75 of 2021 (re-numbered as 1680) [Mahatam Vs. Sambhu], under Section 27(3) of the U.P. Land Revenue (Survey and Record Operations) Rules, 19781. The aforesaid appeal was dismissed by an order dated 25.05.2022.

8. Aggrieved with the aforesaid order dated 25.05.2022, the petitioner preferred a revision before the Commissioner, Gorakhpur Division, Gorakhpur, registered as Case No. 768 of 2022 [Mahatam Sharma Vs. Sabhu]. The revision was dismissed by order dated 02.06.2023, as being not maintainable.

9. Counsel for the petitioner has confined his challenge to the order passed by the revisional court on the question of maintainability of the revision.

10. Learned counsel has contended that the revisional court has erred in holding the revision to be not maintainable against the order passed by the Assistant Record Officer, under Rule 27(3) of the Rules 1978, whereas the said rule itself provides the remedy of revision, as contemplated under Section 219 of the U.P. Land Revenue Act, 19012.

11. Counsel for the respondents has refuted the aforesaid submission by pointing out that in matters relating to survey and record operations, the Commissioner has no role, and it is for this reason that the revisional authority has held the revision to be not maintainable before the court of Commissioner.

12. Counsel for the respondents, however, does not dispute that the order dated 25.05.2022, passed by the Assistant Record Officer, would be subject to the remedy of a statutory revision, under Section 219, though not before the Commissioner, but before the Record Officer.

13 . In order to appreciate the rival contentions, the relevant provisions under

the Land Revenue Act, would be required to be referred.

14. Chapter IV of the Land Revenue Act relates to revision of maps and records, and it deals with survey and record operations. The record operations are to be notified by the State Government with the publication of a notification under Section 48, and upon the notification being issued, the area in question would be under survey and record operations, and all the powers regarding correction of revenue papers shall vest in the Record Officer or the Assistant Record Officer.

15. The provisions under Chapter IV of the Land Revenue Act relating to notification of Record Officers, appointment of Record Officers, powers of Record Officers, and other related provisions, which are relevant for the purposes of controversy involved in the present case, are being reproduced hereinbelow:

**"48. Notification of record operations.** –

If the State Government thinks that, in any district or other local area, a general or partial revision of the records or a resurvey, or both, should be made, it shall publish a notification to that effect.

**Effect of notification**. – And every such local area shall be held to be under record or survey operation or both, as the case may be, from the date of the notification until the issue of another notification declaring the operations to be closed therein.

**49. Record Officers**. – The State Government may appoint an officer, hereinafter called the Record Officer, to be in charge of the record operations or the survey, or both, as the case may be, in any local area and as many Assistant Record Officers, as to it may seem fit, and such officers shall exercise all the powers conferred on them by this Act so long as such local area is under record or survey operations, as the case may be

**50. Powers of Records Officer as to erection of boundary marks**. - When any local area is under survey operations, the Record Officer may issue a proclamation directing all Gaon Sabhas and bhumidhars to erect, within fifteen days, such boundary marks as he may think necessary to define the limits of the villages and fields; and in default of their compliance within the time specified in the proclamation, he may cause such boundary marks to be erected, and the Collector shall recover the cost of their erection from the Gaon Sabhas or bhumidhars concerned.

**51. Decision of disputes**. – In case of any dispute concerning any boundaries, the Record Officer shall decide such dispute in the manner prescribed in Section 41.

**52. Records to be prepared in re-survey.** - When any local area is under survey operations the Record Officer shall prepare for each village therein a map and field-book, which shall thereafter be maintained by the Collector as provided by Section 28, instead of the map and field-book previously existing.

**53. Preparation of new record-of-rights**. – Where any local area is under record operation, the Record Officer shall frame for each village therein the record specified in Section 32 and the record so

framed shall thereafter be maintained by the Collector, instead of the record previously maintained under Section 33.

**54. Undisputed entries and disposal of disputes regarding entries by Record Officer.** – (1) For revising the map and records under this chapter, the Record Officer shall, subject to the provisions hereinafter contained, cause to be carried out survey, map correction, field to field Partal and test and verification of current annual register in accordance with the procedure prescribed.

(2) After the test and verification of the current annual register in accordance with sub-section (1), the Naib-Tahsildar shall correct clerical mistakes and errors, if any, in such register, and shall cause to be issued to the concerned tenure-holder and other persons interested, notices containing relevant extracts from the current annual register and such other records as may be prescribed, showing their rights and liabilities in relation to land and mistakes and disputes discovered during the operations mentioned in the said sub-section.

(3) Any person to whom notice under sub-section (2) has been issued may, within twenty-one days of the receipt of notice, file before the Naib-Tahsildar objection in respect thereof disputing the correctness or nature of the entries in such records or extracts.

(4) Any person interested in the land may also file objection before the Naib-Tahsildar at any time before the dispute is settled in accordance with sub-section (5), or before the Assistant Record Officer, at any time before the objections are decided in accordance with sub-section (6).

(5) The Naib-Tahsildar shall –

(a) where objections are filed in accordance with sub-section (3) or sub-section (4) after hearing the parties concerned; and

(b) in any other case after making such inquiry as he may deem necessary correct the mistake, and settle the dispute, by conciliation between the parties appearing before him, and pass orders on the basis of such conciliation.

(6) The record of all cases which cannot be disposed of by the Naib-Tahsildar by conciliation as required by sub-section (5), shall be forwarded to the Assistant Records Officer who shall dispose of the same, in accordance with the provisions of Sections 40, 41 or 43, as the case may be, and where the dispute involves a question of title, he shall decide the same after a summary inquiry.

(7) Where after the summary inquiry under sub-section (6), the Assistant Record Officer is satisfied that the land in dispute belongs to the State Government or a local authority, he shall cause the person in unauthorised occupation of such land to be evicted and may, for that purpose use or cause to be used such force as may be necessary.

(8) Every order of the Assistant Record Officer –

(a) made under sub-section (6) shall, subject to the provisions of Sections 210 and 219, be final;

(b) made under sub-section (7) shall subject to the result of any suit which the aggrieved person may file in any Court of competent jurisdiction, be final.

**55**. Particulars to be stated in the list of cultivators. – The register of persons cultivating or otherwise occupying land specified in Section 32 shall specify as to each tenure-holder the following particulars :-

(a) the class of tenure as determined by the Uttar Pradesh Zamindari and Land Reforms Act, 1950;

(b) the revenue or rent payable by the tenure-holder, and

(c) any other conditions of tenure which the State Government may by rules made under Section 234 require to be recorded.

Explanation. - For the purposes of this section the year for which the register is prepared shall be reckoned as a complete year.

56. [* * *]

57. Presumption as to entries. – All entries in the record-of-rights prepared in accordance with the provisions of this Chapter shall be presumed to be true until the contrary is proved; and all decisions under this Chapter in cases of dispute shall, subject to the provisions of sub-section (3) of Section 40, be binding on all revenue courts in respect of the subject-matter of such disputes; but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by Section 32."

16. The Board of Revenue, Uttar Pradesh, with the previous sanction of the State Government, and in exercise of powers under Section 234 of the Land Revenue Act, read with Section 21 of the U.P. General Clauses Act, 1904, made the rules, namely, "The Uttar Pradesh Land Revenue (Survey and Record Operations) Rules, 1978", notified by means of Notification dated June 21, 1978.

17. The provisions relating to disposal of mistakes and disputes in land records, as set out in Rules 23, 24, 25, 26 and 27, which are relevant for the purposes of present case, are being extracted below:

"24. (1) The Survey Lekhpal shall make necessary number of copies of the notices, containing relevant extracts in Survey Form-X Khatauni Slip in respect of all the holdings in the basic annual register, after the orders of the Survey Naib-Tahsildar mentioned in Rule 23 have been given effect to. The Survey Kanungo shall check all the notices and at least 25 percent of the notices shall also be checked by the Survey Naib-Tahsildar to ensure their accuracy.

(2) The notices together with the Khatauni slips shall be issued under the signatures of the Survey Naib-Tahsildar to the tenure-holders concerned and persons interested.

(3) The record of service of notice-cum-Khatauni Slip shall be maintained in the Khatauni Terij in Survey Form-XI.

(4) Notices in respect of land belonging to the Government Departments shall be sent to the Heads of the district offices. Notices in respect of land

belonging to or vested in the Gaon Sabha, or other local authourity shall be sent to the pradhan of the Gaon Sabha or the Chairman of Local Authority as the case may be.

(5) Any tenure-holder or any other person aggrieved by any entry in any Khata may file an objection in writing giving the grounds of his objection to the Survey Naib-Tahsildar within twenty-one days of the service of notice.

(6) Office copies of the notices issued shall be kept on the common file for so long as they are not made part of separate files.

25. The objections received against the entries made in the Khatauni slip shall be entered in Misil-Band Register in Survey Form-XII.

26. (i) The Survey Naib-Tahsildar shall then proceed to make enquiries into all the disputes and claims (other than clerical mistakes) and also objections, if any, received in respect of entries made in the Khatauni slips in the village itself. In deciding disputes on the basis of conciliation under Section 54, he shall record the terms of conciliation in the presence of at least two members of the Land Management Committee in the relevant column of the list of mistakes and disputes in Survey Form - VI (Part II). These terms shall be read over to parties concerned and their signatures or thumb-impressions obtained. The members of the Land Management Committee present shall also sign the terms of conciliation. The Survey Naib-Tahsildar thereafter shall record orders in the relevant column of Survey Form VI deciding the disputes in terms of conciliation specifying the precise entries to be made in records. No ex party order or order in default or order in respect of land belonging to the State Government or vested in Gaon Sabha shall be passed by the Survey Naib-Tahsildar.

(2) The cases that cannot be disposed of by the Survey Naib-Tahsildar in terms of conciliation in accordance with the provision of sub rule (1) shall be referred by him to the Assistant Record Officer for disposal. While doing so the Survey Naib-Tahsildar may fix a date and place for the disposal of the cases by the Assistant Record Officer and communicate the same to the parties concerned before him and issue notices to the parties not so present.

27. (1) The case received from the Survey Naib-Tahsildar shall be entered in the Misal Band Register, in Survey Form XII in the office of the Assistant Record Officer.

(2) On the date fixed under sub-rule (2)of rule 26 or on subsequent date fixed for the purpose, the Assistant Record Officer shall hear the parties, and decide the objections.

(3) Any person aggrieved by the order of Survey Naib-Tahsildar made under sub-rule (1) of rule 26 may file, within twenty-one days from the date of order, an appeal before the Assistant Record Officer whose order shall subject to the provisions of Section 219 be final.

(4) Any person aggrieved by the order of the Assistant Record Officer under sub-rule (2) of Rule 27 may file within thirty days from the date of order, an appeal before the Record Officer under Section 210 of the Act."

18. For the purpose of revision of maps and records, in respect of an area which has been notified, the Record Officer has been enjoined with the responsibility to carry out survey, map correction, field to field partal, and test and verification of current annual register in accordance with the procedure prescribed, as per terms of sub-section (1) of Section 54 of the Land Revenue Act. The Naib Tahsildar, is thereafter, entrusted with the duty to correct clerical mistakes and errors in the current annual register with due notice to the concerned tenure-holders and other persons interested. Upon objections being filed, the parties concerned are to be given opportunity of hearing, and after making such inquiry, as may be necessary, the Naib Tahsildar, is to correct the mistakes and settle the disputes by conciliation between the parties, and pass orders on the basis of such conciliation.

19. The records of conciliation are to be forwarded to the Assistant Record Officer, who is to dispose of the same, in accordance with the provisions of Sections 40, 41 or 43, and where the dispute involves a question of title, he is to decide the same after summary inquiry.

20. Every such order of the Record Officer, as per terms of sub-section (8) of Section 54, shall, subject to the provisions of Sections 210 and 219 is to be final.

21. In terms of Rule 26 of the Survey Rules, the Survey Naib Tahsildar is to make inquiries into all the disputes and claims and also objections if any received in respect of entries made in the Khatauni slips, and thereafter is to record orders in the relevant column of the Survey Form - VI deciding the dispute in terms of conciliation specifying the precise entries to be made in the records.

22. As per the terms of sub-rule (3) of Rule 27, any person aggrieved by the order of the Survey Naib Tahsildar made under sub-rule (1) of Rule 26 may file within twenty-one days from the date of order, an appeal before the Assistant Record Officer whose order shall subject to the provisions of the Section 219 be final.

23. The aforesaid scheme as set out in Survey Rules, provides that the order to be passed by the Survey Naib Tahsildar in regard to the disputes and claims in respect of the entries made in the Khatauni, would be subject to an appeal before the Assistant Record Officer, and the said order shall subject to the provisions of Section 219, be final.

24. Section 219 of the Land Revenue Act, confers the power of revision upon the Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer or the Settlement Officer, to call for the record of any case decided or proceeding held by any subordinate revenue court in which no appeal lies or where an appeal lies but has not been preferred.

25. The provision relating to appointment of Commissioners of Divisions is contained under Section 12 of the Land Revenue Act, and in terms thereof the State Government is to appoint in each division a Commissioner, who shall within his division exercise the powers and discharge the duties conferred and imposed on a Commissioner under the Act, or under any other law for the time being in force and who shall exercise authority over all the revenue officers in his division.

26. The subject matter relating to revision of maps and records has been placed under a separate chapter, namely, Chapter IV of the Land Revenue Act. Upon notification being published by the State Government under Section 48, in respect of any area which is to be brought under record operations, the State Government may appoint a Record Officer to be in charge of the record operations or the survey for the area and also Assistant Record Officers, who shall exercise all the powers conferred on them by the Act so long as the said area is under record or survey operations.

27. The scheme of the Act with regard to revision of maps and records as contained under Chapter IV of the Land Revenue Act, does not contemplate any control over the record operations by the Divisional Commissioner. Under Section 49, it is the Record Officer appointed by the State Government who is in charge of the record operations so long as the area is under the record or the survey operations upon notification having been issued under Section 48.

28. The order passed by the Assistant Record Officer in an appeal under sub-rule (3) of Rule 27 of the Survey Rules, 1978, against an order of the Survey Naib Tahsildar under sub-rule (1) of Rule 26, would therefore be subject to a revision to be filed before the Record Officer, and not the Commissioner, under the revisional jurisdiction conferred under Section 219 of the Land Revenue Act.

29. The order dated 02.06.2023 passed by the Additional Commissioner, holding that a revision against an order passed by the Assistant Record Officer under Rule 27(3) of the Survey Rules, would not be entertainable, before the court of Commissioner, therefore cannot be said to suffer from any error or illegality so as to warrant interference.

30. Counsel appearing for the petitioner has not been able to dispute the aforesaid legal position.

31. Accordingly, learned counsel submits that he does not wish to press the petition and that the petitioner would seek redressal of his grievances against the order dated 25.05.2022, passed by the Assistant Record Officer, by availing the remedy of a statutory revision before the Record Officer.

32. The petition stands **disposed of** accordingly.

33. Office to return the certified copy(ies) of the order(s) to the counsel for the petitioner after retaining photostat copy(ies) of the same.

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**(2024) 10 ILRA 273**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 15.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ-C No. 1001034 of 2015

**Garden View Owners Welfare Assc. Thru Secy. & Anr. ...Petitioners**
**Versus**
**The Dy. Registrar Firms Societies & Chits Lko. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Ankit Srivastava

**Counsel for the Respondents:**

C.S.C., Mukund Tewari, Sabita Lahiri, Vijai Krishna

**(A) Societies and Associations Law - Membership of Apartment Owners Association - Societies Registration Act, 1860 - Section 24, Uttar Pradesh Apartment (Promotion of Construction, Ownership, and Maintenance) Act, 2010 - Section 3(e), Section 14(1) & (2) - All apartment owners have a statutory right to become members of the apartment owners' association under Section 14 of the U.P. Apartment Act - Deputy Registrar has jurisdiction to direct compliance with statutory provisions regarding membership - Ownership of flats for the purpose of membership of the society is to be determined only on the basis of proof of execution of sale deed of the flat, which can easily be done by the Deputy Registrar. (Para - 20 to 24)**

Petitioners challenged order passed by Deputy Registrar - directing that all flat owners be inducted as members of *Garden View Owners Welfare Association* - deposit maintenance amount in the society's account - dispute arose after complaints from flat owners - alleging - mismanagement and exclusion from membership. (Para 3-8)

**HELD: -** Petition lacks merit. All apartment owners in the building have a statutory right to become members of the welfare association. Deputy Registrar acted within his jurisdiction. No illegality in the impugned order. (Para 22,28-29)

**Petition dismissed.** (E-7)

**List of Cases cited:**

1. U.O.I. & ors. Vs Ranbir Singh Rathaur, (2006) 11 SCC 696

2. Maharashtra Shikshan Mandal & ors. Vs St. of U.P. & ors, 2016 (114) ALR 452

3. Board of Trustee of the Shia College and the School & anr. Vs St. of U.P. & ors, 2015 (33) LCD 1989

4. Amin Khan Vs St. of U.P., 2008 (26) LCD 1453

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

1. Heard Sri Ankit Srivastava, the learned counsel for the petitioners, Sri Laxmi Mohan Khare, the learned Standing Counsel for the State, Sri Vijai Krishna, the learned counsel for the opposite parties no.2 and 3 and perused the records.

2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioner no.1 - Garden View Owners Welfare Association and petitioner no.2 – Sri. Sudhir S. Halwasiya, Secretary, Garden View Owners Welfare Association, have sought quashing of an order dated 06.02.2015, passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow, whereby the petitioner no.2 has been directed to make all the flat owners of Garden View Apartments, 8 Rana Pratap Marg, Lucknow members of the petitioner no.1 association, which is a society registered under the Societies Registration Act, 1860. The flat owners, who have not paid the membership fee or annual subscription were directed to deposit the same in the society's account within one month. The petitioner no.2 has been directed to deposit the one time maintenance amount charged at the time of execution of sale deeds of apartment in the bank account of the society.

3. Briefly stated, the facts of the case are that the petitioner no.2 along with M/s Halwasiya Properties Private Limited had developed a multi storied residential building called 'Garden View Apartments', 8, Rana Pratap Marg, Lucknow. A Welfare Association/Society called 'Garden View Owners Welfare Association' was created

by the builder for maintenance of the building and the society was registered in the year 1999-2000. Its registration was renewed from time to time and it expired in October, 2009. An application for renewal of registration of the society was filed on 30.06.2014. On 09.07.2014, the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow sent a letter informing the petitioners that the registration of the society was being renewed subject to submission of certain requisite papers mentioned in the letter.

4. It has been stated in para 11 of the writ petition that while the matter of renewal of the society was yet to be finalized and the renewal certificate was yet to be issued, the opposite parties no.2 and 3, who are merely occupants of two flats in Garden View Apartments and who are not members of Garden View Owners Welfare Association, submitted a complaint before the Deputy Registrar. However, the copy of the complaint enclosed with the letter dated 08.09.2014 sent by the Deputy Registrar to the petitioner no.2 shows that this complaint was submitted by as many as 8 complainants, including the opposite parties no.2 and 3. The other 6 complainants have not been arrayed as opposite parties to the writ petition. The complaints inter alia stated that the petitioner no.2 does not reside in Flat No.801, Garden View Apartment. Flat No.801 has been constructed by the builder illegally and it is not a part of the building plan sanctioned by the Lucknow Development Authority. The place where Flat No.801 has been constructed has been shown in the sanctioned building plan as parking area. The flat owners' association is not complying with its statutory obligations and is neglecting maintenance of the building. No meeting of the society is held and no notice thereof is sent to the flat owners. No accounts are placed before the members of the society and no approval for expenditure is taken from the members.

5. A copy of the aforesaid complaint was sent to the petitioner no.2 along with the letter dated 08.09.2014 sent by the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow for giving an opportunity to submit a reply/explanation against the complaint. The petitioner no.2 was further directed to produce the membership receipt and other relevant evidence and to submit point wise explanation on the complaint submitted by the 8 complainants.

6. In reply to the aforesaid notice dated 08.09.2014, the petitioner no.1-Garden View Owners Welfare Association through its Secretary-petitioner no.2, submitted a reply dated 17.11.2014 to the Deputy Registrar, Firms, Societies and Chits stating that Sri Govind Prasad Laath (the opposite party no. 3) and Sri Gaurav Laath, son of Sri Govind Prasad Laath are not members of Garden View Owners Welfare Association. Sri S.K. Gupta (the opposite party no. 2) is also not a member of the association. Smt. Varsha Chatlani is a member of the association but she has not given any written complaint about any alleged irregularities being committed by the association. Smt. Shalini Srivastava is not a member of the association. The association does not have any record concerning B.K.B. Engineering Pvt. Ltd. purported owner of Flat No.502 and he is not a member of the association. Sri Jamshed Khan is also not a member of the association.

7. The petitioners stated that except for Smt. Varsha Chatlani, none of the

complainants are the members of the association and they have no locus-standi to submit any complaint to the Deputy Registrar. The petitioners further stated that as per the provisions contained in Societies Registration Act, 1860, in case any members of the society have any grievance, they should first give a written intimation regarding the same to the office bearers of the society and in case the authority/office bearers failed to redress their grievance, only then they can submit a complaint to the Deputy Registrar. The petitioners did not give any reply to the allegations leveled in the complaint and they only raised objection against the entertainability of the complaint.

8. After taking into consideration the complaint and the reply submitted by the petitioners the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow has passed the impugned order dated 06.02.2015, whereby the petitioner no.2 has been directed to induct all the flat owners as members of the petitioner no.1 society and to deposit the entire maintenance amount charged from the flat owners at the time of execution of the sale deed, in the account of the petitioner no.1-society.

9. It is also mentioned in the impugned order dated 06.02.2015 that the petitioner no.2 has submitted that several flat owners had acted against the interests of the society and their membership had been terminated for the reason of violation of rules of the society and failure to pay annual maintenance amount.

10. The opposite party no. 1 – State of U.P. has filed a counter affidavit and the opposite parties no. 2 and 3 also have filed a counter affidavit. The opposite party no. 1 has inter alia pleaded in its counter affidavit that on 10.04.2015, 15 flat owners of Garden View Apartments have given an application to the Deputy Registrar requesting for compliance of the order dated 06.02.2015. It has also been pleaded that another society in the name of "G. B. Apartment Owners Association" has been registered and there is no prohibition in law against registration of two different societies in two different names.

11. In the counter affidavit filed on behalf of the opposite parties no. 2 and 3, a preliminary objection has been raised that the Writ Petition suffers from the defect of non-joinder of necessary parties, which has been denied by the petitioner in his rejoinder affidavit.

12. While assailing the validity of the aforesaid order, Sri Ankit Srivastava, the learned counsel for the petitioners, has submitted that the petitioner no.2 had not submitted that several flat owners had acted against the interest of the society and their membership had been terminated for the reason of violation of rules of the society and failure to pay annual maintenance amount and this narration made in the impugned order is incorrect.

13. There is always a presumption about correctness of the narration of happenings in the Court made in a judicial order and this presumption will also apply to the orders passed by the quasi judicial authorities. In exercise of its Writ jurisdiction, this Court cannot adjudicate upon the disputed question of fact as to whether the aforesaid submission was made by the learned Counsel for the petitioners or not. In any case, even if the plea had not been raised by the petitioners, a mere wrong mention thereof would not vitiate

the impugned order when this plea has not formed the basis of passing of the impugned order.

14. The second submission of the learned counsel for the petitioners is that the petitioners had raised objections regarding entertainability of the complaint on the ground that the complainants are not members of the society. It was incumbent upon the Deputy Registrar to decide the objection against the maintainability first and only thereafter the aforesaid authority could have proceeded to entertain the complaint. In support of this contention the learned counsel for the petitioners has relied upon a decision of the Hon'ble Supreme Court in the case of **Union of India and others Vs. Ranbir Singh Rathaur:** (2006) 11 SCC 696. In that case, while allowing the appeal filed against an order passed by the Delhi High Court, the Hon'ble Supreme Court held that the Delhi High Court had not dealt with the matter in proper perspective and it would be proper for the High Court to rehear the matter. While remanding the matter the Hon'ble Supreme Court directed the Delhi High Court to decide the preliminary objection raised by the appellant about non-maintainability of the writ petition before proceeding to deal with any other question. However, even while issuing the aforesaid direction, the Hon'ble Supreme Court categorically observed that normally such a course is not to be adopted, but in view of the peculiar facts involved in that case, the Hon'ble Supreme Court felt it proper to direct the High Court to decide the preliminary objection regarding maintainability first. Therefore, even as per the law laid down by the Hon'ble Supreme Court in the case of **Ranbir Singh Rathaur** (Supra) normally there is no necessity for deciding the question of maintainability before proceeding to decide the other questions.

15. Moreover, the aforesaid observations were made by the Hon'ble Supreme Court in the light of the question of maintainability of a writ petition regarding which there are well established principles e.g. a writ petition will not be maintainable where there is a statutory remedy available or it suffers from gross unexplained latches or the dispute involved falls within realm of private dispute or there are disputed questions of fact etc. The aforesaid principle regarding maintainability of the writ petition would not apply to the entertainability of an objection filed before the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow.

16. The learned counsel for the petitioners thirdly submitted that the complainants have no legally enforceable right of becoming members of the petitioner no.1-society and, therefore, the Deputy Registrar has no jurisdiction to pass any such direction to the petitioners. In support of this contention, the learned counsel for the petitioner has relied upon a decision rendered by a coordinate Bench of this court in **Maharashtra Shikshan Mandal and others Vs. State of U.P. and others:** 2016 (114) ALR 452**.** The aforesaid case was decided keeping in view the factual background where certain persons had applied for becoming member of a society which was running an educational institution. The Managing Committee of the society had resolved that ordinary membership should not be allowed to unmarried boys and girls who are not earning and that it should be open to persons who are graduates only. The society considered all 37 applications

received for membership and accepted membership request of 22 persons only. The remaining 15 applicants submitted a complaint to the Assistant Registrar. Without interfering with the decision of the society regarding membership requests, the Assistant Registrar passed an order stating that as the term of the Managing Committee of the society was over, fresh elections are to be held under Section 25 (2) of the Societies Registration Act and he appointed District Inspector of Schools, Jhansi for this purpose. The Assistant Registrar wrote a letter to the D.I.O.S. and sent a list of 89 members, including 7 persons whose applications for membership had not been accepted by the society. The D.I.O.S. informed that those 7 persons had not been accepted by the society as its members. However, the Assistant Registrar passed an order directing the D.I.O.S. to hold elections of the society on the basis of the list of 89 members as submitted by him, including 7 persons whose membership requests had been declined. It was in light of the aforesaid peculiar factual backdrop that this court held that no person has any vested or fundamental right to become a member of a society merely for the reason that he fulfills the eligibility conditions, unless he is accepted to be a member by the society itself.

17. In the present case, the complainants claim to be owners of the apartments in Garden View Apartment, 8 Rana Pratap Marg, Lucknow. The Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (hereinafter referred to as "the Apartment Act, 2010") has been enacted to provide for the ownership of an individual apartment in a building, of an undivided interest in the common areas and facilities appurtenant to such apartment and to make such apartment and interest heritable and transferable and for matters connected therewith or incidental thereto. The aforesaid Act has come into force with effect from 21.07.2010.

18. Section 3 (e) of the Apartment Act, 2010 provides that *"association of apartment owners" means all the owners of the apartments therein, acting as a group in accordance with the bye-laws"*

19. Section 14 of the Apartment Act, 2010 provides that: -

*(1) There shall be an Association of Apartment Owners for the administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities:*

*Provided that where any area has been demarcated for the construction of buildings, whether such area is called a block or pocket or by any other name, there shall be a single Association of Apartment Owners in such demarcated area.*

*(2) It shall be the joint responsibility of the promoter and the apartment owners to form an Association. The promoter shall get the Association registered when such numbers of apartments have been handed over to the owners which are necessary to form an association or sixty percent of apartments, whichever is more, by way of sale, transfer or possession provided the building has been completed along with all infrastructure services and completion certificate obtained from the concerned local authority:*

* * *

20. As per the aforesaid statutory mandate, there has to be an association of apartment owners and all the owners of apartments in the building shall form an association of apartment owners. Therefore, in the present case all the apartment owners in the building have a statutory right to become a member of the association of flat owners, which association in the present case is Garden View Owners Welfare Association-the petitioner no.1. As the flat owners have got a statutory right to become members of the Garden View Owners Welfare Association, the facts of the present case are different and distinct from the facts on the basis whereof the case of **Maharashtra Shikshan Mandal** (supra) was decided and the ratio of the aforesaid case will not apply to the facts of the present case.

21. The learned counsel for the petitioners has fourthy submitted that the Deputy Registrar has no authority to pass any order directing the petitioners to induct the flat owners of the society as members of the society and such an order can only be issued by the competent civil court. In support of this contention, the learned counsel for the petitioner has relied upon a decision of a coordinate Bench of this court in the case **of Board of Trustee of the Shia College and the School and another Vs. State of U.P. and others:** 2015 (33) LCD 1989. In that case, there were rival disputes between parties regarding previous election of the governing body which were held on 15.11.2009. Thereafter, the election was approved/recognized by means of an order dated 31.03.2010 and the registration of the society was also renewed on 30.10.2010 for a period of five years with effect from 10.10.2010. During the term of previous governing body some trustees were removed prior to expiry of their term and some new persons were inducted as trustees on the same day. When election proceedings based on the disputed list were submitted for approval under Section 4-B and Section 4 of Societies Registration Act by the rival claimants, the Deputy Registrar passed the impugned order. It was in these circumstances that this Hon'ble Court had held that the decision making authority of the Registrar/Deputy Registrar is not contemplated under Section 4-B of the Act, but what is contemplated is an administrative exercise of power. The membership disputes are amenable to the jurisdiction of civil court in a civil suit and Section 4-B does not divest the civil court of this dominion either expressly or by implication.

22. In the present case, all the apartment owners in the building have a statutory right to become a member of the association of flat owners and the Deputy Registrar has directed the petitioners to make all flat owners members of the welfare association. Ownership of flat is not such a disputed question of fact as requires any detailed evidence to be taken and arguments to be heard for a finding to be recorded regarding it. Ownership of flats for the purpose of membership of the society is to be determined only on the basis of proof of execution of sale deed of the flat, which can easily be done by the Deputy Registrar. Keeping in view the facts of the case and the law applicable thereto, it cannot be said that the Deputy Registrar is not competent to issue any direction for making all the flat owners members of the petitioner no.1-society.

23. The learned counsel for the opposite parties no.2 and 3 has drawn attention of the court to the statutory provision contained in Section 24 of the

Societies Registration Act, 1860 as applies to the State of U.P. which provides as follows: -

*"24. Investigation of affairs of a society.—(1) Where on information received under Section 22 or otherwise, or in circumstances referred to in sub-section (3) of Section 23, the Registrar is of opinion that there is apprehension that the affairs of a society registered under this Act are being so conducted as to defeat the objects of the society or that the society or its governing body by whatever name called, or any officer thereof in actual effective control of the society is guilty of mismanaging its affairs or of any breach of fiduciary or other like obligations, the Registrar may, either himself or by any person appointed by him in that behalf, inspect or investigate into the affairs of the society or inspect any institution managed by the society.*

*(2) It shall be the duty of every officer of the society when so required by the Registrar or other person appointed under sub-section (1) to produce any books of account and other records of or relating to the society which are in his custody and to give him all assistance in connection with such inspection or investigation.*

*(3) The Registrar or other person appointed under sub-section (1) may call upon and examine on oath any officer, member or employee of the society in relation to the affairs of the society and it shall be the duty of every officer, member or employee, when called upon, to appear before him for such examination.*

*(3-A) The Registrar or other person appointed under sub-section (1) may, if in his opinion it is necessary for the purpose of inspection or investigation, seize any or all the records including account books of the society:*

*Provided that any person from whose custody such records are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of the person having the custody of such records.*

*(4) On the conclusion of the inspection or investigation, as the case may be, the person, if any, appointed by the Registrar to inspect or investigate shall make a report to the Registrar on the result of his inspection or investigation.*

*(5) The Registrar may, after such inspection or investigation, give such directions to the society or to its governing body or any officer thereof as he may think fit, for the removal of any defects or irregularities within such time as may be specified and in the event of default in taking action according to such directions, the Registrar may proceed to take action under Section 12-D or Section 13-B, as the case may be."*

(Emphasis added)

24. The powers of the Registrar have been delegated to the Deputy Registrar. In exercise of the delegated powers the Deputy Registrar entertained the complaint submitted by the eight complainants and forwarded its copy to the petitioners giving them opportunity to submit a reply thereto. The letter dated 08.09.2014 sent by the Deputy Registrar to the petitioners categorically mentions that the petitioners may submit a point wise reply to the complaint dated 21.08.2014 submitted by Govind Laath and others and a copy of the

complaint was annexed with the notice dated 08.09.2014. Although the petitioners submitted a reply dated 17.11.2014, they chose not to submit any point wise reply and they confined their reply to preliminary objections only. Therefore, the factual allegations leveled in the complaint dated 21.08.2014 submitted by the eight complainants remained uncontroverted, which amounts to an implied admission. In these circumstances, if the Deputy Registrar felt that holding of a detailed investigation and seizing of records was not necessary, this court finds no illegality in the approach adopted by the Deputy Registrar. Therefore, this court finds no force in the submission of the learned counsel for the petitioners that the Deputy Registrar had no authority to pass the impugned order.

25. The learned Counsel for the opposite parties no. 2 and 3 has submitted that complaint that led to passing of the impugned order, had been filed by 8 persons, all of whom have not been arrayed as opposite parties to the Writ Petition and, therefore, the Writ Petition suffers from the defect of non-joinder of necessary parties. In reply to this objection, the learned Counsel for the petitioners has submitted that a complainant is not a necessary party to the Writ Petition. In support of this contention, the learned Counsel for the petitioners has placed reliance upon a judgment rendered by a Division Bench of this Court in **Amin Khan versus State of U.P.:** 2008 (26) LCD 1453, in which this Court was dealing with an application filed by a complainant seeking leave to file Special Appeal against an order passed by an Hon'ble Single Judge Bench in a Writ Petition in which the complainant was not a party. The respondent No. 4 in that case had been elected as a Gram Pradhan and proceedings under Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 had been initiated against her on certain charges on the basis of a complaint made by the applicant. The District Magistrate found the charges prima facie established and passed an order depriving the respondent No. 4 from exercising financial and executive powers till regular enquiry is concluded for which he also appointed as Enquiry Officer. The District Magistrate further appointed a three Members Committee to look after the day-to-day work of the Gram Sabha. The applicant was also made a member of the said Committee. The respondent No. 4 challenged the order of the District Magistrate by filing a Writ Petition, which was allowed. The complainant sought leave of the Court for filing a Special Appeal. A preliminary objection was raised regarding the right of the appellant who was the complainant and who had been appointed as a member of the Committee to perform the duties of the Pradhan pending regular enquiry on the ground that the said applicant being the complainant cannot be a party to the lis. Moreso, he was a beneficiary of the order depriving the said respondent from exercising her financial and executive powers, he cannot be permitted to file the appeal. Rejecting the application seeling leave to file the Special Appeal, this Court held that: -

*"5. Admittedly, the applicant is a complainant and has also been included by the District Magistrate in the three Members Committee to look after the work of the Pradhan pending final enquiry. The issue as to whether such a beneficiary of order, impugned in writ petition could be heard by a Court was considered at length by the Division Bench of this Court to which one of us (Dr. B.S. Chauhan, J.) was*

*a member in Smt. Kesari Devi v. State of U.P., (2005) 4 A.W.C. 3563 : (2005 All LJ (NOC) 50) wherein after noticing large number of judgments of the Hon'ble Supereme Court, the Court reached the conclusion that such an applicant cannot be a party in litigation for the reason that he cannot be a person aggrieved. The said judgment was challenged before the Hon'ble Apex Court in S.L.P. (Civil) No. 19761 of 2005 and the same was dismissed vide order dated 3-10-2005."*

26. Thus in **Amin Khan** (Supra), the application seeking leave to file Special Appeal was rejected in view of the peculiar facts of the case where the Court came to the conclusion that the applicant was not a person aggrieved. However, in the present case, the complainants, or at least those complainants who admittedly own flats in Garden View Apartments, have a statutory right to become members of the Society and they have an interest in proper functioning of the society and proper maintenance of the apartment complex and, therefore, the complainants in this case are persons aggrieved.

27. Further, the petitioners themselves have chosen to implead two of the eight complainants as opposite party nos. 2 and 3 to the Writ Petition even when the petitioners' contention is that they do not own any flat in the apartment complex, which shows that the petitioners treat them to be necessary or at least proper parties to the Writ Petition. The petitioners admit that at least one of the complainants Ms. Varsha Chatlani owns an apartment in the complex and that she is a member of the society and yet she has not been arrayed as an opposite party to the Writ Petition whereas she is a person aggrieved and she would be affected by the outcome of the Writ Petition. Therefore, the Writ Petition suffers from the defect of non-joinder of necessary parties, which defect was not removed even after a specific plea having been raised in the counter affidavit. However, as this Court has already examined the merits of the matter, the Writ Petition is not being dismissed on the preliminary ground alone.

28. In view of foregoing discussion, this court is of the considered view that there is no illegality in the impugned order dated 06.02.2015, passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow Division, Lucknow, and the order does not cause a failure of justice to the petitioners. Therefore, the impugned order does not warrant any interference by this Court in exercise of its extraordinary Writ jurisdiction vested in it under Article 226 of the Constitution of India.

29. The Writ Petition lacks merit and the same is **dismissed**.

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**(2024) 10 ILRA 282**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 25.10.2024**

**BEFORE**

**THE HON'BLE MRS. SANGEETA CHANDRA, J.**
**THE HON'BLE MOHD. FAIZ ALAM KHAN, J.**

Crl. Misc. Writ Petition No. 8151 of 2024
Alongwith
Crl. Misc. Writ Petition No. 8254 of 2024

**Pundrik Kumar Pandey @ Pundrik Pandey ...Petitioner**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Alok Kirti Mishra, Dharmesh Kumar Dwivedi

**Counsel for the Respondents:**
G.A.

**Criminal Law - Indian Penal Code,1860-** Two FIR lodged against the Petitioner-alleged that both are on same cause of action-Initial FIR was lodged on 15.10.2024 by the Police official for general information regarding incident which happened during the immersion procession of Devi Durga idols where one person was shot – as a result the crowd got angry and destroyed the shops of other community-whereas the second FIR was lodged on 18.10.2024 at 05:11 pm by the sitting MLA of Mahasi Constituency for the incident where the named accused along with others were holding Dharna Pradarshan with the body of the deceased victim and not letting the Authorities carrying out their public duties regarding autopsy of the deceased.

"Consequence test" –if an offense forming part of the second FIR arises as a consequence of the offence alleged in the first FIR-then the offences covered by both the FIRs are the same and second FIR is impermissible. Prima facie second FIR is not part of the same transaction.

**W.P. dismissed.** (E-9)

**List of Cases cited:**

1. Babubhai Vs St. of Guj. & ors.reported in (2010) 12 SCC 254

2. Ram Lal Narang Vs St. (Delhi Administration) reported in (1979) 2 SCC 322,

3. T.T. Antony Vs St. of Kerala reported in (2001) 6 SCC 181

4. Upkar Singh Vs Ved Prakash reported in (2004) 13 SCC 292

5. Amitbhai Anilchandra Shah Vs Central Bureau of Investigation & anr.reported in (2013) 6 SCC 348

6. Chirra Shivraj Vs St. of Andhra Pradesh reported in (2010) 14 SCC 444,

7. C. Muniappan Vs St. of T.N. reported in (2010) 9 SCC 567

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Mohd. Faiz Alam Khan, J.)

1. We have heard Shri Abhishek Srivastava, counsel for the petitioners at length and the learned A.G.A. who appears for the State-respondents and Shri Manoj Kumar Singh, the counsel appearing for the informant, the sitting MLA of Mahasi Constituency, Bahraich.

2. Since both writ petitions arise out of same F.I.R. they are being dealt with by a common order.

3. It is the case of the petitioner-Pundrik Kumar Pandey @ Pundrik Pandey, that the Opposite party no.4, the sitting MLA has been representing Mahasi Constituency for the past 15 years and the applicant-Pundrik Kumar Pandey @ Pundrik Pandey, was earlier working as a Journalist and he used to write against the Opposite party no.4, as a result whereof the Opposite party no.4 became inimical to the petitioner. The petitioner is currently posted as a Teacher in Government Primary School, U.P.S. Chaugoi, Block-Jamuha, District Shravasti, and the deceased Ram Gopal Mishra was the cousin brother-in-law of the petitioner and for this reason the petitioner went along with the dead body of Ram Gopal Mishra to the Dharna site near the Medical College. He wanted to only accompany the body when it was being taken for post mortem. However, more than 5000 people had gathered near the dead body and they were protesting. Since Opposite party no.4 is an influential person he has engineered the lodging of the impugned F.I.R. to settle his personal grudge against the petitioner under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S.

4. The F.I.R. was lodged after eight days of the incident and it is pre-meditated and delayed and lodged after much deliberation. The petitioner has a gun license and the Respondent no.4 wants to get such license cancelled, therefore, a false allegation has been made in the F.I.R. that a shot was fired in air.

5. The Counsel appearing on behalf of the applicants/ petitioners namely Arpit Srivastava, Anuj Kumar Singh @ Anuj Singh Raikwar, Shubham Kumar @ Shubham Mishra in Criminal Misc. Writ Petition No.8254 of 2024 regarding challenge being raised to the same F.I.R. has argued before this Court that the Opposite party no.4, sitting MLA of Mahasi Constituency had lodged the impugned F.I.R. on 18.10.2024 under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S. 2023 at Police Station Kotwali Nagar, District Bahraich, against seven named accused persons namely Arpit Srivastava, Petitioner no.1; Anuj Kumar Singh @ Anuj Singh Raikwar, Petitioner no.2; Shubham Kumar @ Shubham Mishra, Petitioner no.3; Kushmendra Chaudhary, Manish Chandra Shukla, Pundarik Pandey and Subhanshu Singh Rana and some unknown persons in relation to an alleged incident that took place on 13.10.2024. In the F.I.R., the allegation was that the petitioners as well as other co-accused along with several other persons had made it difficult for the Police and the District Administration in getting the dead body of Ram Gopal Mishra to the mortuary and created a ruckus which led to firing of a gun shot in the air and also of smashing of the wind screen of vehicle of the Respondent no.4.

6. It has been submitted that the impugned F.I.R. is the second F.I.R. in relation to the same incident as Shri Dinesh Kumar Pandey, Inspector Incharge of Police Station Kotwali Nagar, District Bahraich, had earlier lodged F.I.R. No.0346 of 2024 on 15.10.2024 under Sections 191(2), 191(3), 3(5), 190, 131, 115(2), 352, 351(3), 125, 326(g), 326(f), 3(5), 121(1) of the B.N.S. 2023 & Criminal Law Amendment Act, 1932 at 09:11 AM at Police Station Kotwali Nagar, District Bahraich, wherein similar facts have been mentioned. It has been submitted that the Petitioner no.1 is a social worker and Nagar Adhyaksh of the Bhartiya Janta Yuva Morcha, Bahraich since 16.09.2021, and he is pursing his career in politics. Petitioner no.2 is also a social worker and a farmer and Petitioner no.3 is a Graduate and presently working in a private Construction Company. The impugned F.I.R. being the second F.I.R. for the same incident ought to be quashed in view of the law settled by the Hon'ble the Supreme Court in the case of ***Babubhai Vs. State of Gujarat and others reported in (2010) 12 SCC 254.***

7. The counsel for the petitioners has pointed out Paragraphs-2 and 3 of the judgment *in Babubhai Vs. State of Gujarat and others,* from perusal whereof it is evident that on 07.07.2008 some altercation took place between members of Bharwad and Koli Patel Communities regarding plying of rickshaws in the area surrounding Dhedhal village of District Ahmedabad, Gujarat. On the next day i.e. on 08.07.2008 a case, Case Crime No.I-154/2008 was registered at 1730 hours in Police Station Bavla, under Sections 147, 148, 149, 302, 307, 332, 333, 436 and 427 of the Penal Code, 1860, for the incident which had occurred at Village Dhedhal wherein the Sub-Inspector of Bavla Police Station had stated that while he was patrolling in Bavla town, he received a message from the

Station House Officer at around 10:00 AM that some altercation/ incident had taken place between two communities at Dhedhal Crossroads. The Sub-Inspector Bavla Police Station thereafter reached the spot where a clash was going on between two communities in Dhedhal Village. He contacted the Police Control Room and the Deputy Superintendent of Police sent re-enforcement and when the police reached the spot around 2000 to 3000 persons from both communities armed with various weapons were attacking each other. The police resorted to lopping tear gas shells as well as lathi charge to disperse the crowd. Ultimately several rounds of firing were resorted to in order to disperse the mob. In the said incident, more than 20 persons were injured and three houses of members of the Bharwad Community were also set on fire. One person also died. Several police personnel were also injured. The said F.I.R. did not mention the name of any accused. However, another F.I.R. bearing Case number, CR No.I-155/2008 was registered at Bavla Police Station on the same day i.e. on 08.07.2008 at 2235 hours by one Babubhai Popatbhai Koli Patel and he alleged that an incident took place on the same day at around 9:15 a.m. in the Morning in Dhedhal Village. In such F.I.R. he named 18 persons as accused. As per the F.I.R., an incident had occurred on 07.07.2008 in the evening at about 06.30 P.M. It also related to plying Rickshaws and Chhakdas and it also related to altercation between Bharwad and Koli Patel Communities. The complainant stated that the named accused persons not only extended threats to the complainant-informant and his cousin but they also halted vehicles on the road. The informant stated that there were 10-12 persons belonging to Bharwad community assaulting his cousin with sticks. He also saw some named accused from Bharwad community of Dhedhal Village having Tamancha like weapons in their hands and instigating other persons to indulge in violence he named several accused and stated that they assaulted his cousin as well as other Rickshaw pullers saying that they should not pass through the road which belonged to Bharwads. The complainant tried to rescue his cousin but they were stopped and such named accused started the assaulting and abusing him. The informant made specific mention of certain accused inflicting sticks blows on his cousin due to which he became unconscious and the mob thereafter beat up his cousin and other Bharwads from Dhedhal village had also arrived. The details in the F.I.R. related to the vehicles that were stopped and also related to specific incident of the cousin of the informant being attacked with deadly weapons like Revolver and Sticks etc. causing serious injuries.

8. From a perusal of the facts as mentioned in the judgment cited before us in Babubhai, it is evident that the accused in both cases filed special criminal applications praying for investigation of the F.I.R. by an Independent Agency like CBI and also praying for quashing of the CR No.I-154 and CR No.I-155/2008 registered at Bavla Police Station.

9. They also prayed for setting aside of the proceedings undertaken by the Sessions Court. The High Court quashed the F.I.R. registered as CR No.I-155/2008 and clubbed the investigation of the F.I.R. along with investigation of the other F.I.R. bearing CR No.I-154 of 2008 to the extent it was feasible. The Court also transferred the investigation to the State CID Crime Branch and directed a new Investigating

Officer to investigate with a further clarification that quashing of their subsequent F.I.R. would not mean that the accused in respect of the second F.I.R. had been discharged of the offences as they would continue to face the charges in the initial Criminal Case CR No.I-154 of 2008 in which they also stood arrested.

10. The Supreme Court while considering the Appeal preferred by the appellants who were the accused, noted the arguments raised by the learned Senior Counsel appearing for the parties in the Appeal that the High Court reached the correct conclusion that both crimes were two parts of the same transaction and they occurred at the same place and the version given by Babubhai Popatbhai Koli Patel in CR No.I-155 of 2008 cannot be considered a counter version giving rise to a cross case. The Senior counsel had requested the Supreme Court to dismiss the Appeal. However, the Supreme Court after considering the law as laid down **in Ram Lal Narang Vs. State (Delhi Administration) reported in (1979) 2 SCC 322, and in T.T. Antony Vs. State of Kerala reported in (2001) 6 SCC 181,** made observations in Paragraph-13 & 14 which are being quoted hereinbelow:-

*"13. In **Ram Lal Narang v. State (Delhi Admn.)** this Court considered a case wherein two FIRs had been lodged. The first one formed part of a subsequent larger conspiracy which came to light on receipt of fresh information. Some of the conspirators were common in both the FIRs and the object of conspiracy in both the cases was not the same. This Court while considering the question as to whether investigation and further proceedings on the basis of both the FIRs was permissible held that no straitjacket formula can be laid down in this regard. The only test whether two FIRs can be permitted to exist was whether the two conspiracies were identical or not. After considering the facts of the said case, the Court came to the conclusion that both conspiracies were not identical. Therefore, lodging of two FIRs was held to be permissible.*

*14. In **T.T. Antony v. State of Kerala** this Court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had been lodged and the Court held that: "There can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences." (emphasis supplied)*

*The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the police station diary by the officer-in-charge under Section 158 of the Code of Criminal Procedure, 1973 (hereinafter called "CrPC") and all other subsequent information would be covered by Section 162 CrPC. for the reason that it is the duty of the Investigating officer not merely to investigate the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and the investigating officer has to file one or more reports under Section 173 CrPC. Even after submission of the report under Section 173(2) CrPC, if the investigating officer comes across any further information pertaining to the same incident, he can make further Investigation, but it is desirable that he must take the*

*leave of the court and forward the further evidence, if any, with further report or reports under Section 173(8) CrPC. In case the officer receives more than one piece of information in respect of the same incident involving one or more than one cognizable offences such information cannot properly be treated as an FIR as it would, in effect, be a second F.I.R. and the same is not in conformity with the scheme of Cr.P.C."*

11. The Court also considered **Upkar Singh Vs. Ved Prakash reported in (2004) 13 SCC 292,** in Paragraph 16 which is being quoted hereinbelow:-

*"16. This Court considered the judgment in T.T. Antony and explained that the judgment in the said case does not exclude the registration of a complaint in the nature of counterclaim from the purview of the Court. What had been laid down by this Court in the aforesaid case law is that any further complaint by the same complainant against the same accused, subsequent to the registration of a case, is prohibited under Cr.P.C. because an investigation in this regard would have already started and further the complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence, will be prohibited under Section 162 Cr.P.C. However, this rule will not apply to a counterclaim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus, in case, there are rival versions in respect of the same episode, the investigating agency would take the same on two different FIRs and investigation can be carried under both of them by the same investigating agency and thus, filing an FIR pertaining to a counterclaim in respect of the same incident having a different version of events, is permissible."*

12. The Court considered other judgments as well in Paragraphs 17, 18 and 19 which are being quoted hereinbelow:-

*"17. In* ***Rameshchandra Nandlal Parikh v. State of Gujarat reported in (2006) 1 SCC 732****, this Court reconsidered the earlier judgment including T.T. Antony and held that in case the FIRs are not in respect of the same cognizable offence or the same occurrence giving rise to one or more cognizable offences nor are they alleged to have been committed in the course of the same transaction or the same occurrence as the one alleged in the first FIR, there is no prohibition in accepting the second FIR.*

*18.* ***In Nirmal Singh Kahlon v. State of Punjab reported in (2009) 1 SCC 441****, this Court considered a case where an FIR had already been lodged on 14-6-2002 in respect of the offences committed by certain individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), which during investigation collected huge amount of material and also recorded statements of large number of persons and CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. The second FIR was lodged by CBI. This Court after appreciating the evidence, came to the conclusion that matter Investigated by CBI dealt with a larger conspiracy. Therefore, this investigation has been on a much wider canvass and held that second FIR was permissible and required to be investigated.*

*19. The Supreme Court held as under:*

*"67. The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for example, in a case of this nature. If the police authorities did not make a fair Investigation and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/or the High Court to direct Investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged."*

*(emphasis supplied by us)*

13. Thereafter, the Supreme Court examined the Appeal in the light of the settled legal propositions as mentioned in the cases cited hereinabove.

14. The Court also considered the question of tainted investigation and made certain observations with regard to the plea raised regarding malice in law and the duty of Investigating Agency and emphasized that where the Court comes to a conclusion that there was a serious irregularity in the investigation that had taken place, the Court may direct a further investigation under Section 173(8) Cr.PC, even transferring the investigation to an independent agency, rather than directing a reinvestigation. Several binding precedents were considered with regard to the Court's interference where desired in exceptional circumstances to prevent miscarriage of criminal justice and the direction which the High Court / Any Superior Court can give in such matters to ensure fair trial and fair investigation. The Court did not interfere in the order passed by the High Court but only modified it to the extent that the Charge-sheet in both the cases and any other consequent thereto were quashed and it observed that in case any of the accused could not get bail because of pendency of the Special Leave to Appeal before the Court, it would be open for him to apply bail or any other relief before the appropriate Forum.

15. The counsel for the petitioners has failed to point out as to how his case is covered with the facts as mentioned hereinabove with regard to *Babubhai Vs. State of Gujarat* as cited by the counsel for the petitioners.

16. Shri Alok Kirti Mishra, has also cited a judgment rendered ***in Amitbhai Anilchandra Shah Vs. Central Bureau of Investigation and Another reported in (2013) 6 SCC 348,*** and has referred to Paragraph-37 thereof which is being quoted hereinbelow:-

*"37. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In T.T. Antony. this Court has categorically held that registration of second FIR (which is not ca cross-case) is violative of Article 21 of the Constitution. The following conclusion in paras 19, 20 and 27 of that judgment are relevant which read as under:*

*"19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of*

*entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.*

*20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.*

*27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) Cr.PC. It would clearly be beyond the purview of Sections 154 and 156 Cr.PC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.PC or under Articles 226/227 of the Constitution.*

*The abovereferred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions."*

*(emphasis supplied by us)*

17. The Court also referred to TT Antony (Supra), Upkar Singh Vs. Ved Prakash (Supra), Babubhai Vs. State of Gujarat (Supra) as well as judgment rendered in ***Chirra Shivraj Vs. State of Andhra Pradesh reported in (2010) 14 SCC 444***, and ***C. Muniappan Vs. State of Tamilnadu reported in (2010) 9 SCC 567,*** and the laying down of the "Consequence test" i.e. if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then the offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as part of the first FIR.

18. We have gone through the alleged first FIR regarding the same incident which was lodged by one Dinesh Kumar Pandey, the Station House Officer Incharge of Police Station Kotwali Nagar, District Bahraich i.e. F.I.R. No.0346 of 2024 lodged at 09:11 am on 15.10.2024 it relates to the incident that occurred at 07:00 pm on 13.10.2024 when the idols of Devi Durga were being taken for immersion after conclusion of Navratri celebrations and the said procession was attacked by members of a particular community as a result whereof one person was shot dead namely Ram Gopal Mishra which resulted in heavy stonepelting and communal disharmony. The procession which was taking the idols for immersion was stopped and some anti-social elements also incited the members of the general public to abuse and assault public servants /employees and prevent them from carrying out their public duties. The road was blockaded and stonepelting continued unabated also attack was made by Lathi/Danda near one T crossing by the name of Peepal Tiraha and Steelganj market. Reference was made to certain persons belonging to the other community whose names were also mentioned in the said FIR, whose shops were attacked and vandalized and one motorcycle was also set on fire. This FIR talks of some anti-social elements vandalizing public property as well as private property of the other community and creating an atmosphere of social disharmony. Reference was made to such unlawful activity being carried out in several neighbourhoods names of which have been given in the said FIR.

19. On the other hand, the F.I.R. that was lodged on 18.10.2024 at 05:11 pm registered as Case Crime No.0347 of 2024 by the Respondent no.4 under Sections 191(2), 191(3), 3(5), 109(1), 324(2), 351(3), 352 & 125 of the B.N.S. at Police Station Kotwali Nagar, District Bahraich, against seven named accused including the petitioners herein has made mention of a specific incident with regard to the dead body of one Ram Gopal Mishra being kept outside the gate of Bahraich Medical College and the crowd raising slogans and protesting the attempt being made by the District Administration and the Police Authorities as well as the CMO from taking the body for autopsy to the Mortuary. The seven named accused were part of a larger group of persons and mention has been made regarding the attempt being made by informant who is a public representative in trying to pacify the members of the crowd and in trying to explain to them the necessity of getting the post mortem done of the deceased-victim and also help being sought from the District Magistrate in this regard. Despite attempt being made by the District Magistrate and the sitting MLA to pacify the crowd, and to take the body of the deceased-victim to the Mortuary, the

crowd continued stonepelting which resulted in the smashing of the wind screen of one Car registration number of which has been mentioned in the FIR and firing of one gun shot in the air. This incident happened in between 8:00 pm to 10:00 pm at night on 13.10.2024 and the informant has also referred to evidence being made available in CCTV footage if it is examined by the police during the investigation.

20. The initial FIR that was lodged on 15.10.2024 by the police official concerned related to a general information regarding the incident which happened during the immersion procession of Devi Durga idols where one person was shot as a result whereof crowd got angry and destroyed the shops of the other community through stone-pelting and setting them on fire whereas the FIR that was lodged on 18.10.2024 at 05:11 pm by the public representative, the sitting MLA of Mahasi Constituency with regard to the incident where the named accused alongwith others were holding Dharna Pradarshan with the body of the deceased-victim and not letting the District Administration and the Police Authorities from carrying out their public duties regarding the autopsy of the deceased-victim by taking his body to the mortuary for post mortem examination. There was firing of gun shot in the air also.

21. *Prima facie*, we do not find that the second FIR which was lodged on 18.10.2024 and which has been challenged in these petitions to be a part of the same transaction. It is related to a subsequent development and the Section of the B.N.S. invoked in the same are not identical and do not relate to the same incident or the same accused.

22. We, therefore, do not find any good ground to show interference, as prayed for, in these petitions, hence, they are **dismissed.**

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**(2024) 10 ILRA 291**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.10.2024**

**BEFORE**

**THE HON'BLE VIVEK KUMAR BIRLA, J.**
**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Crl. Misc. Writ Petition No.11077 of 2024

**Sukarmpal @ Amit Jat ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Babu Lal Ram, Ramesh Kumar

**Counsel for the Respondents:**
G.A.

**Criminal Law - U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 - Section 3(1) - U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021 - Rule 4(2) - Quashing of FIR - Impugned FIR was registered u/s 3(1) of Gangster Act without mentioning corresponding provision of Section 2(b) of Gangster Act - Base case was registered u/s 60,63 of Excise Act and Sections 419, 420, 307, 467, 468, 471 IPC in which charge-sheet was filed on 14.02.2020 and there was no material to show that base case comes within purview of Gangster Act, though the same was punishable under Excise Act and IPC and charge sheet was filed more than three years back, therefore, bar of proviso of Rule 4(2) was applicable and petitioner couldn't be named as a member of gang on basis of base case mentioned in gang chart. (Para 20)**
**Court observed that if Gangster Act was imposed against a person and charge-sheet was filed then any subsequent illegal activities falling within Sub-section**

**(i) to (xxv) of Section 2(b) of Gangster Act would come within purview of Gangster Act, if there was supporting material regarding his involvement in activities of a gang and in that case the Gangster Act could be imposed, even after three years. (Para 21)**
**Writ Petition allowed.** (E-13)

**List of Cases cited:**

1. Asim @ Hassim Vs St. of U.P. & anr.; 2024 (1) ADJ 125 DB, (Para 9)

2. Dharmendra @ Bhima & anr. Vs St. of U.P. and four others (Crl. Misc. W.P. No. 1049 of 2024, order dated 04.03.2024)

3. Ashok Kumar Dixit Vs St. of U.P.; 1987 SCC Online All 203, (Para 15 and 73)

4. St. of U.P. Vs Babu Ram; 1961 SC 751

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

1. Heard Sri Arjun Singh Yadav, Advocate holding brief of Sri Babu Lal Ram, learned counsel for the petitioner and Sri Ratan Singh, learned AGA for the State.

2. The present writ petition has been preferred for quashing the FIR dated 29.02.2024 registered as Case Crime No.28 of 2024, under Section 3(1) U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station- Alinagar, District-Chandauli and for a direction to respondents-State not to take coercive action against the petitioner pursuant to aforesaid FIR.

3. Contention of learned counsel for the petitioner is that from perusal of the gang chart of the impugned FIR, it is clear that the charge sheet in the base case was filed on 20.12.2020 and after that, no case was registered against the petitioner and after more than three years impugned FIR was lodged on 29.02.2024 by approving the gang chart on 14.02.2024 which is in violation of proviso of Rule 4(2) of U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021 *(hereinafter referred to as the 'Gangster Rules'*). It is further submitted by learned counsel for the petitioner that the impugned FIR was registered under Section 3(1) of the Gangster Act without mentioning the corresponding provision of Section 2(b) of the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 (in short the 'Gangster Act') on the basis of which he was named a gangster, which is against the law laid down by this Court in the case of **Asim @ Hassim vs State of U.P. and another; 2024 (1) ADJ 125 DB.**

4. Per contra, learned counsel AGA for the State has submitted that case of the petitioner does not cover under the proviso of Rules 4(2) of the Gangster Rules, as the same is regarding the offences which do not fall within the purview of the Gangster Act. It is also submitted by learned AGA that so far as contention of counsel for the petitioner that guidelines issued in the judgment of **Asim @ Hassim (supra**) has been violated is also misconceived because that judgment was already referred to Larger Bench in the case of **Dharmendra @ Bhima and another vs State of U.P. and four others** in Criminal Misc. Writ Petition No.1049 of 2024 vide order dated 04.03.2024.

5. Considering the rival submissions of learned counsel for the parties and perusal of record, following two questions arise for determination of this case;

*(i) Which offences are covered under the proviso of Rule 4(2) of the Gangster Rules, 2021.*

*(ii) Whether the guidelines issued in **Asim @ Hassim (supra)** is still valid despite the reference of the same to the Larger Bench in the case of **Dharmendra @ Bhima (supra).***

6. For determination of the first question, it would be apposite to mention Rule 4 of the Gangster Rules, which is being quoted as under;

*4. **Presence at the scene of incident or direct participation in the incident not necessary**.- (1) Presence at the scene of incident or direct participation in the incident is not necessary: For committing the criminal act defined in clause (b) of Section 2 of the Act, if any person organizes the whole gang or abets or aids the gang leader or member of that gang or provides protection and shelter to any such person, with the knowledge that the person in question is a gang leader or member of a gang or involved in committing/aiding/ abetting a criminal act, before or after the commission of such activity, then such a person shall also be liable under the provisions of the Act even though the whole gang had not participated in the incident at the time of commission of the said incident or was not present at the scene of the incident.*

*(2) It is not necessary to commit any offence together: For a person to be a member of a gang under the Act, it is not necessary for him to have committed any offence together with all the members of the said gang. If a member of that gang has committed any offence which comes within the purview of the Act, along with any other member or gang leader, they may be presumed to be a gang:*

***Provided that no such person shall be included in gang who has committed a few offences, which do not come within the purview of the Act, along with a member three years or earlier.***

*(3) Subsequent Prosecution Sanction: If the evidence collected during the investigation also reveals evidence regarding the involvement of any person in the gang against whom the gang-chart is not approved, then the charge-sheet can be sent to the Special Court after obtaining prosecution sanction from the concerned Commissioner of Police/District Magistrate/Senior Superintendent of Police/Superintendent of Police.*

7. Rule 4(2) of the Gangster Rules provides that if a member of a gang committed an offence which comes within the purview of Gangster Act, 1986 along with any other member or gang leader that may be presumed to be a gang. Therefore, even if all the members have not committed offence together but a member can still be a person presumed to be a member of a gang, if he committed an offence along with other members, or gang leader. But the proviso of Rule 4(2) provides that if any person has committed any offence which does not come within the purview of the Gangster Act along with a member of a gang during the last three years or earlier then that person cannot be included in the gang. Therefore, for the applicability of proviso of Rule 4 (2) of the Gangster Rules, it is necessary that offence, committed by a person, even if, with a member of a gang three years or earlier, **should not come within the purview of Gangster Act** and if that offence comes within the purview of the Gangster Act and the bar of nominating a person as member of gang despite the fact that he has not committed any offence during last three years, will not be applicable.

8. Now a question also arises which offence would come within the purview of the Gangster Act, 1986.

9. To decide the issue, it would be relevant to consider the definition of 'gang' as per Section 2(b) of Gangster Act. Rule 3 of the Gangster Rules prescribes the conditions for the punishment under the Gangster Act for the offence mentioned in Sub-clause (i) to (xxv) of Clause (b) of Section 2 of the Gangster Act. Rule 6 of the Gangster Rules which provides that for preparing the gang chart alleged act of a gang falls **within the preview of the Gangster Act.** Section 2(b) of Gangster Act is being quoted as under;

*"2. Definitions. In the Uttar Pradesh Gangsters And Anti-Social Activities (Prevention) Act, 1986-*

*(a) "Code"* ----------.

*(b)"Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in antisocial activities, namely:*

*(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or*

*(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U. P. Excise Act, 1910 (U. P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or*

*(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or*

*(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or*

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being

lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities.

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966:

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

*(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;*

*(xxv) indulging in crimes that impact security of State, public order and even tempo of life.*

10. Rules 3 and 6 of the Gangster Rules are being quoted as under;

*"3. **Conditions of criminal liability**.- (1) The offences mentioned in sub sections (i) to (xxv) of clause (b) of Section 2 of the Act shall be punishable under the Act only if they are :*

*(a) committed for disturbing public order; or*

*(b) committed by causing violence or threat or display of violence, or by intimidation, or coercion or otherwise, either singly or*

*collectively, for the purpose of obtaining any unfair worldly, economic, material, pecuniary or other advantage to himself or to any other person.*

*6.* ***Relevant provision of the Act to be specifically mentioned****.- (1) While preparing the gang-chart, it shall be clearly mentioned if the alleged act of gang falls within the purview of clause (b) of section 2 of the Act along with the relevant provision.*

(2) If the Investigating Officer makes an endorsement to the effect that the accused is causing panic, alarm or terror in public, then evidence shall be collected in this regard.

11. From the definition of gang under Section 2(b) of the Gangster Act, it is clear that merely becoming a member of a gang will not be punishable unless the gang falls within the purview of Section 2(b) of Gangster Act and for the punishment of the member or organizer or leader of a gang under the Gangster Act, conditions mentioned in Rule 3 must be fulfilled, which prescribes that offence mentioned in Sub-section (i) to (xxv) of Section 2(b) of the Gangster Act must be committed for disturbing public order or committed by causing violence or threat or coercion or otherwise for the purpose of obtaining unfair trustworthy, pecuniary, economic, material or other advantage. Therefore, merely because a person has committed any offence mentioned in Sub-section (i) to (xxv) of sub-section (b) of Section 2 of the Gangster Act will not itself come within the purview of the Gangster Act unless he is member of a gang falling under Section 2(b) of Gangster Act.

12. Even the Rule 4(2) of the Gangster Rules itself provides that, if a member of a gang has committed any offence which **comes within the purview of the Act** along with any other members then he will be presumed to be a gang. Therefore, punishing a person under the Gangster Act basic condition to be a member of a gang under Section 2(b) of the Gangster Act must be satisfied

13. Rule 6 of the Gangster Rules also provides that at the time of preparation of gang chart, it must be mentioned that act of gang **falls within the purview of Section 2(b) of the Gangster Act**. Therefore, it is clear that for bringing an offence within the purview of Gangster Act, it must be committed by a member of a gang for the object mentioned in Section 2(b) of the Gangster Act by doing the activities mentioned in Sub-Section (i) to (xxv) of Clause (b) of Section 2 of the Gangster Act**. Therefore, if any offence is committed whether the same falls within the category of Sub-Section (i) to (xxv) of Section 2(b) of the Gangster Act or not, that will not come within the purview of the Gangster Act unless the same is done with the object mentioned in Section 2(b) of the Gangster Act.**

14. The Full Bench of Allahabad High Court in **Ashok Kumar Dixit vs State of U.P.; 1987 SCC Online All 203** also observed in paragraph 15 that a person is not liable to be punished under Gangster Act merely because he happens to be a member of group unless he chooses to join a group which indulges in anti-social activities defined under the Gangster Act with the use of force or otherwise for gaining material advantage to himself or other person. Again in paragraph 73 of the aforesaid judgement, the Full Bench observed that for booking a person under the provisions of Gangster Act, the authority has to be satisfied and there is a reasonable and proximate connection between the occurrence and the activity of the person and such activities were, to achieve undue temporal, physical, economic or other advantage. Paragraph nos.15 and 73 of the aforesaid judgement are being quoted as under;

*"15. For the same reason, the submission of Sri Rakesh Dwivedi (discussed later) to the effect that the Act attempts to punish a mere status of a person without there being any actus reus has to be rejected. A person is not liable to be punished under the Act merely because he happens to be a member of a group. He comes within the clutches of the Act only if he chooses to join a group which indulges in anti-social activities defined under the Act with use of force for gaining material advantage to himself or any other person. The element of actus reus is hence clearly present in the offence created under the statute. We will discuss this aspect of the case in greater depth later in this judgment.*

*73. In this behalf, provisions of the Act themselves provide intrinsic guidelines. If we advert to Section 2(b) of the Act, which defines the term 'gangster' we would find significant words. They are "acting", 'singly or collectively', 'violence or show of violence', 'intimidation', 'coercion', or 'unlawful means'. Thus, for booking a person under the provisions of the Act, the authorities have to be prima facie satisfied that a person has acted. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage. There need not be any overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime."*

15. Rules under Section 23 of the Gangster Act were framed for carrying out the purposes of this Act. Therefore, the rules must be interpreted in consonance with the object of the Gangster Act. The object and reason of the Gangster Act are quoted as under;

***"Object and reason of the Act-*** *Gangsterism and anti-social activities influenced the State Legislature in making introduction of such Act. The object and reason of the Act is that gangsterism and anti-social activities were on the increase in the state posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menace. With a view to break the gangs by punishing the gangsters and to nip in the bud their conspirational designs it was considered necessary to make special provision for the prevention of and for coping with gangsters and anti-social activities in the State."*

16. In the case of **State of U.P. vs Babu Ram; 1961 SC 751**, the Hon'ble Apex Court observed that the Rules made under the statute are treated for the purpose of construction as if they were in the enabling Act and are to be of the same effect as if contained in the Act.

17. In 9th edition of G.P. Singh's Principles of Statutory Interpretation, on page 78, it is observed that *"the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary".* Therefore, the proviso of Rule 4 of Gangster Rules is to be interpreted as per the object of the Gangster Act and meaning of any words should be assigned the same meaning as it is made under the Gangster Act.

18**. From the above analysis, it is clear that bar of proviso of Rule 4(2) of Gangster Rules, 2021 will apply only in those cases where the offences were committed three year or earlier from the date of preparation of gang chart and these offences do not come within the purview of Section 2(b) of the Gangster Act as well as under Rule 3 of the Gangster Rules, even though those offences may fall within the category of activities mentioned in Sections (i) to (xxv) of Clause (b) of Section 2 of the Gangster Act.**

19. So far as the second question is concerned regarding the reference of judgement of **Asim @ Hassim (supra)** to a larger Bench of **Dharmendra @ Bhima (supra),** the law is well settled that mere reference to a Larger Bench will not dilute the proposition laid down by the judgement referred, therefore, guidelines issued in the case of **Asim @ Hassim (supra)** that FIR registered u/s 3(1) of the Gangster Act without mentioning corresponding provisions of Section 2(b) of the Gangster Act, based on which, he was named as gangster is illegal, is still holds good till the reference is decided. For ready reference, para 9 of Asim @ Hassim (supra) case is being quoted as under:

*"9. In the present case, the impugned F.I.R. was registered u/s 3(1) Gangsters Act, without mentioning the corresponding provision, mentioning the anti social activities in which the accused is involved and on the basis of which he was named as gangster. A person cannot be punished without specifying the offence committed by him which would justify his classification as a Gangster."*

20. In the present case, the base case was registered under Sections 60/63 the Excise Act and Sections 419, 420, 307, 467, 468, 471 IPC in which charge-sheet was filed on 14.02.2020 and there was no material to show that base case, in the present case, comes within the purview of the Gangster Act though the same is punishable under the Excise Act as well as IPC and the charge sheet was filed more than three years back, therefore, bar of proviso of Rule 4(2) of the Gangster Rules is applicable and the petitioner cannot be named as a member of a gang on the basis of base case mentioned in the gang chart in which charge-sheet has been filed.

21. However, it is observed that if an earlier occasion the Gangster Act was imposed against a person and charge-sheet was filed then any subsequent illegal activities falling within Sub-section (i) to (xxv) of Clause (b) of Section 2 of the Gangster Act would come within the purview of the Gangster Act, if there is other supporting material regarding his involvement in the activities of a gang and in that case the Gangster Act can be imposed, even after three years.

22. The impugned FIR is registered u/s 3(1) of the Gangster Act without mentioning the corresponding provision of Section 2(b) of the Gangster Act, therefore, the same is illegal in view of the law laid down in the case of **Asim @ Hassim (supra)**

23. In view of the above, the present petition is **allowed** and the FIR dated 29.02.2024 along with its gang-chart is hereby quashed.

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**(2024) 10 ILRA 299**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 18.10.2024**

**BEFORE**

**THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.**

Criminal Revision No. 2998 of 2023

**Vinod Kumar Shukla & Anr. ...Revisionists**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Revisionists:**
Sri Ajay Kumar Jagdish, Sri Ayush Mishra, Sri Nitin Sharma, Sri Prabha Shanker Mishra, Sri Ram Kumar Dubey

**Counsel for the Respondents:**
G.A., Sri Ram Sajiwan Mishra, Sri Tarun Kumar Shukla

**Criminal Law - Code of Criminal Procedure,1973 - Section 397/401-**

Revisionist moved an application under Section 145 Cr.P.C. -claim as owner in possession in disputed land-opposite parties were trying to grab the disputed land and prepared to engage in violent acts- initiated action under Section 107, 116 Cr.P.C. - the same is liable to be attached in proceedings under Section 145 Cr.P.C- finding of fact recorded by learned trial court cannot be disturbed or replaced by new finding of fact by revisional court unless the same appears to be perverse. - the finding is based on a due appreciation of material on record-Civil Suit is pending between the parties –but no ad-interim order or temporary injunction has been passed therein-The learned Executive Magistrate has released the property in dispute in favour of opposite party, until a contrary order or an order with regard to title and possession of disputed property is passed by a competent court-no infirmity in the impugned order.

**Revision dismissed.** (E-9)

**List of Cases cited:**

1. Munshi Ram Vs St. of Raj., through Pp Nemaram son of Bhagirath Ram, Tehsil Maulasar, District Didwana Kuchaman Raj vide - S.B. Criminal Misc. (Pet.) No.4923 of 2024

2. Ram Sumer Puri Mahant Vs St. of U.P. & ors. reported in 1985 (1) SCC 427

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

1. Instant Criminal Revision has been preferred under Section 397/401 Cr.P.C. against the final order dated 03.04.2023 passed by Up Zila Magistrate, Tehsil Machalishahar, District Jaunpur in Case No.02711 of 2018 (Vinod Kumar Vs. Arun Kumar) under Section 145 Cr.P.C., with prayer to set-aside the impugned order and directing the opposite party No.4 to 6 not to interfere in peaceful possession of the applicants in land in dispute which is Abadi Land situated at village Hemapur Tarathi, Police Station Mungra Badshahpur, Tehsil Machhali Shahar, District Jaunpur.

2. Heard learned counsel for the revisionist and learned A.G.A. for the State-respondent and perused the material available on record.

3. On perusal of record it appears that the applicants/revisionists Vinod Kumar Shukla and Anil Kumar Shukla sons of Ram Deo Shukla moved an application under Section 145 Cr.P.C. before the Up Zila Magistrate, Machalishahar, District Jaunpur against present respondent Nos. 4,5 and 6 with averments that the disputed land originally belonged to Ram Pyari Devi wife of Madhav Prasad, who was owner in possession of the land in dispute during her life time. She executed a Will deed in favour of the mother of the applicants, and after death of Ram Pyari, the mother of the applicants/revisionists namely Raj Kali entered thereon as owner in possession. The opposite parties were trying to grab the disputed land and for that purpose they were prepared to engage in violent acts. The local police apprehending the breach of peace, initiated action under Section 107, 116 Cr.P.C. in the matter, as there was constant threat of breach of peace in regard to disputed land and the same is liable to be attached in proceedings under Section 145 Cr.P.C, otherwise any serious incident is likely to occur. The boundary marks on disputed land are given a foot of land and the application shows which may be read as under:-

East- House and Shahan Ram Dev
West- Kharanja road and Shivam Sundaram Jogi Beer Baba Mandir
North- Pucca House of Rajkali
South- Pucca House of respondent No.2

4. The chalani report was filed by local police also on 15.04.2018, in which it is stated there there is land dispute between the parties with regard to abadi land, and both parties are claiming their title and possession thereon. The land in chalani report is marked by red lines and denoted as ABCD. In chalani report also a site plan is shown, which is similar too that shown in application filed by applicants Vinod Kumar Shukla and others in application under Section 145 Cr.P.C. The police officer also prayed for attachment of land in dispute to avoid any in incident of breach of peace, which is likely to be caused due to tension prevalent on the spot. The opposite parties filed written statement in which they averred that the application moved by applicants is liable to be dismissed. The chalani report filed by local police is against the position appearing on spot. The parties belonged to same clan and blood are relatives. The ancestral land was partitioned between the parties and they are in possession of their respective share on this part. The opposite parties got an old Khaprail house in a portion which was in dilapidated condition and they constructed the pucca dalan after demolishing the old structure, and they have been using the pucca dalan since time of their father. In fact, the land marked by ABCD letters in chalani report has never been in dispute, because on this land trees are planted and pillars of construction of Varandah are lying. A civil suit is also pending with regard to land in dispute and for that reason also the proceedings under Section 145 Cr.P.C. are not maintainable.

5. The applicants also took stand that in their pleadings before the Executive Magistrate that according to genealogical table the opposite parties are owner of 1/4th share of property. Smt. Ram Pyari died in the year 2011 and thereafter mother of the applicants namely Rajkali became owner in possession of the property left by Smt. Ram Pyari on the basis of registered Will deed. Opposite parties are not in any manner concerned with the property inherited by the mother of the applicants through Will deed from Smt. Ram Pyari. The notice was issued after receiving report from police station on 25.04.2018, some interim orders were passed on 26.03.2018 and 03.05.2018 by learned Executive Magistrate. When opposite parties, with intent to grab the possession of the land in dispute, were trying to raise pillars etc. to raise a Varandah in the land in dispute. The opposite parties also filed a Civil Suit for cancellation of Will deed propounded by the applicants and also filed a suit for permanent injunction separately.

6. Learned Executive Magistrate after considering the pleadings and submissions of the parties observed that a Civil Suit has been instituted by opposite parties which is cited as (Varun Kumar and another Vs. Ram Deo and others) in the court of Civil Judge (Junior Division) Jaunpur, which is pending, but the Civil Suit has been instituted after filing of application under Section 145 Cr.P.C. before the Executive Magistrate. The second chalani report was also filed by P.S. concerned under Section 145 Cr.P.C. 11.02.2020 which is without any logic and same is liable to be dismissed.

7. On perusal of chalani report dated 11.04.2018 filed by P.S. concerned and site plan given therein, it is obvious that disputed land ABCD lies at the door of opposite parties. The pillars raised by opposite parties is also shown in disputed land ABCD in chalani report dated 11.04.2018. When opposite parties were

trying to grab the possession of dispute land by raising pillars etc. the dispute arose. The opposite parties moved complaint to several competent officials by registered post on 19.11.2017 having been perturbed by actions of opposite parties, but no action was taken thereon. Thereafter this application was moved before the court of Executive Magistrate by applicants to restrain opposite parties to take possession of the land in an illegal manner, as stated by applicants in their pleadings. However, they have also stated that opposite parties were never in possession of land in dispute, therefore both the averments are self-contradictory.

8. According to applicants the dispute occurred prior to 19.11.2017, it shows that opposite parties were in possession of land in dispute sixty days earlier to commencement of proceedings. The applicants have claimed themselves as owner of the land in dispute, but the same has not been decided in proceedings under Section 145 Cr.P.C. but only question has been determined.

9. Learned Magistrate gave a finding to the effect that opposite parties were in possession of the land in dispute which is sixty days earlier to initiation of action under Section 145 Cr.P.C. Therefore, any dispute regarding title of land in dispute between the parties can only be decided by instituting a Civil Suit. With these findings learned Executive Magistrate released land in dispute in favour of the opposite parties till any order with regard to title of disputed land/possession is decided by competent court. Learned Magistrate also directed the opposite parties in the impugned order that until any adjudication regarding title of land in dispute is made, they would not raise any new constructions on the spot, nor they will change status of the spot. The Station House Officer concerned has also been directed that in case any apprehension of breach of parties is found between the parties, the punitive action be taken against them.

10. Learned counsel for the revisionist submits that the learned Executive Magistrate has travelled beyond jurisdiction while passing the impugned order in favour of the opposite parties. Inasmuch as, he has included the house also in the impugned order, which is not disputed. It is admitted fact that there is only dispute of Sahan land lying between before the house of Ram Pyari Devi and newly constructed house of opposite parties. The applicants have not stated in their application under Section 145 Cr.P.C. that no pillar has been raised by opposite party on the land in question. Inasmuch as in chalani report dated 15.04.2018 the local police has also not stated any where about existence of pillars on the land in dispute, but nevertheless the existence of pillar has been assumed by learned Executive Magistrate in the impugned order. He also submits that learned Magistrate has not only released the disputed land in favour of opposite parties, but also issued an order in the nature of temporary injunction, which is without jurisdiction. Learned Executive Magistrate is not empowered to pass any order in the nature of injunction proceedings under Section 145 Cr.P.C.. This was a fit case for issuing attachment order with regard to land in dispute, but instead a release order has been passed in favour of opposite parties, which is not sustainable in the eyes of law.

11. Even due procedure has not been observed while deciding the case finally. No evidence has been recorded

during the proceedings under Section 145 Cr.P.C. and the case has been decided only on the basis of the pleadings of the opposite parties. No ad-interim injunction has been granted in Civil Suit filed by the opposite parties seeking relief of permanent injunction. The finding of possession of opposite parties on the land in dispute is against the position of spot and not supported by any cogent evidence.

12. There is gap of period of more than six months between conclusion of arguments by the parties and passing of the impugned judgment by learned Magistrate and in this period of six months no re-arguments were heard.

13. Learned counsel for the revisionists placed reliance on a judgment of High Court of Judicature Rajasthan at Jodhpur in **Munshi Ram Vs. State of Rajasthan, through Pp Nemaram son of Bhagirath Ram, Tehsil Maulasar, District Didwana Kuchaman Raj vide order dated 29.07.2024 in S.B. Criminal Misc. (Pet.) No.4923 of 2024.** The petitioner was aggrieved by an order passed by Additional Session Judge in Criminal Revision No.7 of 2024, whereby the revision petition filed by respondent No.2 was allowed. In exercise of revisional jurisdiction, the order dated 28.09.2024 was passed under Section 145/146 Cr.P.C. by learned Sub Divisional Magistrate by which, he had provisionally attached disputed Khasra No.274 and appointed a receiver as an interim measure was set-aside. The High Court dismissed the petition and held that there were no grounds to interfere. The High Court observed as under:-

"*8. Once civil litigations regarding the property are already pending, the Magistrate under Section 145 Cr.P.C. should not delved into making finding on the civil/possession/title rights of the parties concerning the property. The purpose of Section 145 is to maintain public peace and order when there's a dispute over possession of property, and not to already been filed regarding the property, making it thus unnecessary for the SDM to interfere in the matter.*

*9. Once the civil proceedings are concededly in progress, the SDM's role is limited, and issuing orders like appointment of receiver amounts to overstepping the boundaries of peace, not to settle property disputes, which is within the purview of civil courts. Instead, if there is a need to prevent breach of peace, the Magistrate can take measures under Section 107 of the Cr.P.C."*

14. Learned counsel for the revisionists also placed reliance on a judgment of Hon'ble Supreme Court **in Ram Sumer Puri Mahant Vs. State of U.P. and others reported in 1985 (1) SCC 427**, in which it is held that there is no scope to doubt or dispute the position that the decree of Civil Court is binding on the criminal court in a matter like one before us in a proceedings under Section 145 Cr.P.C. that parallel proceedings should not be permitted to continue and the event of decree of civil court, the criminal court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders, such as injunction or appointment of receiver for adequate protection of the property during the pendency of the dispute. Multiplicity of litigation is not in the interest of the parties, nor should public time be allowed to be wasted over meaningless litigation.

15. Learned counsel for the respondent No.2 submitted that the land in dispute stands at the door of the house of respondent Nos. 4,5 and 6, which is their sahan land and was allotted to the share of father of respondent Nos. 4 to 6 in family settlement which reached about 50 years ago. Smt. Ram Pyari who belonged to the khandan of the parties had no right to bequeath the sahan land of the respondents in favour of the mother of the applicants, and on the basis of said will deed the claim of the applicants/revisionists have acquired no title whatsoever on the land in dispute and same was never in possession of the applicants.

16. The impugned order is based on facts admitted by the parties in their pleadings and well within jurisdiction of the learned Executive Magistrate. The temporary injunction has been granted in the interest of justice and the revisionists are not likely to suffer by temporary injunction order, the opposite parties themselves are enjoined to maintain statusquo on the spot.

17. Leaned A.G.A. submitted that there is no irregularity or illegality in the impugned order passed by learned Executive Magistrate, even Naib Tehsildar in his report dated 05.09.2020 addressed to Zila Adhikari has stated that the disputed site is 3ft. above from the surface. It is stated therein that the spot where earth work was done by defendant Tarun Kumar tension is prevalent between the parties. There is no problem of water evacuation on the spot, as the same is on height. However, he admitted in his report the prima facie there was no occasion of earth work on the spot and due to this act there is apprehension of dispute.

18. Learned counsel for the respondent Nos. 4 to 6 further submitted that the revisionists never appeared in both the civil suits filed by the respondents, even after publication of notice, in spite of the fact that they are well within knowledge of both the civil suits.

19. Learned counsel for the revisionist submitted that the above mentioned order of Rajasthan High Court (supra) pertains to a provisional attachment and appointment of receiver order passed in respect of identical plot by Sub Divisional Magistrate, as an interim measure under Section 145/146 Cr.P.C. Whereas in the present case final order has been passed under Section 145 Cr.P.C. by Up Zila Adhikari in respect of land in dispute with a finding that on the basis of evidence on record the possession of second party (Arun Kumar) is found prior to 60 days next before the date of initiation of proceedings with regard to possession. First party has failed to established his possession on undisputed house by evidence, if there is any dispute regarding the title the parties can seek appropriate relief by instituting a civil suit before the competent court. In the opinion of Magistrate the disputed land is liable to be released in favour of second party who is found to be in possession of the same.

20. The relevant provisions of Criminal Procedure Code of 1973 is applicable to present case may be produced as under:-

**Section 145- Procedure where dispute concerning land or water is likely to cause breach of peace.**

*(1)Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.*

*(2)For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property.*

*(3)A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.*

*(4)The Magistrate shall then, without reference of the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute :Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of this order under sub-section (1).*

*(5)Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.*

*(6)(a)If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.(b)The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).*

*(7)When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for*

*the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.*

*(8)If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.*

*(9)The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.*

*(10)Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.*

**Section 146- Power to attach subject of dispute and to appoint receiver**

*1. If the Magistrate at any time after making the order under Sub-Section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof;*

*Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.*

*2. When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any civil Court, make such arrangements as he considers proper for looking after the properly or if he thinks fit. Appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908);*

*Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any civil Court, the Magistrate—*

*1. shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the civil Court and shall thereafter discharge the receiver appointed by him;*

*2. may make such other incidental or consequential orders as may be just.*

*21. The aforesaid statutory provisions provides that Magistrate can exercise powers under Section 146 Cr.P.C. on satisfcation of following conditions:-*

*(I) At any time after making an preliminary objection under sub-Section 1 of Section 145 Cr.P.C. considers that*

*(1) the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute.*

22. After forming the opinon as envisaged under Section 146 (1) Cr.P.C. he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof;

23. The Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

24. Although in the impugned order the learned Magistrate has referred on some places "disputed land" and another place "dispute house", but there is no dispute between the parties that dispute is with regard to Abadi land which is shown as per boundary marks in application under Section 145/146 Cr.P.C. dated 29.01.2018 by the applicants Vinod Kumar Shukla and Anil Kumar Shukla, the present revisionists. The parties to dispute belonged to same clan and they have been co-sharers. Applicants/revisionist claim their title over land in dispute on the basis of a will deed executed by late Pyari Devi in favour of their mother and respondents claimed that the said land was allotted to their share in partition of ancestral property.

25. It is trite law that a finding of fact recorded by learned trial court cannot be disturbed or replaced by new finding of fact by revisional court unless the same appears to be perverse. On a perusal of impugned order passed by Up Zila Magistrate (SDM), the finding of fact regarding possession of respondent Nos. 4 to 6 in disputed land cannot be said to be perverse as it is based on a due appreciation of material on record. Although a Civil Suit No.572 of 2018 Varun Kumar Vs. Ram Deo is pending between the parties in the court of Civil Judge (JD) Jaunpur, but no ad-interim order or temporary injunction has been passed therein. This Civil Suit was instituted by present respondent No.5 after initiating present proceeding under Section 145/146 Cr.P.C. at the instance of revisionist. Only due to the fact that civil court did not find it proper to issue an ad-interim exparte injunction in favour of the plaintif (present respondent No.5) in civil suit, it cannot be inferred that the civil court had not found him in possession at the outside. The grant of exparte injunction is not a rule but an exception and it can only be granted in cases where all the necessary parameters prima facie find support, for grant of exparte injunction. In present revision the revisionists have themselves sought a consequential relief in the nature of injunction.

26. The learned Executive Magistrate has released the property in dispute in favour of opposite party, until a contrary order or an order with regard to title and possession of disputed property is passed by a competent court. I find no infirmity or illegality or perversity in the impugned order 03.04.2023 passed by Up Zila Magistrate, Tehsil Machalishahar, District Jaunpur. The impugned order will be subject to any order passed by civil court in relation to property in suit. The revision is devoid of merit, and is liable to be dismissed.

27. The revision is **dismissed**.

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**(2024) 10 ILRA 308**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.**

Criminal Revision No. 4411 of 2023

**Sarita Sharma ...Revisionist**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Revisionist:**
Sri Ambreen Masroor, Sadrul Islam Jafri, Sr. Adv.

**Counsel for the Respondents:**
G.A., Sri Ram Rang Patel

**Criminal Law - Code of Criminal Procedure,1973 - Section 156(3)-** Applicant/victim moved application u/s 156(3) Cr.P.C. -dismissed-impugned-case of outraging modestly of a woman and criminal intimidation etc.- dismissed the application on the basis of preliminary inquiry report submitted by the police, in which no Statementof witnesses was recorded-placing reliance on police report submitted in favour of the proposed accused is neither desirable nor lawful-impugned order set aside.

**Revision allowed.** (E-9)

**List of Cases cited:**

1. 'XYZ' Vs St. of M.P. & ors. reported in 2022 (0) SC 740

2. Priyanka Srivastava & anr.Vs St. of U.P. 2015 (6) SCC 287

3. Lalita Kumari Vs Government of U.P. (2014) 2 SCC 1

4. Kailash Vijayvargiya Vs Rajlakshmi Chaudhuri

5. Manju Surana Vs Sunil Arora & ors. reported in (2018) 3 SCR 696

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

1. Instant Criminal Revision has been preferred under Section 397/401 Cr.P.C. against the impugned order dated 23.06.2023 passed by learned Chief Judicial Magistrate, Hathras in Criminal Complaint Case No.849/12/2022, whereby application moved by the applicant/revisionist under Section 156(3) Cr.P.C. has been dismissed.

2. Heard Sri N.I.Jafri, learned Senior Advocate assisted by Sri Ali Jamal Khan and Sri Sadrul Islam Jafri learned counsel for the revisionist, Sri Saghir Ahmad learned Senior Advocate assisted by Sri Rahul Kumar Sharma and learned A.G.A. for the State-respondent and perused the material available on record.

3. Brief facts of the case are that the applicant who is the victim has moved application under Section 156(3) Cr.P.C. stating therein that the incident occurred on 24.06.2022 at 01:00 pm. When she moved towards office after finishing her teaching work in Civilian School run by Basic Education Department, Kota in Block Mursan, District Hathras, suddenly opposite party Laxmi Narayan Sharma who was working as Head Master in Primary School Nagla Mallu, Block Mursan, District Hathras emerged there and asked her to stop, when she reached in the veranda of the school he abused her in filthy language and asked for her husband Jitendra Sharma in abusive language, then she stopped her to abuse them, he again abused her and acted in obscene manner

with her. He tried to grab her breast and tried to molest her, which resulted in outraging her modesty. On hearing her shierks her husband Jitendra Sharma reached on the spot and then the opposite party escaped from there after threatening him with life. The opposite party used to threaten her every now and then, when she happened to be on way to school. Her report was not lodged at police station, she reported the matter by registered post to police, but no action was taken. She moved an application under Section 156(3) Cr.P.C. before the Magistrate concerned i.e. Chief Judicial Magistrate, Hathras.

4. However, learned C.J.M. placing reliance on preliminary inquiry report filed by Station House Officer concerned, dismissed the application with observation that application had been moved due to personal animosity of the applicant and her husband with the opposite party only with a view to exert unnecessary pressure on him. No cognizable offence is made out on the basis of evidence on record. Feeling aggrieved by the order the applicant/revisionist has preferred the present revision.

5. Learned counsel for the revisionist submits that the impugned order passed by learned Magistrate is illegal and contrary to law. The impugned order is based on conjectures and surmises and wrong observation has been made by learned Magistrate by rejecting the application under Section 256(3) Cr.P.C. that no cognizable offence is made out. In fact it is clear case of outraging modestly of a woman and criminal intimidation etc. is also made out on the facts of the case, but same has not been taken care of by learned C.J.M.. No preliminary inquiry is called for, where a sexual offence having been alleged against the proposed accused. Inspite of a cognizable offence is made out, the learned C.J.M. has dismissed the application on the basis of preliminary inquiry report submitted by the police, in which no statement of witnesses was recorded.

6. Learned counsel for the revisionist has placed reliance on a judgment of Supreme Court in **'XYZ' Vs. State of Madhya Pradesh and others reported in 2022 (0) SC 740** and observations made in paragraph Nos. 15, 16, 20, 25, 26, 27, 28, 29, 30 and 31 and submitted that on the facts of the case a cognizable offence in the nature of sexual offence is made out, which has been committed against a women. There is no other option before the Magistrate but to direct registration of an FIR, where an application under Section 156(3) Cr.P.C. has been filed victim on her behalf, other facts are not relevant at the stage of registration of FIR, such as whether the information falsely given, whether the information in genuine, whether the information is credible etc. These are the issue that had to be verified during the investigation of the FIR. In a nutshell veracity of such type of allegations made against the accused at this stage cannot be gone by deciding the application under Section 156(3) Cr.P.C. Moreover if the allegations are found to be false during investigation the police is well within its right to file a case of lodging false FIR and given false information to the police.

7. Learned counsel for the revisionist also submitted that where a clear allegations of sexual violence are made against the accused. No preliminary inquiry is called for as this is not covered in the cases cited in the Constitution Bench

judgment of Hon'ble Apex Court in **Priyanka Srivastava and another Vs. State of U.P. 2015 (6) SCC 287** in that case the borrower had moved an application under Section 156(3) Cr.P.C. with a prayer to lodged FIR against the officials who had initiated recovery proceedings against the complainant in exercise of powers under Section SARFAESI Act. The alleged offfence in the present case is neither leads to commercial dispute nor matrimonial discord.

8. Per contra, Sri Saghir Ahmad learned Senior counsel for the respondent No.2 submitted that Hon'ble Supreme Court in Priyanka Srivastava Vs. State of U.P. (supra) has laid down certain guidelines to avoid abuse of process of the law by moving an application under Section 156(3) Cr.P.C. with malafide intention and only to settle scores with a person against whom he/she is having some personal animosity. He vehemently contended that on one hand in the light of Hon'ble Supreme Court judgment **in Lalita Kumari Vs. Government of Uttar Pradesh (2014) 2 SCC 1** held it mandatory for a police officer to lodge an FIR in exercise of powers under Section 154 (1) Cr.P.C. where the information discloses commission of cognizable offence, on the other hand the Magistrate having jurisdiction is not bound to direct registration of the case and registration by police in each and every case where a cognizable offence is made out on the face of the application, and Magistrate is expected to apply his judicial mind towards the allegations made in the application so that abuse of judicial process could be avoided. This reflects in judgment of Supreme Court in **Priyanka Srivastava and another Vs. State of U.P.** (supra) and in **Kailash Vijayvargiya vs Rajlakshmi Chaudhuri** that such power cannot be exercised in routine manner. In the present case learned C.J.M. has dismissed the application 156(3) Cr.P.C. after directing a preliminary inquiry by Station House Officer concerned, in the preliminary report the local police has given complete set of facts which suggest that no such type of occurrence as alleged, in fact has taken pace and the application has abeen moved with malafide intention to settle scores.

9. Learned Senior Counsel placed reliance on a judgment **of Kailash Vijayvargiya vs Rajlakshmi Chaudhuri** (supra) the paragraph Nos. 22, 23, 24, 27,28, 38 of said judgment are reproduced as under:-

*22. One would grant that the jurisdiction of the Court when asked to invoke power under Section 156(3) is wider as held in Priyanka Srivastava (supra), yet there are limits within which the Magistrate must act. When the Magistrate is satisfied that the allegations made disclose commission of a cognizable offence, he must stay his hands, direct registration of an FIR and leave it to the investigative agency to unearth the facts and ascertain the truth of the allegations. Magistrate in terms of the ratio in Lalita Kumari (supra) can for good reasons direct preliminary enquiry. We would now refer to the power of the Magistrate to take cognizance, postpone issue of process and follow the procedure under* Section 202 *of the Code.*

*Difference in the power of Police to register and investigate an FIR under Section 154(1) read with 157 of the Code, and the Magistrate's direction to register an FIR under Section 156(3) of the Code.*

*Power of the Magistrate to direct registration of an FIR under Section 156(3) in contrast with post-cognizance stage power under Section 202 of the Code.*

*23. The operandi for registration of information in a cognizable offence and eventual investigation is not limited to Police, and as observed above, sub-section (3) to Section 156, subject to legal stipulations, gives the ameliorating power to a Magistrate empowered under Section 190 to order an investigation in a cognizable offence. Two different powers vested with two distinct authorities, namely the Police and the Magistrate, who discharge distinct functions and roles under the Code as indicated above are not entirely imbricating.*

*24. The power of Magistrate to direct investigation falls under two limbs of the Code: one is pre-cognizance stage under Section 156(3), and another on cognizance under Chapter XIV ('Conditions Requisite for Initiation of Proceedings'; Sections 190-199) read with Chapter XV ('Complaints to Magistrates'; Sections 200-210). These two powers are different and there also lies a procedural distinction between the two.*

*27. In this Court in Priyanka Srivastava (supra) referred to the nature of power exercised by the Magistrate under Section 156(3) of the Code and after referring to several earlier judgments held that the direction for registration of an FIR should not be issued in a routine manner. The Magistrate is required to apply his mind and exercise his discretion in a judicious manner. If the Magistrate finds that the allegations made before him disclose commission of a cognizable offence, he can forward the complaint to the Police for investigation under Section 156 and thereby save valuable time of the Magistrate from being wasted in inquiry as it is primarily the duty of the Police to investigate. However, the Magistrate also has the power to take cognizance and take recourse to procedure under Section 202 of the Code and postpone the issue of process where the Magistrate is yet to determine existence of sufficient ground to proceed. In a third category of cases, the Court may not take cognizance or direct registration of an FIR, but direct preliminary inquiry in terms of the dictum in Lalita Kumari's case (supra).*

*28. In Priyanka Srivastava (supra), this Court highlighted abuse of the criminal process by the unprincipled and deviant litigants who do knock at the door of the criminal court for malevolent reasons. In the said case criminal action was initiated by those against whom the financial institutions had proceeded under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This was notwithstanding the protection given to the officers under Section 32 of the aforesaid Act against action taken in good faith. Reiterating Lalita Kumari (supra), it was observed that an action under Section 156(3) should not be entertained without the complainant taking recourse to sub-section (1) and (3) of Section 154 and compliances of these two Sections should be clearly spelt out in the application and necessary documents filed. To check malevolence and false assertions, the Court directed that every petition/application under Section 156(3) should be supported by an affidavit so that the person making an application should be conscious of it and to see that no false allegation is made. If the affidavit is found to be false, the*

*complainant will be liable for prosecution in accordance with the law. Vigilance is specially required in cases pertaining to fiscal sphere, matrimonial/family disputes, commercial offences, medical negligence cases, corruption cases, or cases where there is abnormal delay/laches. Thus, the Magistrate must be attentive and proceed with perspicacity to examine the allegation made and the nature of those allegations. He should not issue directions without proper application of mind which would be contrary to the object and purpose of the statute.*

*38. We were informed that the Magistrate, on remand, has passed an order under Section 156(3) directing registration of the FIR. He has misread the order and directions given by the High Court. In terms of the judgments of this Court, the Magistrate is required to examine, apply his judicious mind and then exercise discretion whether or not to issue directions under Section 156(3) or whether he should take cognizance and follow the procedure under Section 202. He can also direct a preliminary inquiry by the Police in terms of the law laid down by this Court in Lalita Kumari (supra)."*

10. Learned counsel for the respondent No.2 has also placed reliance in judgment of Hon'ble Supreme Court **in Manju Surana Vs. Sunil Arora and others reported in (2018) 3 SCR 696** the paragraph Nos. 33 and 51 are reads as under:

*" 33. We have examined the rival contentions and do find a divergence of opinion, which ought to be settled by a larger Bench. There is no doubt that even at the stage of 156(3), while directing an investigation, there has to be an application of mind by the Magistrate. Thus, it may not be an acceptable proposition to contend that there would be some consequences to follow were the Magistrate to act in a mechanical and mindless manner. That cannot be the test.*

*51. The matter is referred to a larger Bench along with SLP (CRL.) No.5838/2014 in terms of the judgment passed today."*

11. Learned Senior Counsel placed before this Court the order dated 16.04.2024 passed by Supreme Court **in Shamim Khan Vs. Debashish Chakrabarty** and others which reveals that the question which was referred to a larger bench on 27.03.2018, as per the judgment in "***Manju Surana Vs. Sunil Arora and Ors***." (2018) 5 SCC 557 deserves an early decision and for that reason, Hon'ble Apex Court directed the Registry to place these matters before the Chief Justice of India for appropriate orders.

12. In ***Lalita Kumari vs. Government of U.P., decided in Writ Petition (Criminal) No. 68 of 2008,*** vide judgement dated 12.11.2013, Constitutional Bench of Hon'ble Supreme Court concluded and issued directions as under:-

*"101) This can also be seen from the fact that Section 151 of the Code allows a police officer to arrest a person, even before the commission of a cognizable offence, in order to prevent the commission of that offence, if it cannot be prevented otherwise. Such preventive arrests can be valid for 24 hours. However, a Maharashtra State amendment to Section 151 allows the custody of a person in that State even for up to a period of 30 days (with the order of the Judicial Magistrate)*

*even before a cognizable offence is committed in order to prevent commission of such offence. Thus, the arrest of a person and registration of FIR are not directly and/or irreversibly linked and they are entirely different concepts operating under entirely different parameters. On the other hand, if a police officer misuses his power of arrest, he can be tried and punished under Section 166. "*

13. Thus, from perusal of the conclusion given by Hon'ble Apex Court in Lalita Kumari (supra), it is obvious that the scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are: a) Matrimonial disputes/ family disputes b) Commercial offences c) Medical negligence cases d) Corruption cases e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. However, the Hon'ble Apex Court clarified that these are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

14. In **Priyanka Srivastava and another Vs. State of U.P.** (supra) a Division Bench of Hon'ble Apex Court referred and placed reliance on a catena of judgements on issue of scope, purport and exercise of power available to a judicial magistrate having jurisdiction in the case under Section 156(3) Cr.P.C. In said case, the Hon'ble Court issued a caution to Magisterial Courts that while exercising powers under Section 156(3) Cr.P.C., the Magistrate should ensure that the applicant has not taken undue advantage in a criminal court to settle scores while filing application under Section 156(3) Cr.P.C. Paragraph Nos.30 and 31 are relevant in this regard and these are being reproduced hereinunder:-

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

*……31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be*

*supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR. "*

15. On a bare perusal of paragraph No.31 of the judgement in Priyanka Srivastava (supra), it is obvious that Hon'ble Supreme Court has enable the Magistrate on filing application under Section 156(3) Cr.P.C. before him to take steps to verify the nature of allegations of the case and preliminary inquiry in the cases pertaining to fiscal sphere, matrimonial/family disputes, commercial offences, medical negligence cases, corruption cases, or cases where there is abnormal delay/laches in initiating criminal prosecution have been permitted as has been stated in Lalita Kumari (supra). The Hon'ble Supreme Court observed in Priyanka Srivastava (supra) that the Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants to take adventurous steps with courts to bring the financial institutions on their knees. Thus, on a conjoint reading of Lalita Kumari (supra), Priayanka Srivastava and Another vs. State of UP and others (supra) cited on behalf of the respondent and 'XYZ' vs. State of MP and others (supra), it can be discerned that in Priayanka Srivastava (supra), Hon'ble Apex Court expressed need of directing a preliminary investigation by a magistrate while dealing with an application under Section 156(3) Cr.P.C., in the cases which are enumerated in Lalita Kumari vs. Government of UP (supra) while lodging the FIR under Section 156(3) Cr.P.C. In cases like present one, in which informant has levelled specific allegations of sexual assault and molestation against the accused/respondent No.2 directing preliminary investigation to police into allegations made by the victim in application under Section 156(3) Cr.P.C. and placing reliance on police report submitted in favour of the proposed accused is neither desirable nor lawful.

16. The approach of learned magistrate is not in consonance with the recent pronouncements of Hon'ble Apex

Court in 'XYZ' vs. State of MP and others in year 2022. the impugned order passed by learned trial court is found to be contrary to law and deserves to be set aside.

17. Accordingly, present criminal revision is **allowed** and the impugned order dated 23.6.2023, passed by learned Chief Judicial Magistrate, Hathras in Criminal Complaint Case No.849/12/2022, is hereby set aside and the matter is remanded to learned Chief Judicial Magistrate, Hathras to decide the same afresh after giving opportunity of hearing to the revisionist/de-facto complainant in the light of law propounded by the Hon'ble Apex Court as discussed hereinabove.

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**(2024) 10 ILRA 315**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

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

Writ-A No. 3561 of 2023

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

**Counsel for the Petitioner:**
Raghavendra Sharan Tiwari

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

**A. Civil Law - Constitution of India,1950-Article 226-The petitioner's candidature for the position of Police Constable in Uttar Pradesh was rejected by the Deputy Commissioner of Police, Varanasi citing a criminal case against him despite his subsequent acquittal-The case pertains to allegations u/s 498A,323,504,506 & ¾ D.P. Act-this rejection was challenged – Held, the court criticized the mechanical approach of rejecting candidates based solely on pending or resolved criminal cases, especially in light of societal issues such as false implications in section 498A-the court emphasized that trivial incidents or social disputes should not permanently disqualify a person from public employment if they demonstrate otherwise clean antecedents-the court quashed the order of rejection and issued a mandamus directing the Deputy Commissioner of Police to reconsider the case within three weeks.(Para 1 to 21)**

**The writ petition is allowed.** (E-6)

**List of Cases cited:**

1. Commr. Of Police & ors.Vs Sandeep Kumar (2011) 4 SCC 644

2. Ram Kumar Vs St. of U.P. & ors.(2011) 14 SCC 709

3. Avtar Singh Vs U.O.I. & ors.(2016) 8 SCC 471

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

1. This writ petition is directed against an order of the Deputy Commissioner of Police, Police Headquarters, Police Commissionerate, Varanasi dated 03.02.2023, rejecting the petitioner's case for appointment as a Constable in the Uttar Pradesh Police, on account of a criminal case lodged against him, of which he has been later on acquitted.

2. The facts giving rise to this petition would show that the petitioner staked his claim for the post of a Police Constable in the Uttar Pradesh Police. This was in the recruitment year 2013. The petitioner was selected for the post and the date for his training was scheduled as 02.12.2015. After the petitioner was selected, in the Police Verification Report Form (PVR), he

disclosed that a criminal case had been lodged against him, in which this Court had stayed proceedings. The Senior Superintendent of Police, Varanasi by his order dated 02.02.2016 rejected the petitioner's candidature on ground of pendency of that case. That order of the Senior S.P., Varanasi was challenged by the petitioner before this Court by means of Writ-A No.18399 of 2016, wherein an interim order dated 26.04.2016 was granted to the following effect:

*"In the meantime, the respondents are directed to send the petitioner for training and if he successfully completes his training, then in his appointment letter it would be mentioned that the appointment of the petitioner shall abide by the result of the writ petition."*

3. This order was challenged by the State by means of Special Appeal Defective No.130 of 2017. The Division Bench allowed the appeal vide judgment and order dated 27.02.2017 and set aside the interim order dated 26.04.2016. The learned Single Judge was required to decide the writ petition on merits. The writ petition came up before the learned Single Judge for hearing on 19.09.2022 and this Court vide judgment and order of that date set aside the order dated 02.02.2016 passed by the Senior Superintendent of Police, Varanasi, rejecting the petitioner's candidature, with a remit of the matter to the said Officer carrying a direction to take into account the subsequent acquittal that the petitioner had earned vide judgment and order dated 05.03.2019 passed by the learned Magistrate. The learned Judge directed the Senior S.P. that in taking his decision, he shall exercise his power independently, in accordance with law, but would consider the effect of the judgment of acquittal dated 05.03.2019 passed by the learned Magistrate in the criminal case.

4. When the matter again came up before the respondents, this time, represented by the Deputy Commissioner of Police, Police Headquarters, Police Commissionerate, Varanasi, he proceeded to reject the petitioner's candidature vide order dated 03.02.2023, holding the judgment of the Trial Court not to have cleansed or purged the petitioner of the lingering shadows of the crime, which in the view of the Deputy Commissioner of Police, he had committed but got away because of some kind of a compromise reached outside Court.

5. Aggrieved, this writ petition has been instituted.

6. A notice of motion was issued on 03.03.2023. Parties have exchanged a short counter and a short rejoinder, besides a counter affidavit on behalf of respondent Nos.2, 3, 5 and 6, to which a rejoinder too has been filed. The parties having exchanged pleadings, this petition was admitted to hearing on 20.09.2024, which proceeded forthwith and judgment was reserved.

7. Heard Mr. Raghavendra Sharan Tiwari, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel on behalf of the respondents.

8. A perusal of the impugned order shows that the Deputy Commissioner of Police has gone more by the fact that a crime was registered against the petitioner, wherein after investigation, the Police filed a charge-sheet. He has then opined that a perusal of the judgment passed by the

learned Magistrate, acquitting the petitioner, does not surely lend itself to a construction that the petitioner had not committed the crime. The reason for this conclusion is that the prosecution witnesses had turned hostile, the advantage of which went to the petitioner. There is a remark by the Deputy Commissioner of Police that in the social milieu of rural life, it is often seen that domestic disputes, leading to FIRs / NCRs, invite intervention of some respectable persons of the society, who mediate the dispute, resulting in a compromise between parties. This in turn causes the witness to go hostile. The impact of the hostility of witnesses in a Criminal Court is that the prosecution is not able to prove its case beyond reasonable doubt, leading to the accused being acquitted. It is then remarked that in the present case something of this kind has happened. It is then added that a person to be appointed to the Police must be a man of clean antecedents. A man with criminal antecedents, if appointed to the Police Force, would put a question mark on their image. It is more or less on the said reasoning that the Deputy Commissioner of Police has proceeded to pass the order impugned.

9. The short counter affidavit and the rejoinder are not of much relevance because the first respondent has disassociated itself from any issue in the matter, leaving it to the Police Authorities who passed the impugned order to answer the petitioner. In the counter affidavit, that has been filed on behalf of respondent Nos.2, 3, 5 and 6, the stand taken is that the Commissioner of Police, Varanasi directed verification of the petitioner and it was found that Crime No.359 of 2013, under Sections 498A, 323, 504, 506 IPC read with Section 3/4 of the Dowry Prohibition Act was registered against him. In this regard, the opinion of the District Magistrate, Varanasi was obtained and he gave opinion that the petitioner is not a fit person for appointment on a Constable's post in the Civil Police. As such, the then Senior Superintendent of Police, Varanasi passed the order dated 02.02.2016, rejecting the petitioner's candidature, since set aside by this Court. There is then a copious reference to Government Order No. 4694-II-B-321-1947 dated 28.04.1958, which has bearing upon matters of character verification of candidates, seeking employment under the State Government. It is again mentioned there that the Senior Superintendent of Police referred the matter to the District Magistrate in accordance with the said Government Order, who opined the petitioner not fit for appointment vide his letter dated 20.01.2023. The stand is that the District Magistrate had given legal opinion to the effect that the judgment of the learned Additional Chief Judicial Magistrate, acquitting the petitioner, was due to the witnesses hostility, leaving the Appointing Authority free to take his decision. It is then averred that the Appointing Authority, taking into consideration the fact that the petitioner had been acquitted due to witnesses turning hostile, held that he was not a person of good character, free from criminal antecedents and, therefore, unfit to be recruited to the Police Force. If appointed, he would bring the Police a bad name. It is more or less on these grounds, most of which figure in the impugned order, that the respondents have sought to support their action.

10. Upon hearing learned Counsel for the parties, we are of opinion that the purpose of all rules relating to recruitment

and the way the law about it has evolved, is to keep persons with criminal antecedents out of government service; not just the Police. It is for this reason that the Government Order of 1958 makes very elaborate provision in keeping with the time when it was issued to check on the criminal antecedents of a prospective appointee to government service. It would be apposite to extract the relevant part of the Government Order dated 28.04.1958:

3. (a) Every direct recruit to any service under the Uttar Pradesh Government will be required to produce:

(i) A certificate of conduct and character from the head of the educational institution where he last studied (if he went to such an institution).

(ii) Certificates of character from two persons. The appointing authority will lay down requirements as to kind of persons from whom it desires these certificates.

b) In cases of doubt, the appointing authority may either ask for further references, or may refer the case to the District Magistrate concerned. The District Magistrate may then make further enquiries as he considers necessary.

Note(a) A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account and if they involve on moral turpitude or association with crimes of violence or with a movement which has its object to overthrow by violent means of Government as by law now established in free India the mere conviction need not be regarded as disqualification. (Conviction of a person during his childhood should not necessarily operate as a bar to his entering Government service. The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service).

(b) While no person should be considered unfit for appointment solely because of his political opinions, care should be taken not to employ persons who are likely to be disloyal and to abuse the confidence placed in them by virtue of their appointment. Ordinarily, persons who are actively engaged in subversive activities including members of any organization the avowed object of which is to change the existing order of society by violent means should be considered unfit for appointment under Government. Participation in such activities at any time after attaining the age of 21 years and within three years of the date of enquiry should be considered as evidence that the person is still actively engaged in such activities unless in the interval there is positive evidence of change of attitude.

(c) Persons dismissed by the Central Government or by a State Government will also be deemed to be unfit for appointment to any service under this Government.

2(d) In the case of direct recruits to the State Services under the Uttar Pradesh Government includes requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above. The appointing authority shall refer all cases

simultaneously to Deputy Inspector General of Police, intelligence and the District Magistrate (of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry) giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District Magistrate at the instance of the appointing authority ask for an enquiry on the spot the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then reports his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate the District Magistrate may give the candidate a hearing before sending his report.

(e) In the case of direct recruits (who are lower in rank than that of a State Service Officer) of:

(i) the police (including ministerial staff of Police Officers).

(ii) the Secretariat.

(iii) the staff employed in the government factories,

(iv) power houses and dams.

besides requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above, the appointing authorities shall refer all cases simultaneously to the Deputy Inspector General, C.I.D. and the District Superintendent of Police (of the home district and of the district(s) where the candidate has resided for more than a year within five year of the date of the inquiry) giving full particulars about the candidate. The Superintendents of Police will send his report direct to the appointing authority if there is nothing adverse against the candidate. In cases where the report is unfavourable the Superintendent of Police will forward it to the District Magistrate who will send for the candidate concerned, give him a hearing and then, form his own opinion. All the necessary papers (the Superintendent of Police's report the candidate's statement and the District Magistrate's finding) will there after be sent to the appointing authority.

4. It will be seen that in cases of direct recruit to services other than those mentioned in paragraphs 3 (c) and 3 (d) above, verification shall not be necessary as a matter of routine except in cases of doubt when the procedure mentioned in paragraph 3 (b) shall be followed.

5. In the case of a candidate for services mentioned in paragraphs 3 (c) and 3 (d) above-

(i) if at the time of enquiry the candidate is residing in a locality situated outside Uttar Pradesh or if he has resided in such a locality at any time within five years of the date of enquiry for a period of one year or more it shall be the duty of the deputy Inspector General, C. I. D. to consult also the C. I. D. D. of the State concerned in which the locality is situated before making his verification report.

(ii) if the candidate was residing before partition in area now comprising

Pakistan the Deputy Inspector General, C. I. D. shall also make a reference to the Director of Intelligence Bureau, Ministry of Home Affairs, Government of India, in addition to the usual enquires as indicated above.

6. It has also been observed that where the District Magistrates are required to send the attestation forms they sometimes do not sign the forms themselves, Government consider it very desirable that the attestation forms should invariably be signed by the District Magistrates them selves in all such cases."

11. A careful perusal of the aforesaid Government Order shows that it was never considered trite principle that every conviction would lead to refusal of a certificate of good character. It would, if moral turpitude was involved or there was participation in a crime of violence or association with a movement which had for its object overthrow of the lawful Government established in free India by violent means. It would show the concern of those who issued the Government Order not to alienate from government service young men of the time, who had participated in movements to free India, and may be, resorted to violent means against the British Government. There are also provisions about safeguarding the interest of candidates for government service against childhood indiscretions that were committed by young men at a juvenile age, who later on reformed themselves. The reason why the District Magistrate was associated with the process of character verification was to secure, what was thought at the time, a non-partisan view about the antecedents of the person and not just a stereotyped opinion, stencil cut on the basis of registered criminal cases alone. The later Government Orders have not changed this position and the District Magistrate's opinion is still sought by the Police before verifying a candidate's character.

12. It is quite another matter, as it seems that the District Magistrates do not seem to have lived up to the trust reposed in them in that, that they too seem to refuse certification of good character, if they find a case registered against a candidate, or even a judgment of acquittal that makes them think that it was not honourable. Not every crime, irrespective of its triviality, or the fall out of a social malady, ought be regarded as a definitive, pre-determined disablement from government employment. A young man or a woman could for once be accused, rightly or wrongly, of indulging in some kind of a skirmish leading to the registration of a case, say for an offence punishable under Section 323, 504, 506 IPC. It may lead to a final report or a charge-sheet. If charge-sheeted, the trial may end in acquittal, or may be a conviction too for the young man or woman, who once committed the indiscretion. But, never again. Should such a person for all times to come be banished from the privilege of public employment, when otherwise the person possesses by all other standards sterling character. This, of course, would not hold true of a heinous offence committed by a man or woman, not a juvenile. Yet every indiscretion, as already remarked, must not become a lifetime disability for a person of good character and sound talent to be deprived of public employment. In this connection, reference may be made to **Commissioner of Police and others v. Sandeep Kumar, (2011) 4 SCC 644.** The facts in **Sandeep Kumar (supra)** can best be recapitulated in the words of their Lordships that say:

"2. The respondent herein, Sandeep Kumar applied for the post of Head Constable (Ministerial) in 1999. In the application form it was printed:

"12(a) Have you ever been arrested, prosecuted, kept under detention or bound down/fined, convicted by a court of law for any offence, debarred/disqualified by any Public Service Commission from appearing at its examination/selection or debarred from any examination, rusticated by any university or any other education authority/institution."

Against that column the respondent wrote: "No".

3. It is alleged that this is a false statement made by the respondent because he and some of his family members were involved in a criminal case being FIR No. 362 under Sections 325/34 IPC. This case was admittedly compromised on 18-1-1998 and the respondent and his family members were acquitted on 18-1-1998.

4. In response to the advertisement issued in January 1999 for filling up of certain posts of Head Constables (Ministerial), the respondent applied on 24-2-1999 but did not mention in his application form that he was involved in the aforesaid criminal case. The respondent qualified in all the tests for selection to the post of temporary Head Constable (Ministerial). On 3-4-2001 he filled the attestation form wherein for the first time he disclosed that he had been involved in a criminal case with his tenant which, later on, had been compromised in 1998 and he had been acquitted.

5. On 2-8-2001 a show-cause notice was issued to him asking the respondent to show cause why his candidature for the post should not be cancelled because he had concealed the fact of his involvement in the aforesaid criminal case and had made a wrong statement in his application form. The respondent submitted his reply on 17-8-2001 and an additional reply but the authorities were not satisfied with the same and on 29-5-2003 cancelled his candidature."

13. In upholding the relief granted by the High Court to the candidate seeking employment in the police in **Sandeep Kumar**, it was held by the Supreme Court:

"8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often be condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives.

11. As already observed above, youth often commits indiscretions, which are often condoned.

12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or

rape, and hence a more lenient view should be taken in the matter."

14. Of particular relevance in connection with the present case is the authority of the Supreme Court in **Ram Kumar v. State of U.P. and others, (2011) 14 SCC 709**. This case too related to police service, where the candidate seeking recruitment, had a criminal case in the background, of which he was acquitted. The facts in **Ram Kumar** (supra) again can best be gathered from the report of their Lordships' decision, which read:

"2. The facts very briefly are that pursuant to an advertisement issued by the State Government of U.P. on 19-11-2006, the appellant applied for the post of Constable and he submitted an affidavit dated 12-6-2006 to the recruiting authority in the pro forma of verification roll. In the affidavit dated 12-6-2006, he made various statements required for the purpose of recruitment and in Para 4 of the affidavit he stated that no criminal case was registered against him. He was selected and appointed as a male constable and deputed for training.

3. Thereafter, Jaswant Nagar Police Station, District Etawah, submitted a report dated 15-1-2007 stating that Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC was registered against the appellant and thereafter the criminal case was disposed of by the Additional Chief Judicial Magistrate, Etawah on 18-7-2002 and the appellant was acquitted by the court. Along with this report, a copy of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate was also enclosed.

4. The report dated 15-1-2007 of Jaswant Nagar Police Station, District Etawah, was sent to the Senior Superintendent of Police, Ghaziabad. By order dated 8-8-2007, the Senior Superintendent of Police, Ghaziabad, cancelled the order of selection of the appellant on the ground that he had submitted an affidavit stating wrong facts and concealing correct facts and his selection was irregular and illegal.

5. Aggrieved, the appellant filed Writ Petition No. 40674 of 2007 under Article 226 of the Constitution before the Allahabad High Court but the learned Single Judge dismissed the writ petition by his order dated 30-8-2007 [ WP (C) No. 40674 of 2007, order dated 30-8-2007 (All)] . The learned Single Judge held that since the appellant had furnished false information in his affidavit in the pro forma verification roll, his case is squarely covered by the judgment rendered by this Court in Kendriya Vidyalaya Sangathan v. Ram Ratan Yadav [(2003) 3 SCC 437 : 2003 SCC (L&S) 306] and that he was rightly terminated from service without any inquiry. The appellant challenged the order of the learned Single Judge in Special Appeal No. 924 of 2009 but the Division Bench of the High Court did not find any merit in the appeal and dismissed the same by the impugned order dated 31-8-2009 [ Special Appeal (Defective) No. 924 of 2009, order dated 31-8-2009 (All)]."

15. In **Ram Kumar**, it was held by the Supreme Court:

"9. We have carefully read the Government Order dated 28-4-1958 on the subject "Verification of the character and antecedents of government servants before their first appointment" and it is stated in the government order that the Governor has been pleased to lay down the following

instructions in supersession of all the previous orders:

"The rule regarding character of candidate for appointment under the State Government shall continue to be as follows:

The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be the duty of the appointing authority to satisfy itself on this point."

10. It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.

11. In the facts of the present case, we find that though Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18-7-2002 by the Additional Chief Judicial Magistrate, Etawah

12. On a reading of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate it would show that the sole witness examined before the court, PW 1, Mr Akhilesh Kumar, had deposed before the court that on 2-12-2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC. On these facts, it was not at all possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable.

13. The order dated 18-7-2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15-1-2007 of Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 8-8-2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the appellant was illegal and irregular because he did not furnish in his affidavit in the pro forma of verification roll that a criminal case has been registered against him.

14. As has been stated in the instructions in the Government Order dated 28-4-1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of

suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment."

16. A mechanical approach, which reads like a mathematical equation, always leading to disqualification from public employment for a person, against whom a criminal case is registered - whatever be the charge - even if he is acquitted - has to be eschewed. The nature of the case against the person has to be taken into consideration and the background in which the accusation came to be made. The degree of moral turpitude attaching to the crime given the prevailing circumstances in society, must also be borne in mind. Also, it cannot be discounted if the offence is one that has become commonplace in society by easy false implications. Of course, this Court does not wish to say that any generalization be made out of these propositions. At the same time, the Appointing Authority and the Advising District Magistrate must carefully glean through the evidence and circumstances that may point towards a patently false accusation, given the prevalent social conditions about certain offences. The background of the person and his general reputation must also be taken into account, particularly, when considering the effect of a judgment of acquittal entered in his favour by the Court that tried him.

17. This is particularly true, this Court must make it bold to say, when an offence punishable under Section 498-A IPC and the accompanying charges under Section 3/4 of the Dowry Prohibition Act are in issue. While the evil may be rife in society, it is equally true that there is abundant false implication. This is particularly so about the relatives of the husband, not so directly connected, with the sovoured matrimonial bond between the spouses. This includes the husbands, brothers, married sisters and the sister's husband, all of whom may unnecessarily suffer the stigma of being under the malevolent shadow of a criminal case, when there is not the slightest of criminality about any facet of there being.

18. The petitioner in this case is the brother of the prosecutrix's husband. The District Magistrate and the Deputy Commissioner of Police, as the Certifying and the Appointing Authority, have applied a thumb rule to the judgment of acquittal to conclude against the petitioner on the ground alone that the witnesses had turned hostile. This is not a case involving a heinous offence, where the accused - a possible desperado or a hardened criminal - might have suborned witnesses or won them over. The crime itself is a fall out of matrimonial maladjustment between the spouses. The corpus delicti in this case would not show any case or evidence of violence. A perusal of the judgment, even if the witnesses have been motivated by compromise not to support the prosecution, does in no way show the petitioner to be a person of any kind of criminal antecedents. Rather, this Court has no hesitation in saying that he appears to be the victim of an accident, because his brother and sister-in-law could not get along in matrimony. Going a step further, if one were to think that indeed the husband or the in-laws demanded dowry or mistreated the prosecutrix, there is nothing in the judgment, particularly, appearing against

the petitioner. It would be too much, in our opinion, to deprive a man otherwise of clean antecedents, of hard won public employment in the fashion the respondents have done. It is clearly arbitrary.

19. The remarks about the disciplined character of the Police Force are no doubt very valid in themselves, but the idea of this disciplined force cannot be exalted to a position, where all candidates, seeking recruitment to the Force, must be expected to be men, unscathed by the wear and tear of life or the accidents of contemporary society. We think that the Deputy Commissioner of Police as well as the Collector, who advised in the matter, applied an entirely unrealistic standard to the case in judging the petitioner unsuitable for recruitment to the Police. Both sides have time and again placed reliance upon the celebrated decision of the Supreme Court on the issue in **Avtar Singh v. Union of India and others, (2016) 8 SCC 471.** The principles propounded there by their Lordships have been summarized thus:

38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer

still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

20. Going by the principles enumerated in **Avtar Singh** *(supra)*, this Court must remark that here is not a case of any kind of suppression on the petitioner's part. He has truthfully disclosed his involvement in the case at the time he filled up the Police Verification Report Form, supported by an affidavit. The fact of disclosure is not disputed by the respondents too. The principles in **Avtar Singh**, also in the opinion of this Court, would not work to mechanically disqualify the petitioner in the manner the respondents have chosen to do.

21. In the result, this writ petition succeeds and is allowed. The impugned order dated 03.02.2023 passed by the Deputy Commissioner of Police, Police Headquarters, Police Commissionerate, Varanasi is hereby **quashed.** A mandamus is issued to the Deputy Commissioner of Police aforesaid to pass fresh orders within three weeks next of the receipt of a copy of this judgment, bearing in mind the guidance here.

22. There shall be no order as to costs

23. Let a copy of this judgment be communicated to the Deputy Commissioner of Police, Police Headquarters, Police Commissionerate,

Varanasi through the Chief Judicial Magistrate, Varanasi by the Registrar (Compliance).

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**(2024) 10 ILRA 327**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 17.10.2024**

**BEFORE**

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

Writ-A No. 3827 of 2023

**Wasi Ahmad ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Brijesh Kumar

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

**A. Service Law – UP Government Servants (Discipline & Appeal) Rules, 1999 – Rule 7 – GO dated 19.07.2022 & 16.08.2022 – Enquiry proceeding was kept pending for five years – Chargesheet issuing authority and punishing authority is the same person – Effect – Principle of Natural justice and Principle of Bias – 'One cannot be judge in his own case – Applicability – Held, failure to observe the principle that no person should adjudicate a dispute which he/she has dealt with in any capacity, creates an apprehension of bias – Entire disciplinary proceedings as well as the appeal has been decided contrary to the settled cannons of settled principles of natural justice and was clearly hit by the principles of bias . (Para 11 and 13)**

**B. Maxim '*nemo debet esse judex in propria causa*'– Meaning – No one can be a Judge in his own cause. (Para 10)**

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

**List of Cases cited:**

1. A.K. Kraipak & ors.. Vs U.O.I.: AIR 1970 SC 150

2. U.O.I.Vs Naseem Siddiqui; 2004 SCC OnLine MP 678

3. Rattan Lal Sharma Vs Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School & ors.; (1993) 4 SCC 10

4. A. U. Kureshi Vs High Court of Guj.; (2009) 11 SCC 84

5. Ashok Kumar Yadav Vs St. of Har.; (1985) 4 SCC 417

6. Mohd. Yunus Khan Vs St. of U.P.; (2010) 10 SCC 539

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

1…Heard Sri Brijesh Kumar, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. A challenge has been made to the appellate order dated 14.12.2022 passed by the opposite party no. 2- Sri Ajay Kumar Shukla in his capacity as Secretary Election Anubhag, Lucknow Uttar Pradesh rejecting the appeal of the petitioner.

3. It has been contended by counsel for the petitioner that while serving on the post of Senior Assistant in the Office of District Relation Officer/District Magistrate, Amethi departmental proceedings were initiated against the petitioner and he was placed under suspension on 01.09.2017. The Sub Divisional Officer, Gauriganj, District Amethi was appointed as Enquiry Officer. The said Enquiry Officer was, in the meanwhile, transferred and on 11.6.2018, the Deputy District Election Officer, Gauriganj was appointed as the Enquiry Officer. The Deputy District Election Officer, Gauriganj also could not conclude

the enquiry proceedings and he was replaced by the then Sub Divisional Officer, Gauriganj. A charge sheet was submitted on 29.6.2018 and the same was handed over to the petitioner on 24.7.2018. According to the petitioner, the charge-sheet did not contain any documents as mentioned therein and, accordingly, he had requested the respondents to supply all the documents, which were necessary in support of the charges levelled in the charge sheet.

4. The petitioner had replied to the charge sheet on 13.3.2020 denying the allegations levelled against him and the Enquiry Officer concluded enquiry on 1.12.2020 and submitted it to the Chief Election Officer, Lucknow. The petitioner was given a show cause notice containing a copy of the enquiry report on 5.1.2021. In his reply, the petitioner has stated that entire enquiry proceedings were conducted dehors the provisions of the U.P. Government Servants (Discipline & Appeal) Rules, 1999 (hereinafter referred to as the "Rules 1999), inasmuch as provisions of Rule 7 were also not followed. The disciplinary authority rejected the reply of the petitioner and passed an order for reduction in rank to the lowest pay of his original post of Junior Assistant and imposed recovery of Rs. 6,59,487/- from his salary as penalty. Apart from the above, the difference in the salary was also forfeited pertaining to the period, the petitioner was kept under suspension during the disciplinary proceedings.

5. Being aggrieved by the order of punishment dated 24.6.2022, the petitioner preferred an appeal on 15.9.2022 under Rule 11 of the Rule 1999. In his appeal, he had submitted that enquiry was conducted in gross violation of provisions contained in Rule 7 and in contravention of the Government Orders dated 19.7.2022 and 16.8.2022 and the petitioner was illegally continued under suspension for five years and only 50% of the salary was paid to him during the said proceedings. The petitioner being aggrieved by the order of the punishment, had preferred an appeal, which has been rejected by means of impugned order dated 14.12.2022.

6. The main contention raised by the petitioner with regard to the fact that:-

(a) Sri Ajay Kumar Shukla is the authority who had issued the charge sheet dated 5.1.2021 in his capacity as Chief Election Officer.

(b) The punishment order dated 24.6.2022 was also imposed by Sri Ajay Kumar Shukla in his capacity as Chief Election Officer, Election Department, Government of Uttar Pradesh.

(c) Lastly, Sri Ajay Kumar Shukla in his capacity as Secretary of Election Department, Government of Uttar Pradesh has rejected the appeal of the petitioner on 14.12.2022.

7. Counsel for the petitioner submitted that all canons of principles of natural justice have been violated in the conduct of enquiry against the petitioner apart from the fact that the respondents have acted malafide in keeping the enquiry proceedings pending for five years and the person, who had issued the charge sheet is the same persons, who proceeded to impose the punishment and rejected the appeal against the order of punishment. He submits that the respondents have totally ignored the provisions of principles of bias where it is clearly stated that a person

cannot be a judge of his own cause and the said provisions has been adequately detailed by the Hon'ble Supreme Court in the case of ***A.K. Kraipak and others Vs. Union of India: AIR 1970 SUPREME COURT 150 .*** In view of above, he has submitted that entire disciplinary proceedings are vitiated and, accordingly, are liable to be set aside.

8. Learned Standing Counsel has opposed the writ petition but could not dispute the aforesaid fact specially that Sri Ajay Kumar Shukla is the same authority, who had issued the charge sheet, passed the punishment order and also decided the appeal against the order of punishment.

9. In ***Union of India, Through Its Secretary, Ministry of Railway . Naseem Siddiqui, 2004 SCC OnLine MP 678***, the Court held that one of the fundamental principles of natural justice is that no man shall be a Judge in his own cause and this principle in turn consists of seven well-recognized facets, one of them being 'the adjudicator shall be impartial and free from bias' and 'if any one of these fundamental rules is breached, the inquiry will be vitiated'. It was also held that a domestic inquiry must be held by an unbiased person so that he can be impartial and objective in deciding the subject matter of the inquiry and should have an open mind till the inquiry is completed. IO should neither act with bias nor give an impression of bias.

10. In ***Rattan Lal Sharma Vs. managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School & Ors, (1993) 4 SCC 10*** , the Supreme Court held that no one can be a Judge in his own cause, which is a common law principle derived from the Latin maxim ***'nemo debet esse judex in propria causa'. In A. U. Kureshi v. High Court of Gujarat, (2009) 11 SCC 84***, the Supreme Court referring to the said principle held that failure to adhere to this principle creates an apprehension of bias on the part of the Judge and referred to the observations of Justice ***P.N. Bhagwati in Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417***, as follows:?

*One of the fundamental principles of our jurisprudence is that no man can be a judge in his own cause. The question is not whether the judge is actually biased or has in fact decided partially but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. If there is a reasonable likelihood of bias 'it is in accordance with natural justice and common sense that the judge likely to be so biased should be incapacitated from sitting'. The basic principle underlying this rule is that justice must not only be done but must also appear to be done."*

11. It was further held that failure to observe the principle that no person should adjudicate a dispute which he/she has dealt with in any capacity, creates an apprehension of bias on the part of the said person. Therefore, law requires that a person should not decide a case in which he is interested and the question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision. In ***Mohd. Yunus Khan v. State of Uttar Pradesh (2010) 10 SCC 539***, the Supreme Court observed that existence of an element of bias renders the entire disciplinary proceedings void and reiterated that apprehension of bias operates as a disqualification for a person

to act as an adjudicator. Anyone who has personal interest in the disciplinary proceedings must keep himself away from such proceedings else the entire proceeding will be rendered null and void. I may quote an observation of the Supreme Court, as follows:?

*"Principles of natural justice are to some minds burdensome but this price - a small price indeed - has to be paid if we desire a society governed by the rule of law".*

12. In this context, it would be relevant to refer to a few passages from the judgment of the Supreme Court in ***Rattan Lal Sharma (supra***), as follows:?

*"9. In Administrative Law, rules of natural justice are foundational and fundamental concepts and law is now well settled that the principles of natural justice are part of the legal and judicial procedures. On the question whether the principles of natural justice are also applicable to the administrative bodies, formerly, the law courts in England and India had taken a different view. It was held in Franklin v. Minister of Town and Country Planning [[1947] 2 All ER 289 (HL)] that the duty imposed on the minister was merely administrative and not being judicial or quasi-judicial, the principle of natural justice as applicable to the judicial or quasi-judicial authorities was not applicable and the only question which was required to be considered was whether the Minister had complied with the direction or not. Such view was also taken by the Indian courts and reference may be made to the decision of this Court in Kishan Chand Arora v. Commissioner of Police, Calcutta [(1961) 3 SCR 135 : AIR 1961 SC 705]. It was held that the compulsion of hearing before passing the order implied in the maxim 'audi alteram partem' applied only to judicial or quasi-judicial proceedings. Later on, the law courts in England and also in India including this Court have specifically held that the principle of natural justice is applicable also in administrative proceedings. In Breen v. Amalgamated Engineering Union [[1971] 1 All ER 1148 (CA)] Lord Denning emphasised that statutory body is required to act fairly in functions whether administrative or judicial or quasi-judicial. Lord Morris observed (as noted by this Court in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 285 :(1978) 2 SCR 621] decision) that:*

*"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed."*

13. In the light of the above, this Court is of the considered view that entire disciplinary proceedings as well as the appeal has been decided contrary to the settled cannons of settled principles of natural justice and was clearly hit by the principles of bias and entire disciplinary proceedings against the petitioner stands vitiated and are, accordingly, quashed.

14. Needles to say, it will be open for the respondents to conduct a fresh enquiry in accordance with law but considering the fact that a Senior Officer of the State Government had proceeded to

act in such an illegal and arbitrary manner where he had himself issued a charge sheet as well as the punishment order and apart from the above proceeded to decide the appeal again his own order has acted contrary to the canons of principle of natural justice and the conduct of such Senior Officer of the State Government is deprecated, as he is required to be well versed in the basic legal provisions pertaining to adherence to the principles of natural justice.

15. In all the three stages the requirement of law is that Inquiry Officer has to be different person then the Disciplinary Authority and Appellate Authority has to be superior authority who looks into the correctness of the order passed by the Disciplinary Authority.

16. It is well known that the errors if any in the inquiry are to be looked into by the Disciplinary Authority and the errors if any in the disciplinary proceedings are to be looked into by the Appellate Authority.

17. To give a fair hearing under reasonable opportunity, each of the three authorities have to be different individuals inasmuch as, no person can be adjudged in his own cause.

18. Sri Ajay Kumar Shukla, have acted himself in all the three capacities in the present case as lead to miscarriage of justice and accordingly the entire disciplinary proceedings stand vitiated. The entire exercise will have to be carried out afresh in accordance with law.

19. Needless to say that such miscarriage of justice results in huge loss to the State exchequer where huge time and energy will be spent by the senior officials in conduct of the said inquiry proceedings. Therefore, we expect that the persons conducting disciplinary proceedings are supposed to be well versed with the relevant rules and law applicable and only thereafter they should be permitted to conduct disciplinary proceedings.

20. In this regard the State Government should ensure that the persons who are entrusted with the task of conducting disciplinary proceedings have adequate knowledge in this regard.

21. The Senior Registrar of this Court is directed to send a copy of this order to the Chief Secretary, Government of U.P., Lucknow for necessary orders and compliance.

22. It is the matter of serious concern considering the manner in which Sri Ajay Kumar Shukla has acted in the present case. Accordingly, this Court is of the view that the paper pertaining to the present case be placed before the Chief Secretary for initiating suitable proceedings against the said officer and making him accountable for his conduct as is evident from the manner in which single handedly he has acted as the Enquiry Officer, Disciplinary Authority and the Appellate Authority.

23. Let the necessary order be passed by him within a period of six weeks and communicated to this Court through the Senior Registrar.

24. With the aforesaid directions, **the writ petition is allowed with the cost of Rs. 25,000/- to be paid by the State Government.**

25. It is also directed that the enquiry may be concluded against the petitioner within a period of three months form the date a certified copy of this order is produced before the competent authority.

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**(2024) 10 ILRA 332**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

**THE HON'BLE ROHIT RANJAN AGARWAL, J.**

Writ-A No. 12611 of 2024
Alongwith
Writ-A No. 11436 of 2024

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

**Counsel for the Petitioner:**
Vinod Kumar Singh

**Counsel for the Respondents:**
C.S.C., Sankalp Kumar, Sharad Chandra

**A. Service Law – UP Education Service Section Commission Act, 2023 – Establishment of an unified Commission – Object – Idea for setting up a unified commission was due to the difference in the level of efficiency related to selection by the above named Commission/Institution, as the quality of selection of teachers was affected, there was no uniformity in the process of selection, timely selection of teachers was not being done, and there were several vacant posts of teachers in various institutions, which adversely affected the education/training of the students/trainees in the St.. (Para 6)**

**B. Service Law – UP Education Service Section Commission Act, 2023 – Section 31 – Repeal and Saving clause – UP Secondary Education Service Selection Board Act, 1982 – C/M had already sent the requisition to the Board in the year 2019 – Sub-section (2) of Section 31, which is a non obstante clause, saves all those action taken and proceedings initiated under Act of 1982, and it shall be deemed to have been done or taken under the Act of 2023. The saving clause of Section 31 clearly saves all the action which were done pursuant to the Act of 1982 – Additional Director did not have the power to proceed with the single transfer taking benefit of the proviso to sub-rule (5) of Rule 28. (Para 18, 19 and 23)**

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

**List of Cases cited:**

1. Prashant Kumar Katiyar Vs St. of U.P. & ors..; 2013(1)ADJ 523 (FB)

2. Hari Pal Singh Vs St. of U.P. & ors..; 2016 (8) ADJ 622

3. Writ A No. 5106 of 2023; Mayashankar Vs St. of U.P. & ors.. decided on 13.08.2024

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. The question which needs adjudication by this Court, raised through these two petitions are as to "Whether once the requisition has been sent by the Committee of Management to the U.P. Secondary Education Service Selection Board *(hereinafter referred to as "the Board")* in terms of sub-rule (4) of Rule 11 of U.P. Secondary Education Services Selection Board Rules, 1998 *(hereinafter called as "Rules of 1998")* the post of Principal in an intermediate institution can be filled by way of transfer or the senior most teacher officiating as a Principal is to continue till a duly selected candidate is sent by the Board."

2. Further, upon the enactment of Uttar Pradesh Education Service Section

Commission Act, 2023 *(hereinafter called as "Act of 2023")* enforced on 17.08.2023 published in official gazette on 21.08.2023 and the Uttar Pradesh Education Service Selection Commission Rules, 2023 *(hereinafter called as "Rules of 2023")* having been enforced from 13.12.2023, whether anything done or action taken in pursuance of Rules of 1998 to continue or not.

3. The question relating to intimation of vacancy to the Board and cessation of power to fill up the vacancy by transfer was before the Full Bench in case of **Prashant Kumar Katiyar vs. State of U.P. and others 2013(1)ADJ 523 (FB).** The Full Bench found that once the procedure as per Rule 11(4) was followed and necessary intimation was given to the Board, there vest no power to fill up the vacancy by transfer. Relevant paras 38 to 41 of the judgment are extracted hereas under :

*"38. In our opinion if the management has determined the vacancy or the District Inspector of Schools has done it as per Rule 11(4) then in that event the alteration of such determination and intimation is controlled only to the extent as provided by sub-rule (3) of Rule 11 which authorises the management and the Inspector to notify any fresh vacancy that may have occurred after such notification. The management or the District Inspector of Schools therefore has not been empowered under the rules to reverse the determination and it can only add to it, subject to the contingency as contemplated under sub-rule (3) of Rule 11. This however does not take away the power to correct any arithmetical or calculative errors that may have crept into such determination.*

*39. To our mind, the function of the management and the District Inspector of Schools, therefore, has to follow this procedure and it is trite law that if a statute requires a thing to be done in a particular manner then it should be done in that manner alone and not otherwise. The procedure under the Act and Rules is mandatory and it has to be done in that manner alone. Reference be had to Para 20 and 23 of the division bench judgment in the case of Km. Poonam Vs. State of U.P. 2008 (3) AWC Pg. 2852 and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of U.P. 2011 (3) ADJ Pg. 340. The rules have been framed consciously by making a provision of limited alteration in the determination by adding to the vacancies on account of any fresh occurrence during the year of recruitment itself. Thus impliedly no power has been conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and Rules. The requisition to fill up the vacancies after having sent to the Board therefore becomes unalterable as the Board proceeds with the advertisement under Rule 12 by publishing the vacancy in accordance with reservation rules and in accordance with the subject-wise and group-wise vacancies against which appointments are to be made inviting applications from candidates giving their preference of the institution which choice has to be indicated by the candidate. At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the management can indulge into motivated manipulations which are not uncommon and give rise to*

*uncalled for controversies ending up in litigation.*

*40. We would also like to put a note of caution for the District Inspector of Schools while performing his duty of verification of the determination of vacancies. There can be cases where the management deliberately modifies a requirement in the name of extending benefit to some candidate/teacher who may be desirous of seeking promotion but otherwise not eligible within the year of recruitment. The management can withhold such information and it is at this stage that the District Inspector of Schools has to exercise his powers under sub-rule (4). The management at times may not cooperate with the District Inspector of Schools and therefore the District Inspector of Schools has to determine the vacancy as per the records available in his office and inform the Board. The responsibility therefore rests on the District Inspector of Schools to undertake this exercise by putting the management to clear notice during the year of recruitment itself. The District Inspector of Schools on coming to know of any additional vacancy if any that arises or the management having withheld such information is obliged to take action forthwith and disallow the management from taking any undue advantage in such situations. The vacancy that has occurred during the year of recruitment has to be mandatorily informed as noted hereinabove as no selection can be held except through the Board.*

*41. Once it is held that the power of the management and the District Inspector of Schools after determination, and intimation to the Board, to re-introduce any alteration is taken away then the management cannot be given the authority to adopt any other mode of recruitment."*

4. The matter again came up before Division Bench of this Court in case of **Hari Pal Singh Vs. State of U.P. and others, 2016 (8) ADJ 622** where the Court, relying upon the judgment of Full Bench rendered in **Prashant Kumar Katiyar (supra),** held that logic of initiation of selection process has to be distinguished in the present process of recruitment where the initiation of determination of vacancy is relevant for the purpose of choosing the mode of recruitment. The Court further held that once determination and notification process is either made or there is a failure on the part of management to do so, then the DIOS has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. Relevant paras 15, 16 and 17 of the judgment are extracted hereas under :

*"15. On a consideration of the ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra), what we find is that the learned Single Judge in the impugned decision has extracted paragraphs 36, 37 and 38 of the said judgment and thereafter, it crosses over to paragraph - 43 of the judgment and has then reconciled it with the judgments in the cases of Asha Singh vs. State of U.P. And others 2007 (3) UPLBEC 2497 and Smt. Amita Sinha vs. State of U.P. And others 2008 (4) ESC 2799 to conclude that the appointment through transfer would be legally permissible up to the stage of advertisement only.*

*16. We are unable to uphold the said view of the learned Single Judge, inasmuch as it appears that the learned*

*Single Judge has concluded that the process of direct recruitment starts with the issuance of advertisement and in such a situation, prior to that, the process of appointment by way of transfer would be permissible. The ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra) in paragraphs 38, 39, 40 and 41 has clearly concluded that the power of the Management or the District Inspector of Schools or even the authority which is to give effect to any transfer cannot proceed to adopt any other mode of recruitment after the steps taken for determination and notification as per Rule 11 of the 1998 Rules. It has also been held that the alteration of any such determination is not permissible and cannot be reversed. This has been reiterated in paragraph - 39 of the decision. Not only this in paragraph - 40, the Full Bench also obliges the Committee and the District Inspector of Schools to fulfill their obligations as per Rule 11 for determination and intimation of vacancies. The ratio therefore of the Full Bench read with the aforesaid Rules is clearly to the effect that the authorities, who are obliged to fill up the vacancies occurring in the year of recruitment, have to mandatorily perform their function of determining and notifying the vacancy. The failure by the Management or the District Inspector of Schools to act as per Rule 11 of the 1998 Rules would therefore not generate a right in favour of any person to seek transfer or even in the Committee of Management to defeat the very purpose of Rule 11 of determining or intimating the vacancies to the Selection Board for direct recruitment. The Committee of Management no doubt has the right to select the mode of recruitment when it has to be filled up directly in the event it has an option from a candidate seeking transfer. However, this conscious decision of the Committee of Management to adopt a particular mode has to be taken within the time frame as provided under Rule 11 of the 1998 Rules. If the Committee of Management is allowed to violate the time schedule, then it would be allowing the Committee of Management to have a free play to choose to determine it's mode of recruitment at any time which is not the purpose of the Rules. For that matter, under Sub-Rule (4) of Rule 11, the District Inspector of Schools is also obliged to take a decision as per the specifications of the time schedule provided in Rule 11 itself for the Committee as well as for the District Inspector of Schools. This compliance has to be adhered to keeping in view the year of recruitment and also the eligibility of the candidate including his qualification as on the first day of the year of recruitment which would be the 1st of July of the year in question. However, any failure on their part would not extend the right of the Management to any stage beyond that for adopting the mode of appointment by way of transfer. It is this aspect which has been insisted upon by the Full Bench in the paragraphs referred to here-in-above and which has not been noticed by the learned Single Judge in the impugned judgment. Consequently, we are of the opinion that the learned Singe Judge has not correctly appreciated the ratio of the Full Bench and has therefore arrived at an incorrect conclusion that the option is open up to the stage of advertisement for making appointment by way of transfer. The impugned judgment therefore cannot be sustained to that extent.*

*17. There is yet another aspect which deserves to be explained, namely, that the process of determination and intimation of vacancy for direct recruitment is a distinct process under Rule 11 of the*

*1998 Rules. The stage of advertisement comes after the request is received by the Board. The stage of determination and notification of the vacancy is therefore a unique methodology in this process of selection which is a stage prior to advertisement. It is for this reason that the judgment in the case of Prashant Kumar Katiyar (supra), as noted above, has held that this process should not be avoided which is mandatory. Consequently, the learned Single Judge did not appreciate this distinction while applying the principles of commencement of the date of selection process on the strength of the judgments of the Supreme Court and the ratio of the judgments in the cases of Asha Singh (supra) and Smt. Amita Sinha (supra) respectively. The said logic of the initiation of the selection process has to be distinguished in the present process of recruitment where the initiation of the determination of vacancy is relevant for the purpose of choosing the mode of recruitment under the 1998 Rules. Consequently, we are of the opinion that once the determination and the notification process is either made or there is a failure on the part of the Management to do so, then the District Inspector of Schools has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. This issue will therefore have to be taken into account by the Joint Director (Education) who would be under our orders in this appeal be now proceeding to examine the matter."*

5. U.P.Act No.15 was enacted on 21.08.2023 with the object to bring in uniformity, transparency and timeliness in the recruitment process of teachers as there were five various commission functioning in the State for selection of teachers, in the name of; (i) Uttar Pradesh Higher Education Service Commission for the selection of teachers of non-government aided colleges of the State; (ii) Uttar Pradesh Secondary Education Service Selection Board for the selection of teachers of non-government aided intermediate colleges; (iii) Concerned management committee for the selection of the posts of assistant teachers in aided junior high schools and affiliated primary schools; (iv) District Basic Education Officer and |Secretary, Basic Education Council for selection of assistant teachers in council schools; (v) Uttar Pradesh Subordinate Services Selection Commission for the selection of instructors in the Department of Vocational Education.

6. The idea for setting up a unified commission was due to the difference in the level of efficiency related to selection by the above named Commission/Institution, as the quality of selection of teachers was affected, there was no uniformity in the process of selection, timely selection of teachers was not being done, and there were several vacant posts of teachers in various institutions, which adversely affected the education/training of the students/trainees in the State. Apart from this, a lack of transparency is also evident in the selection process conducted by institution level selection committee which has resulted in litigations.

7. Section 31 is the repeal and saving clause, which is extracted hereasunder :

*"31. (1) The Uttar Pradesh Higher Education Services Commission Act, 1980, the Uttar Pradesh Secondary Education Service Selection Board Act,*

*1982 and the Uttar Pradesh Education Service Selection Commission, 2019 are hereby repealed.*

*(2) Notwithstanding such repeal, anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times.*

*(3) Save as otherwise provided in this Act, the repeal of the Acts referred to in sub-section (1) shall not have an adverse effect on the general application of section 6 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act no.1 of 1904) in relation the enforcement of provisions."*

8. Sub-section (2) of Section 31 is the saving clause which provides that anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times. Meaning thereby, that all the actions, which were done pursuant to Uttar Pradesh Secondary Education Service Selection Board Act, 1982 (hereinafter called as "Act of 1982") and the rules framed thereunder, were saved by sub-section (2) of Section 31.

9. Rules of 2023 was introduced on 13.12.2023. Sub-rule (2) of Rule 1 provides for commencement of Rules dated 13.12.2023, which came into force with effect from the date of its publication in the gazette. Rule 1 is extracted hereasunder :

*"1(1) These rules may be called the Uttar Pradesh Education Service Selection Commission Rules, 2023.*

*(2) They shall come into force with effect from the date of their publication in the Gazette."*

10. Chapter V of Rules of 2023 provides for procedure of recruitment. Rule 28 is of great importance and relates to determination of notification of vacancies. It is somewhat pari materia to Rule 11 of Rules of 1998. Sub-rule (1) of Rule 28 provides for determination of vacancies in accordance with sub-section (1) of Section 10 of Act of 1923 by the Appointing Authority or Management or Authorized Officer and the same has to be notified through Director (Higher Education) or the Director (Secondary Education), or the Director (Basic Education) or the Director (Training and Employment) or Director General of Atal Residential Schools, as the case may be, to the Commission in the manner hereafter provided.

11. Similarly, sub-rule (2) provides that vacancies for each category of post to be filled in by direct recruitment, including the vacancies that are likely to arise on the last day of the year of recruitment has to be sent by the Appointing Authority or Management or Authorized Officer by July 15 of the year of recruitment to the Authorized Officer.

12. Sub-rule (3) of the Rule 28 envisages a situation that if, after vacancies have been notified under sub-rule (2), any vacancy in the post of teacher or instructor occurs, the Appointing Authority or Management or Authorized Officer shall, within fifteen days of its occurrence, notify the Authorized Officer in accordance with the said sub-rule and the Authorized Officer shall within ten days of its receipt by him send it to the Commission.

13. Sub-rule (4) further provides that where for any year of recruitment, the Appointing Authority or Management or Authorized Officer does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Authorized Officer shall on the basis of the record in his office, determine the vacancies in such institution in accordance with sub-section (1) of section 10 and notify them to the Commission in the manner and by the date referred to in the said sub-rule. The explanation appended to it clarifies that vacancies notified to the Commission under the sub-rule shall be deemed to be notified by the Appointing Authority or Management or Authorized Officer of such institution. Thus, explanation appended to sub-rule (4) is a deeming clause.

14. Sub-rule (5) is of great importance as it provides that post of notified vacancies shall not be filled by a single transfer. However, proviso to sub-rule (5) provides that in special circumstances, if a single transfer is necessary, then it will be necessary to bring the said process to the notice of the Commission as soon as possible, and the vacancy as a result of single transfer will be considered included in the posts notified by the Director, and this vacancy will also be covered by the same selection process. After commencement of the selection process, no single transfer will be done under any circumstances.

15. Thus, it is clear from sub-rule (5) that notified vacancy is not to be filled by single transfer. However, in exceptional cases, when it is brought to the notice of Commission, the single transfer may be considered for the post which has been notified. It cannot be done in a routine manner.

16. Coming to the facts of the case, in Writ A No.12611 of 2024, the post of Principal became vacant on retirement of Principal on 31.03.2019. One Shri Ram Prakash Rathore, who was the senior most teacher, was appointed as an Officiating Principal with effect from 01.04.2019. The requisition for filling up the post of Principal was made online to the Board on 30.09.2019. Thereafter the Officiating Principal of the institution had also notified the DIOS through letter dated 29.05.2023. Thus, the vacancy was notified by the Management through online on 30.09.2019 and through Principal on 29.05.2023. Sri Ram Prakash Rathore attained the age of superannuation on 31.03.2024, thereafter Committee of Management had passed a resolution for appointing one Sri Khemkaran as Officiating Principal. The petitioner made a representation before the District Inspector of Schools, who accepted his claim on 26.04.2024 and appointed him as Officiating Principal and his signatures were attested. He assumed the charge on 27.04.2024 and since then he is working as Officiating Principal. By the order impugned dated 28.06.2024, 5th respondent has been transferred to the institution known as Late Gaya Prasad Verma Smarak Krishak Inter College, which is subject matter of dispute.

17. In Writ-A No.11436 of 2024 the post of Principal fell vacant on 30.06.2015 on the retirement of one Dharam Singh. There also stood vacancy of four Assistant Teachers alongwith that of Principal in the institution known as Sarvodaya Inter College, Nazirpur Sakeet, District Etah. Pursuant to the letter of District Inspector of Schools dated 15.7.2019, the Management notified the vacancy online to the Board. This fact was conveyed to the District Inspector of Schools through letter dated 22.07.2019.

One Shyam Singh being the senior-most teacher was officiating as Principal of the institution. He attained the age of superannuation on 31.03.2022. The petitioner, who was the senior-most teacher, on 01.04.2022 was given the charge of Officiating Principal and his signatures were attested on 16.05.2022, since then he is working as Officiating Principal in the institution. The Committee of Management has given consent for transfer of the 4th respondent to the institution as he is the relative of the Manager. By the order impugned, the 7th respondent has been transferred in the institution on 28.06.2024.

18. In both these writ petitions, the Committee of Management had already sent the requisition to the Board in the year 2019 when the vacancy occurred on the post of Principal. In both the cases, requisition was made online as well as intimation was also sent in writing to the District Inspector of Schools.

19. Sub-section (2) of Section 31, which is a non obstante clause, saves all those action taken and proceedings initiated under Act of 1982, and it shall be deemed to have been done or taken under the Act of 2023. The saving clause of Section 31 clearly saves all the action which were done pursuant to the Act of 1982.

20. Reliance placed by respondent's counsel upon the decision rendered by coordinate Bench in case of **Mayashankar vs. State of U.P. and 4 others, Writ-A No.5106 of 2023**, decided on 13.08.2024 does not help his cause. The Court found that once the Act of 1982 was repealed, the Rules of 1998 framed thereunder also stood repealed.

21. It seems that provisions of Section 31(2) was not brought to the notice of Court, which is the saving clause. Only Section 31(1) of Act of 2023 was placed before the Court, which has been considered in para 23 of the said judgment. Sub-section (2) of Section 31 clearly saves anything done or any action taken under the Act referred to in sub-section (1) shall be deemed to have been done or taken under this Act i.e. Act of 2023. Sub-section (2) starts with a non obstante clause. Meaning that it will prevail over the repealed provision as provided under sub-section (1) of Section 31.

22. Action taken or anything done under the Act of 1982 and the rules framed thereunder are thus saved by the instant saving clause. In both the writ petitions, the requisition was made as per sub-rule (4) of Rule 11 of Rules of 1998 by concerned Committee of Management online to the Board for making appointment to the post of Principal. Once such requisition was made, the post could not have been filled by transfer.

23. Shelter taken to proviso to sub-rule (5) of Rule 28 does not stand attracted as the action taken by Committee of Management is saved by Section 31(2) and the Additional Director did not have the power to proceed with the single transfer taking benefit of the proviso to sub-rule (5) of Rule 28.

24. Selection and appointment to the post of Principal could only be made by the Board or the Commission under the relevant provisions of the Act and it cannot be on the basis of the transfer relying upon the proviso to sub-rule (5) and Rule 28 of Rules of 2023.

25. The ratio laid down by the Full Bench in **Prashant Kumar Katiyar (supra)** as well as **Hari Pal Singh (supra)** still hold good as once the vacancy is notified to the Board, the same cannot be filled by transfer.

26. In view of the foregoing discussion, I am of the opinion that sub-section (2) of Section 31, which is the saving clause, protects the action of Committee of Management sending requisition to the Board for filling up the post of Principal complying the provisions of sub-rule (4) of Rule 11 of Rules of 1998, thus no transfer can be allowed to fill up the vacancy.

27. Thus, in view of the above, the question raised in both the writ petitions stands answered.

28. In the result, both the writ petitions succeed and are hereby allowed. The transfer orders dated 28.06.2024 (Annexure 1 to Writ-A No.12611 of 2024) and 28.06.2024 (Annexure 1 to Writ A No.11436 of 2024) are not sustainable in the eyes of law and the same are hereby set aside.

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**(2024) 10 ILRA 340**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.10.2024**

**BEFORE**

**THE HON'BLE VIKRAM D. CHAUHAN, J.**

Writ-C No. 15271 of 2009

**Smt. Maya Devi ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
R.P.S. Chauhan

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

**Estoppel-**The land i.e. arazi no. 297 been released from being surplus land-therefore all subsequent proceedings would be non est- the St. itself has taken an alternate land of original tenure holder as surplus land -the respondent authorities itself by order dated 27th April 1979 and 5th November 1981 has accepted that land of petitioner cannot be a surplus land-therefore, the respondent authorities are estopped from raising question on validity of sale of land at this stage- the lease granted in pursuance to the aforesaid declaration of surplus-no right would accrue in favour of respondent no. 8.

**W.P. allowed.** (E-9)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

In Re: Civil Misc. Impleadment Application No. 6 of 2018

1. Impleadment application has been filed on behalf of one Ms. Roopa claiming to be the subsequent purchaser of the property in question from the respondent nos. 6 and 7.

2. Sri Brijesh Kumar, advocate appearing for the impleader submits that the present impleadment application has been filed as the right of the impleader could be materially affected by the litigation pending before this Court.

3. Learned Standing Counsel and learned counsel for the petitioner has no objection to the same.

4. Accordingly, the application is allowed.

5. Learned counsel for the impleader is permitted to implead Ms. Roopa as respondent no. 8 in the array of parties during course of the day.

6. It is further submitted by learned counsel for the impleader that he does not propose to file counter affidavit as already an affidavit along with impleadment application has been filed which may be construed as his objection to the writ petition.

7. Learned counsel for the petitioner and learned Standing Counsel have no objection.

**In Re: Writ Petition**

1. Heard Sri R. P. Singh Chauhan, learned counsel for the petitioner, Sri Brijesh Kumar, learned counsel for the newly impleaded respondent no.8 and learned Standing Counsel for respondent nos.1 to 5.

2. It is submitted by learned counsel for petitioner that one Maktool Singh was the original tenure holder and was subjected to ceiling proceedings. Learned counsel for petitioner submits that petitioner has purchased arazi no. 297 situated at Village Nagla Shahpur, Pargana and Tehsil Jewar, District Gautam Budh Nagar on 13th May 1974. Thereafter the land of the original tenure holder-Maktool Singh was declared surplus on 1st May 1976.

3. Petitioner, initially had filed an application for amendment in the order declaring the land surplus, however, the same was rejected without giving any reasons on 3rd December 1977 against which the petitioner had filed an appeal before the IIIrd Additional District Judge, Bulandshahar, which was allowed by order dated 1st June 1978 and the matter was remanded back to prescribed authority for rehearing the application of petitioner. The authority concerned, in compliance of the order of appellate authority, thereafter has passed an order dated 27th April, 1979 whereby surplus land being arazi no.297 was withdrawn and new numbers being arazi nos.187 and 246 were exchanged as the aforesaid arazi nos.187 and 246 belonged to original tenure holder.

4. Thereafter, an amended parwana was issued on 31st May 1979, (which has been recorded in the order dated 5th November 1981 which is at page 51 of the paper book). Additional District Magistrate, Bulandshahar on 5th November 1981 had directed that the name of State from arazi no.297 be removed and the name of petitioner be included as per the amended parwana issued. The respondent-authorities did not comply with the amended parwana and name of petitioner was not recorded in revenue records. Thereafter, petitioner again filed an application before the Additional District Magistrate/Prescribed Authority for recording of name of petitioner in revenue records in respect of Arazi No.297. The aforesaid application of petitioner was decided by order dated 12th February 1996, whereby it has been specifically recorded that since the land in question was already leased to private respondents, therefore, the matter was referred under Section 27(2) of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (for short “Act, 1960”), to the Commissioner. The commissioner, in turn, by order dated 27th August, 1996 has rejected the application of petitioner on

ground of non-prosecution. The recall application was filed by petitioner to recall order dated 27th August 1996 and the same was also rejected by order dated 4th April 2003.

5. Learned counsel for petitioner submits that recall application which was rejected by order dated 4th April 2003 on ground that reference of application of petitioner under section 27 of Act, 1960 was time barred. It is submitted by counsel for petitioner that reference to Commissioner was itself illegal as under section 27 of Act, 1960, only a land, which has been declared as surplus, can be settled and the validity of settlement of the land can be considered and examined.

6. Learned counsel for the petitioner submits that once the land itself has been removed as being surplus land then the foundation itself has gone and it was therefore not permissible for the Additional District Magistrate to have referred the matter to higher authorities. It is further submitted that even otherwise, order passed by Commissioner under section 27 of the Act, 1960 is a nonest order as he has no jurisdiction in the matter. It is further submitted by learned counsel for petitioner that once amended parwana has been issued to authority for including the name of petitioner in Arazi no.297 then it was not open for authorities to have refused the name of petitioner being recorded after deleting name of the lease holders, as the lease was granted on the foundation of Arazi no.297 being a surplus land.

7. The question with regard to lease of land in question, being surplus land, is finally decided by order dated 27th April 1979 and 5th November 1981. Once the respondent-authorities have taken stand that the land in question being. Arazi no.297 was not a surplus land and in lieu thereof land of original tenure holder was declared as surplus land then foundation stands removed. The land not being surplus land petitioner is entitled to to get her name mutated in revenue records. Learned counsel for petitioner further submits that even otherwise mutation of name of private respondents in revenue records would not confer title and the same is only for purpose of revenue.

8. Learning standing counsel has opposed the writ petition and submitted that the land in question was sold by original tenure holder in the year 1974 that is after coming into force, the provisions of section 5(6) of the Act, 1960. He further submits that reference to Commissioner under section 27 of the Act, would be maintainable as the validity of settlement can only be examined under section 27 of the Act, 1960.

9. Learned counsel for newly added respondent no.8 submits that petitioner had purchased the property/Arazi, in question, from private respondent nos. 6 and 7. He does not dispute the fact that the respondent nos.6 and 7 were the lease holders of property/Arazi during currency of the surplus land. He further submits that the right of newly impleaded respondent no.8 shall be affected if the petitioner's name is permitted to be included in revenue record as the owner of property.

10. In the present case, it is to be seen that original tenure holder being one Maktool Singh had sold Arazi no.297 to petitioner on 13th May 1974, thereafter land of original tenure holder was declared

surplus on 1st May 1976. Application was filed by petitioner before the authorities that original tenure holder had given the option of land in the year 1977 that the land being Arazi no.297 be taken as surplus land. Although original tenure holder was not the owner of the aforesaid property on the date his land was declared as surplus land. The application of petitioner for correction of record was rejected at the first instance by order dated 3rd December 1977, however, that order was neither a speaking order nor there was any application of mind. Against the aforesaid order an appeal was preferred by petitioner before Additional District Judge, Bulandshahar which was allowed by order dated 1st June 1978 and matter was remanded back to the prescribed authority for decision afresh. After remand, prescribed authority by order dated 27th April 1979 has accepted the other two arazies being Arazi no. 187 and 246 of the original tenure holder Maktool Singh in lieu of surplus land being Arazi no.297, which was left out and amended parwana was issued on 31st May 1979 for recording the name of petitioner in Arazi no.297. The aforesaid details are provided in the order dated 5th November 1981 of the Additional District Magistrate, Bulandshahr, which is at page-51 of the paper-book.

11. By order dated 5th November 1981 the ceiling declaration in respect of Arazi no.297 was withdrawn by Additional District Magistrate and thereafter new Arazi nos. 187 and 246 were declared as surplus land. A direction was also issued for mutation of name of petitioner and for deletion of name of State in earlier surplus land being Arazi no.297 of petitioner.

12. The aforesaid mutation were not carried out, thereafter, an order was passed on 5th November 1981 by Sub Divisional Officer, Bulandshahr directing removal of name of lease holders from Arazi no. 297. When the aforesaid mutation proceeding were not carried on, the petitioner again approached the Additional District Magistrate/Prescribed Authority, Bulandshahr, who by order the dead 12th February 1996 referred the matter to Commissioner under section 27(2) of the Act, 1960, as the Additional District Magistrate was of the view that in respect of the settlement of land it is Commissioner, who empowered under law to examine the validity. The Commissioner, at the first instance, had rejected the reference on the ground of non-prosecution by order dated 27th August 1996, however, when the recall application was filed by the petitioner, the same was also rejected by order dated 4th February 2003.

13. According to order dated 4th February 2003, the reference was time barred as the same was hit by provisions of Section 27(6)A and 27(4) of the Imposition of Ceiling Act. It is to be seen that Section 27 of the Act empowers the authorities to settle the surplus land. Section 27 can only be invoked when the land in question is a surplus land. The examination of the settlement of land can be made by Commissioner under Section 27(4) of Act. It is to be seen that in the present case, arazi no. 297 was earlier declared as surplus land and was recorded in the name of the State, however, subsequently, by order dated 27th April 1979 and 5th November 1981 the land was withdrawn from being surplus land and alternate land of original tenure holder was taken as surplus land and in this respect amended parwana was issued on 31st May 1979. Once the land in question being arazi no. 297 itself was not having status of a surplus land then under Section

27 of the Act, proceedings would not be maintainable as proceedings under Section 27 of the Act, 1960 arises only in a case where the land is a surplus land and settlement of the land is subject matter of challenge or examination.

14. In the present case, the land i.e. arazi no. 297 itself has been released from being surplus land as such the foundation of land in question being surplus has been removed, therefore, all subsequent proceedings would be nonest in the eyes of law. The submission of learned Standing Counsel that transfer in favour of the petitioner is hit by the provisions of Section 5(6) of the Imposition of Ceiling Act also does not hold the field as the State itself has taken alternate land in lieu of land being Arazi no.297 and this fact has not been disputed by learned counsel for the respondents. Once the State itself has taken an alternate land of original tenure holder as surplus land then it would be highly unfair on the part of the State to argue that the transfer in question was against law. The State has already received alternate land which has been duly accepted. As per learned counsels for the parties, the alternate land has already been leased out to the third party, so the aforesaid argument at this stage cannot be permitted to be raised. The respondent-authorities itself by order dated 27th April 1979 and 5th November 1981 has accepted the stand of petitioner that land of petitioner cannot be a surplus land and alternate land has already been accepted, therefore, the respondent authorities are estopped under law in raising argument with regard to validity of sale of land at this stage. This issued should have be raised prior to passing of order dated 27th April 1979 & 5th November 1981 and prior to issuing of amended parwana. The State has not challenged the aforesaid orders of authorities before this Court and as such these orders have attained finality and therefore, law of acquiesce would apply and State cannot be permitted to agitate the aforesaid issues any further.

15. Insofar as, objection of respondent no. 8 is concerned, who has purchased Arazi no.297 from respondent nos. 6 and 7 on 16th March 2009, the aforesaid date of purchase is very significant as prior to aforesaid date on 27th April 1979 and 5th November 1981, status of Arazi no.297 was removed from surplus land and amended parwana was already issued on 31st May 1979, therefore, once the land itself was not surplus, the lease granted in pursuance to the aforesaid declaration of surplus, which has been subsequently modified would also fall and consequently no right would accrue in favour of respondent no. 8. The remedy lies for respondent no. 8 to claim the relief before the appropriate court against private respondent nos. 6 and 7 as their title to the property itself stood demolished by previous orders i.e. on 27th April 1979 and 5th November 1981 which the respondent nos. 6 and 7 till date has not been shown to have challenged.

16. In view of aforesaid facts and circumstances of case, the writ petition stands allowed. The impugned order dated 27th August 1996 passed by Additional Commissioner (Judicial) Meerut Region, Meerut, as well as, order dated 4th April 2003 passed by Commissioner, Meerut Region, Meerut in Case No. 02 of 1996-96) are hereby set aside. The respondent nos. 1 to 5 are hereby directed to forthwith mutate the name of the petitioner in Arazi no.297, Village Nagla Shahpur, Pargana and Tehsil Jewar, District Gautam Budh Nagar and

petitioner would be deemed to be the owner of the property in question. The aforesaid mutation proceedings would be carried out within 30 days from the date of production of certified copy of this order.

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**(2024) 10 ILRA 345**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 03.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Matter Under Article 227 No. 4747 of 2024

**Santram ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Rohit Kumar Singh, Akhilendra Kumar Goswami, Harshit Singh, Shweta Mishra

**Counsel for the Respondents:**
C.S.C., Pankaj Gupta, Pradeep Kumar Shukla

**Civil Law - Code of Civil Procedure,1908 - Order VII, Rule 11 C.P.C. - Rejection of plaint - A plaint can be rejected under Order VII, Rule 11 (a) C.P.C. where it does not disclose any cause of action. Under Order VII, Rule 11 (d) C.P.C., a plaint can be rejected where the suit appears *"from the statement in the plaint"* to be barred by any law. For rejecting a plaint under the aforesaid provisions, only the statements made in the plaint have to be examined. Statement in defence cannot be considered for deciding an application under Order VII, Rule 11 C.P.C. Plea regarding concealment of fact, discrepancy in the description of boundaries of the property, or necessary or proper party is not to be decided while deciding an application under Order VII, Rule 11 C.P.C. If any fact has been concealed, it can be brought to the court's notice by the defendants by filing a written statement and presenting evidence in support thereof, and the same can be adjudicated at the appropriate stage. It will not give rise to rejection of the plaint under Order VII, Rule 11 C.P.C. A mere discrepancy in the description of boundaries of the property in dispute, as given in the plaint and in the site plan, does not attract any of the clauses of Order VII, Rule 11 C.P.C. for rejection of the plaint. Plea that the Gaon Sabha is a necessary or proper party can be raised before the learned Trial court at the appropriate stage and need not be examined while deciding an application under Order VII, Rule 11 C.P.C. In the instant case, plaintiffs stated that they have purchased the suit property through a registered sale deed and that the defendant is creating hindrance in the enjoyment of the property. Court held that the plaint discloses a cause of action and cannot be rejected under Order VII, Rule 11 C.P.C. (Para 13, 14, 15)**

**Dismissed.** (E-5)

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

1. Heard Sri Ahilendra Kumar Goswami, the learned counsel for the petitioner, Sri Atul Kumar Mishra, the learned counsel for the State, Sri Pankaj Gupta, the learned counsel for the opposite party no.2/Gaon Sabha, Sri Indrajeet Shukla, the learned counsel for the opposite parties no.3 to 7 and perused the records.

2. By means of the instant petition under Article 227 of the Constitution of India the petitioner has challenged the validity of an order dated 09.12.2022, passed in Regular Suit No.1481 of 2003 by the learned Civil Judge, Junior Division/FTC-II, Gonda, whereby the petitioner's application under Order VII, Rule 11 C.P.C. for rejection of plaint has been rejected. The petitioner has also challenged the validity of a judgment and

order dated 04.09.2024, passed in Revision No.16 of 2023 by the learned Additional District Judge/F.T.C.-II, Gonda, whereby the revision has been dismissed and the order dated 09.12.2022, passed by the learned Civil Judge has been affirmed.

3. The opposite parties have filed the aforesaid suit for declaration and perpetual injunction claiming that they have purchased the property in dispute through a registered sale deed and the petitioner is creating hindrance in their enjoyment of the property in dispute.

4. The petitioner has filed a written statement in the suit and thereafter he filed an application under Order VII, Rule 11 C.P.C. for rejection of the plaint. The opposite parties have stated that the plaint does not disclose the title of the plaintiffs, the pleadings are incomplete and misleading and it has been filed without seeking permission of the court and under a conspiracy. Therefore, the plaint is liable to be rejected. The application was not supported by any affidavit.

5. The learned trial court found that in para 5 of the plaint the plaintiffs have submitted that the defendant is disputing the title of the plaintiffs and therefore a cause of action has accrued. Accordingly, the trial court rejected the application under Order VII, Rule 11 C.P.C.

6. In revision, the learned Additional District Judge also found that there is no ground for rejection of the plaint under Order VII, Rule 11 (a) (d) C.P.C. and there is no illegality in the order passed by the learned trial court.

7. Assailing the validity of the aforesaid orders, the learned counsel for the petitioner has submitted that there are major concealment of facts in the plaint. He submitted that there is some discrepancy in the boundaries of the land in dispute given in the plaint and those given in the site plan forming a part of the plaint.

8. The learned counsel for the petitioner lastly submitted that the dispute between the parties has already stands finally decided by a previous decree, which has been concealed while filing the suit.

9. Order VII, Rule 11 C.P.C. provides as follows:

> *"O.7. R.11. Rejection of plaint. -The plaint shall be rejected in the following cases:-*
>
> *(a)where it does not disclose a cause of action;*
>
> *(b)where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c)where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
>
> *(d)where the suit appears from the statement in the plaint to be barred by any law :*
>
> *(e)[where it is not filed in duplicate;] [Inserted by the Code of Civil Procedure (Amendment) Act, 1999, Section 17 (w.e.f. 1.7.2002).]*
>
> *(f)[ where the plaintiff fails to comply with the provisions of*

*rule 9:] [Substituted by the Code of Civil Procedure (Amendment) Act, 2002, Section 8, for sub-Clauses (f) and (g)(w.e.f. 1.7.2002)(as inserted by the Code of Civil Procedure (Amendment) Act, 1999, Section17 (w.e.f. 1.7.2002).]*

*[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.] [Added by the Code of Civil Procedure (Amendment) Act, 1976, Section 72 (w.e.f. 1.2.1977).]"*

10. A plaint can be rejected under Order VII, Rule 11 (a) C.P.C. where it does not disclose any cause of action. Under Order VII, Rule 11 (d) C.P.C. a plaint can be rejected where the suit appears from the statement in the plaint to be barred by any law. The plaintiffs have stated that they have purchased the suit property through a registered sale deed and that the defendant is creating hindrance in enjoyment of the property. Therefore, the plaint discloses a cause of action and it cannot be rejected under Order VII, Rule 11 C.P.C.

11. Under Order VII, Rule 11 (d) C.P.C. a plaint can be rejected where the suit appears "from the statement in the plaint" to be barred by any law. For rejecting a plaint under the aforesaid provisions merely statements made in the plaint have to be examined. The statement in defence cannot be examined for deciding an application under Order VII, Rule 11 C.P.C.

12. A mere discrepancy in the description of boundaries of the property in dispute given in the plaint and in the site plan, does not attract any of the clauses of Order VII, Rule 11 C.P.C. for rejection of plaint. Concealment of fact regarding any previous decree is also not a ground as while deciding an application under Order VII, Rule 11 C.P.C. the court is merely required to examine the averments made in the plaint itself.

13. In case any fact has been concealed, that can be brought to the court's notice by the defendants by filing a written statement and giving an evidence in support thereof, which will be decided at the appropriate stage. It will not give rise for rejection of the plaint under Order VII, Rule 11 C.P.C.

14. Although, it is stated in the application that the suit has wrongly been filed without seeking permission of the court, the learned counsel for the petitioner could not point out any provision of law under which the plaintiff was required to obtain leave of the court before filing a suit for declaration and permanent injunction.

15. The learned counsel for the petitioner has also submitted that gaon sabha has not been impleaded as a party in the suit. From the pleadings contained in the plaint it does not appear that the gaon sabha is a necessary party to the suit. In case the gaon sabha is a necessary or proper party, this plea can be raised before

the learned trial court at the appropriate stage and this plea is also not required to be examined while deciding an application under Order VII, Rule 11 C.P.C.

16. In view of the aforesaid discussions, this court is of the considered view that there is no illegality in the impugned orders dated 09.12.2022 and 04.09.2024. The petition lacks merit and the same is accordingly ***dismissed.***

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**(2024) 10 ILRA 348**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 04.10.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482 Nos. 5413 of 2024 & 2283 of 2023

**Jagdish Singh @ Jagdish Kumar Singh ...Applicant**

**Versus**

**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicant:**
Abhishek Singh, Gautam Singh Yadav

**Counsel for the Respondents:**
G.A.

**Departmental proceedings and Criminal Proceedings-**Four persons violated the lockdown guidelines and abused and assaulted the police personnel-FIR lodged-disciplinary proceeding also initiated- if an accused has been exonerated and held innocent in the disciplinary proceedings –then the criminal prosecution premised on the same/identical set of allegations cannot be permitted to continue-criminal proceedings set aside.

**Application allowed.** (E-9)

**List of Cases cited:**

1. P.S. Rajya Vs St. of Bihar, 1996 (9) SCC 1

2. Lokesh Kumar Jain Vs St. of Raj. (2013) 11 SCC 130

3. Radheshyam Kejriwal Vs St. of W.B. & anr.(2011) 3 SCC 581

4. Ashoo Surendranath Tewai (Supra) Vs Deputy Superintendent of Police, EOW, CBI & anr., reported in (2020) 9 SCC 636

5. J. Sekar @ Sekar Reddy Vs Directorate of Enforcement, reported in (2022) 7 SCC 370

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Subject matter of both the application(s) filed by the applicant namely Jagdish Singh @ Jagdish Kumar Singh relates to Case Crime/FIR No. 0271 of 2020, under Section 323, 504, 506, 307, 332, 353, 188, 270 IPC, P.S.- Kakori, District-Lucknow and as such the same are being decided by means of this common order/judgment.

2. Heard learned counsel for the applicant and Shri S.P. Tiwari, learned AGA for the State and perused the record.

3. APPLICATION U/S 482 No. 5413 of 2024 has been filed seeking following main relief:

> *"to set aside the impugned order dated 04.06.2024 passed by Learned Court Additional District and Session Judge, Court No. 21, Lucknow in the Session Case No. 1907 of 2023 bearing title "State of U.P. Vs Anoop Kumar Gupta & Others" arising out of charge sheet bearing No 01 dated 14.07.2020 submitted in F.I.R. No. 0271/2020, Under Section 323/504/506/307/332/353/188/270*

*IPC, P.S. Kakori, District Lucknow whereby the discharge application of the applicant/accused has been rejected (contained as Annexure No. 1 to theaccompanying affidavit to this application)and be further pleased to discharge the applicant/accused in the aforementioned case pending before the aforesaid court and also quash/set aside the entire proceedings pursuant to the aforesaid impugned order against the applicant/accused."*

4. APPLICATION U/S 482 No. 2283 of 2023 has been filed seeking following main relief:

*"to quash the impugned charge sheet bearing No 01 dated 14.07.2020 submitted in F.I.R. No. 0271/2020, Under Section 323/504/506/307/332/353/188/270 IPC, P.S. Kakori, District Lucknow along with the impugned cognizance and summoning order dated 15.11.2021 (contained as Annexure No. 1 and 2 respectively to the accompanying affidavit to this application) passed by the Learned Court of Additional Chief Judicial Magistrate, Court No. 30, District Lucknow and the entire proceedings arising out of it against the applicant/accused."*

5. Brief facts of the case, which are relevant for adjudication of the matter, in brief are as under:

As per FIR No. 0271 of 2020 dated 13.05.2020, on 13.05.2020, at about 20:50 hours the opposite party No.2/Sub Inspector Daya Shankar Singh (informant) was on routine checking in view of the lock-down imposed due to COVID-19 Pandemic and he was informed by the constable namely Man Singh that four persons were standing at a public place near "Joggers Park", Sitapur Bypass and on being asked the reasons of their presence they started hurling abuses and thereafter the informant reached on spot and tried to settle the issue but the efforts of the informant went in vain and all the four persons assaulted the three police men and two persons were apprehended and two managed to escape and upon inquiry the persons apprehended disclosed their particulars. In nutshell, four persons violated the lockdown guidelines and abused and assaulted the police personnel on 13.05.2020 at about 20:50 hours.

6. Considering the allegations levlled in the FIR, the same was lodged under Sections 323, 504, 506, 307, 332, 353, 188, 270 IPC against jagdish Singh S/o Ravindra Singh (applicant), Hardwari Prasad S/o Ishwardeen, Anil Kumar Gupta and one unknown person.

7. It would be apt to indicate that the applicant was released on bail in compliance of the order dated 01.06.2020 passed by the trial Court in Bail Application No. 1747 of 2020.

8. After completion of investigation, which includes reducing the statements of the witlessness of prosecution in writing, the charge-sheet no. 01 dated 14.07.2020 was filed against the

applicant/Jagdish Singh S/o Ravindra Singh, Haridwari Singh S/o Iswardeen. under under Sections 323, 504, 506, 307, 332, 353, 188, 270 IPC. Subsequently, the charge-sheet no. 02 dated 01.11.2020 was filed against Anoop Kumar Gupta S/o Krishna pal under Sections 323, 504, 506, 307, 332, 353, 188, 270 IPC. Thereafter the charge-sheet no. 03 dated 16.02.2021 was filed. By this charge-sheet the investigation was closed against Ajay Kumar whose name was surfaced during the investigation. Upon submission of charge-sheet(s) the cognizance was taken on 15.11.2021.

9. From the charge-sheet(s), indicated above, it is apparent that the prosecution to establish/prove its case before the trial court proposed to examine the following witnesses:

| Name | Type of evidence |
|---|---|
| S.I. Daya Shankar Singh | Informant |
| S.I. Vineet Singh | I.O. |
| Constable Hargovind Singh | Police Witness |
| Constable Man Singh | Victim |
| Constable Ratan Singh | eye-witness |
| Ram Singh alias Ramu | Formal witness |
| Manoj | Formal witness |
| Constable Mohit Kumar Singh | eye-witness |
| Constable Vivek Kumar Singh | eye-witness |

10. Before taking cognizance, vide order dated 15.11.2020 passed by the Magistrate, Registrar General of this Court, considering the facts pertaining to the FIR No. 0271 of 2020 dated 13.05.2020, Registrar General of this Court vide his order dated 19.06.2020 suspended the applicant and thereafter, departmental inquiry no. 16/2020 was initiated by issuing a charge-sheet dated 22.06.2020.

11. The charge-sheet dated 22.06.2020 issued for conducting disciplinary proceedings, being relevant, is extracted herein-under:-

*"You are hereby charged as follows:*

*On 13.05.2020 at 22:20, an F.I.R. under sections 323, 504, 506, 307, 332. 353. 188. 270 of the Indian Penal Code, Police Station Kakori, District Lucknow was registered against you alongwith three other persons on the fact that you alongwith three other persons were present in public place near Joggers Park, Sitapur Byepass Road, Lucknow and when police personnel enquired of you, during admist enforcement of preventive measure for COVID-19, about the reason of your presence at the spot, you and other three persons started hurling abuses, threatening and scuffling with the police personnels and strangulated police constable Sri Man Singh, who was doing his official duties and thus you were arrested and detained in judicial custody in crime number 0271 of 2020, under sections 323, 504,506,307, 332, 353, 188, 270 of the Indian Penal Code, Police Station: Kakori, District Lucknow.*

*Thus, your above conduct is unwarranted and unbecoming of a Government Official, you thus committed 'Misconduct' within the meaning of Rule 3 of U.P. Government Servants Conduct*

*Rules, 1956 and punishable under Rule 3 of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999.*

*The evidence which is proposed to be considered in support of the charge are as follows:*

*1 Photocopy of FIR Dated 13.05.2020, under sections 323. 504, 506. 307, 332, 353, 188, 270 of the Indian Penal Code, Police Station Kakori, District Lucknow.*

*2. Photocopy of Bail order dated 01.06.2020 passed by the Sessions Judge, Lucknow in Bail Application No. 1745 of 2020 (Jagdish Singh Vs. State of U.P) Case Crime No. 0271 of 2020, under sections 323, 504, 506, 307, 332, 353, 188, 270 of the Indian Penal Code, Police Station: Kakori, District Lucknow.*

*3. Photocopy of your application dated 10.06.2020 for permission to resume duties.*

*4. Photocopy of Suspension Order No. 538 / Establishment / High Court, Allahabad Dated June 19th, 2020.*

*Oral evidence proposed to be recorded during the course of enquiry is as follows:*

*1. Sri Daya Shankar Singh, Informant/Sub-Inspector of Police. Police Station: Kakori, District Lucknow.*

*2 Sri Man Singh, Police Constable, Police Station: Kakori, District Lucknow.*

*3. Sri Mohit Singh, Police Constable, Police Station: Kakori, Districi Lucknow.*

*4. Sri Vivek Kumar Singh, Police Constable, Police Station: Kakon, District Lucknow.*

*Note: Any other necessary evidence may be considered by the undersigned during the course of enquiry after due notice to you.*

*The copies of documentary evidence in support of the charge are attached herewith*

*You are hereby required to put in written statement of your defence in reply to the charge within 15 days. You are warned that if no such statement is received from you by the undersigned within the time allowed, it will be presumed that you have none to furnish, and if you fail to appear on the prescribed date, the enquiry shall proceed exparte and orders will be passed in your case accordingly.*

*You are further, required simultaneously to inform the undersigned, in writing whether you desire to be heard in person and in case you wish to examine or cross-examine any witness, to submit alongwith your written statement, their names and addresses together with a brief indication of the evidence which each such witness shall be expected to give.*

*If you desire or if the undersigned so directs, an oral enquiry shall be held in respect of such allegations as are not admitted. At that inquiry, such oral evidence will be recorded as the undersigned considers necessary and then you shall be entitled to cross-examine the witnesses."*

12. From a conjoint reading of the charge-sheet no. 1 dated 14.07.2020 submitted in the criminal case and the charge-sheet issued for conducting disciplinary proceedings i.e. departmental inquiry no. 16 of 2020, it is evident that the charges and the witnesses to prove the charges of both the charge-sheets are the same except formal witnesses to be examined before the trial Court. The name of witnesses of fact are as under:

*"1. Sri Daya Shankar Singh, Informant/Sub-Inspector of Police. Police Station: Kakori, District Lucknow (Informant).*

*2 Sri Man Singh, Police Constable, Police Station: Kakori, District Lucknow (Victim).*

*3. Sri Mohit Singh, Police Constable, Police Station: Kakori, Districi Lucknow (Eye-witness).*

*4. Sri Vivek Kumar Singh, Police Constable, Police Station: Kakon, District Lucknow (Eye-witness)."*

13. In the departmental enquiry, Sri Daya Shankar Singh (Informant) (E.W.1), Sub-Inspector of Police. Police Station - Kakori, District - Lucknow, stated as under:

Examination-in-chief

*"मैं सशपथ बयान करता हूँ कि–*

*वर्तमान समय में मैं बतौर उपनिरीक्षक काकोरी थाना में तैनात हूँ। घटना की तिथि दिनांक 13.5.2020 को मेरी तैनाती चौकी प्रभारी दुबग्गा थाना काकोरी के रुप में थी। घटना जागर्स पार्क चौराहा के परन्तु सीतापुर बाईपास रोड के किनारे की है। घटना की शुरुआत के समय मैं मौके पर नहीं था। जब मैं कास्टेबल मानसिंह की सूचना पर मौके पर पहुंचा, तो उस समय पी0आर0वी0 के दो सिपाही सर्व श्री मान सिंह, कास्टेबल एवं श्रीमान सिंह श्रीमान सिंह, कास्टेबल एवं श्री रतन सिंह कास्टेबल की श्री जगदीश कुमार सिंह हरद्वारी प्रसाद व दो अन्य लोगो से बाता कहनी है रही थी। श्री जगदीश कुमार सिंह व उनके साथ के अन्य तीन लोग पी0आर0वी0 के सिपाही व विभाग को गाली दे रहे थे। मैंने वहॉ पहुँच कर श्री जगदीश कुमार सिंह, जिन्होंने अपने को हाईकोर्ट में तैनात ए0आर0ओ0 बताया उनको समझाया और कहा कि आप प्रतिष्ठित पद पर तैनात है इस तरह का व्यवहार ना करें। ये चारो लोग गाली देते हुए छनदोइया चौराहें की तरफ चल दिये। उसी चौराहे पर पुलिस चौकी है। हम लोग भी पीछे–पीछे चल दिये ये चारो लोग छनदोइया चौराहे पर रुक गये। वहॉ भी गाली देने लगे। कास्टेबल मान सिंह को चारो लोग गिरा दिये तथा गला दबाने लगे और कहे कि जान से मार देगे। वहॉ पर चौराहे पर दो और सिपाही कास्टेबल श्री विवेक कुमार सिह एवं कास्टेबल श्री मोहित सिंह थे, जो दौड़कर वहॉ आ गये। इन्होने बीच बचाव किया। कास्टेबल मान सिंह की जान बचाया। जगदीश कुमार सिंह और हरद्वारी प्रसाद को पकड़ लिया गया। तथा दो लोग मौके का फायदा उठाकर भाग गये हम लोगों को चोटें आयी थी। हम लोगों ने डाक्टरी मुआयना सी0एस0सी0 काकोरी में कराया था। डाक्टरी रिपोर्ट ब्तपउपदंस ब्रेम में लगा हुआ है। यह घटना दिनांक 13.05.2020 की समय 20.50 की है। घटना की रिपोर्ट मैने स्वयं लिखायी थी। जब कास्टेबल मान सिंह द्वारा मुझे सूचना दी गयी तो मैं क्षेत्र में था। मेरी तैनाती पुलिस चौकी दुबग्गा में थी। पुलिस चौकी में कोई जी0डी0 अनुरक्षित नहीं है। मुझे याद नही है कि मेरी रवानगी थाने से किस जी0डी0 नम्बर से हुई।*

*जिरह जारी।*

*Cross-Examination*

*"सशपथ जिरह–*

*घटना का समय इस याद नही है। मैं घटना स्थल पर मैं कितने बजे पहुँचा इस समय याद नहीं है थ्ण्ण्त्ण् देखकर बता सकता हूँ। मुझको सूचना आरक्षी मान सिंह ने जरिये फोन सूचना दिया था। मान सिंह का फोन नम्बर याद नही है। का0 मान सिंह व का0 रतन सिंह पहले से क्षेत्र में मौजूद थे। यह दोनो पी.आर.वी. बाइक के सिपाही थे। उनके पास वायरलेस सेट नही था। मैं सूचना के लगभग 5–7 मिनट बाद मौके पर पहुँचा। मैने यह देखा कि आप चारो लोग सिपाही से*

*उलझ गये थे गाली गलौज कर रहे थे तथा वर्दी उतरवाने की धमकी दे रहे थे। मैने सिपाहियों से झगड़ा का कारण पूंछा था तथा फोन से बताया था। उसने यह बताया था कि आप चारो लोग सड़क के किनारे खड़े थे जब खड़े होने का कारण पूंछा तो चारो लोग गाली गलौज करने लगे। अनयास लाकडाऊन में खड़े थे। बाहर निकलना प्रतिबन्धित था। हमने आप लोगो को काफी समझाया लेकिन आप लोग नहीं माने और गाली गलौज करते हुए छन्दोइया चौराहा की तरफ चल दिये। अपनी बाइक से आप लोग चले थे। छन्दोइया चौराहे पर आप लोग खड़े थे जब हम लोग पहुंचे तब आप लोग फिर गाली देने लगे। वहॉ पर चारो लोगों ने का0 मान सिंह को गिरा दिया गया गला दबाया गया। वहीं चौराहे पर का0 मोहित सिंह व का0 विवेक कुमार सिंह जो वही पर चौराहे पर थे यह लोग भाग कर आये, हम चारों लोगों ने बमुश्किल उसको बचाया। मौके का फायदा उठाकर दो लोग भाग गये थे। हमने श्री जगदीश सिंह व श्री हरिद्वारी को गिरफ्तार कर लिया गया और मुकदमा मैने लिखवाया था। दो लोग जो भाग गये थे उनका नाम इन्ही लोगों ने बताया था। एक का नाम अनिल गुप्ता है और दूसरे का नहीं मालूम। चौकी पर कितने आदमी थे मुझे नही मालूम है। यह कहना गलत है कि उस समय चौकी पर 10 लोग थे। यह कहना गलत है कि हम लोग (पुलिस वाले) हथियार सहित सबके पास हथियार नही था। थ्त मैने रात 10.20 पर कायम करायी थी। घटना के समय व एफ0आई0आर0 ;थ्त्द्ध के मध्य जो समय लगा वह साधन तथा तहरीर लिखने के समय के कारण लगा। यह कहना गलत है कि मैं 5 लाख रुपया की मांग कर रहा था और यह कह रहा था कि यदि रुपया नहीं दिये तो नौकरी चली जायेगी और सब्जी बेचने के योग्य नहीं रहोगे।*

*यह कहना गलत है कि थ्त के समय मेडिकल नही हुआ था तथा बिना मेडिकल रिर्पोट के धारा 307 भा0द0सं0 में थ्त लिख दी गयी। मुझे यह याद नही है कि मेडिकल उस समय हुआ या अगले दिन हुआ था।*

*यह कहना गलत है कि मेरा पिता जी श्री रवीन्द्र सिंह जो खोया व्यापारी है उनको हफ्ते के लिए धमकाया था। यह कहना गलत है कि सचिवालय सेवा से वंचित करने के लिए मेरे खिलाफ एफ0आई0आर0 करायी गयी। मुझे यह नहीं पता कि आपका चयन सचिवालय सेवा में हो गया है। यह कहना गलत है कि धारा 307 भा0द0सं का अपराध इसलिए लगाया गया ताकि हमारी जमानत न हो और मा0 उच्चतम न्यायालय द्वारा गठित हाइलेवल कमेटी के दिशा निर्देश का लाभ न मिल सके। यह कहना गलत है कि मा0 उच्च न्यायालय द्वारा निर्गत पहचान पत्र जो मैने अपने जूते से रगड़ कर यह कहा कि यह उच्च न्यायालय की औकात है। आप लोगों द्वारा कान्सटेबिल से टोका–टोकी कर कार्य में बाधा पहुंचायी गयी। हमला करना व मारपीट करने के आधार पर धारा 332 व धारा 353 का अपराध लगाया गया है। यह सही है कि थ्त के अनुसार चार लोगा सड़क के किनारे बात कर रहे थे। यह धारा 144 ब्तचब का उल्लंघन नही था यह लाकडाउन के सम्यक कानून का उल्लंघन है। मैंने सिपाही से विवाद का कारण पूंछा था धारा 188 के साथ संज्ञेय अपराध समाहित है। धारा 188 भा0द0सं0 के अपराध मात्र के लिए थ्त नही हो सकती। कोरोना महामारी के कारण धारा 207 भा0द0सं0 का अपराध लगाया था। धारा 270 भा0द0सं0 छूआछूत व महामारी फैलाने के लिए लगता है। आपके कृत्य से महामारी फैल सकता था इसलिए धारा 270 भा0द0सं का अपराध लगाया गया।*

*कारित अपराध के आधार पर धारा लगायी गयी न कि मेडिकल के आधार पर यह मुझे संज्ञान में नही है कि इस प्रकरण से ..... किसी लूट या छेडछाड का कोई प्रकरण जांच में मेरे विरुद्ध चल रहा हो। यह कहना गलत है कि लूटपाट व महिला से छेडखानी की घटना से बचने के लिए बचाव स्वरुप यह मुकदमा आपके विरुद्ध दर्ज कराया गया है। यह जानकारी नही है कि इस घटना में आपको अपहति कारित हुई जिससे आंख में गम्भीर चोट लगी थी जिससे रोशनी में काफी कमी आ गयी थी। तथा नाक व मुह में चोट आयी थी। यह कहना गलत है कि पुलिस थाने में दबाव के कारण प्राथमिक स्वास्थ्य के डाक्टर ने जिन्होने मेरा चिकित्सय परीक्षण किया था उसने गम्भीर क्षतियां नही दर्शायी गयी केवल सामान्य चोटे ही दर्शायी गयी थी। मुझे इसके बारे में पता है चिकित्सक ने आपके नाक के चोट के बारे में व्यक्त की है कि यह गिरने से आयी है। यह कहना गलत है कि न्यायिक अभिरक्षा में प्रति प्रेषित किये जाने के पूर्व तक रात भर आपको लाकअप में थी। पर*

*गाली गलौज दिया गया और मारा पीटा गया। यह कहना गलत है कि थाने पर लॉकअप बन्दी के दौरान इन्काउन्टर की धमकी दी गयी हो। मोबाइल व पहचान पत्र में पुलिस वर्ग ने तोड दिया था। यह कहना गलत है कि मान सिंह के माथे पर कोई चोट नहीं थी। मुझे यह पता नही है कि मधु द्वारा छेडखानी व लूट तथा रुपये की मांग के विषय में कोई तहरीर पुलिस थाना या किसी अन्य जगह दिया गया। मुझे इस बात की जानकारी नही है यह कहना गलत है कि गलत एफ0आई0आर0 लिखायी गयी थी।"*

14. In the departmental enquiry, Constable Ratan Kumar Chaudhary (Eye-witness) (E.W.3), Police Constable, Dial 112, District - Unnao stated, as under:

*Examination-in-chief*

*"मैं सशपथ बयान करता हूँ कि मेरी ड्यूटी PRV Two Wheeler 3842 पर जनपद लखनऊ थाना क्षेत्र काकोरी मे चल रही थी। दिनांक 13.05.2020 को मेरी डयूटी Second Shift में अपराहन 2 से 10 बजे तक में थी। घटना करीब 8.30 बजे से 9.00 बजे बीच रात्रि की है। वास्तविक समय नहीं याद है। करीब 7.30 बजे से 8.00 बजे सायं के बची में आम्रपाली योजना से सूचना आयी थी। सूचना Attend कर वापस लौट रहा था। Joggers Park चौराहा पर Bike खडी कर दिये। वहॉ करीब 5–7 मिनट, मैं और कांस्टेबल मान सिंह रुके रहे। वही पर कुछ राहगीरो ने बताया कि सीतापुर बाईपास सड़क के किनारे चार नयी उम्र के लोग आने जाने वाले लोगो को परेशान कर रहे है, गाली–गलौज कर रहे है। हम सीतापुर बाईपास की तरफ बढ़े। छन्दोइया चौराहे से पहले ही सीतापुर बाईपास रोड के किनारे चारो लोग को पकड़ लिया गया।*

*जिरह–*

*आम्रपाली योजना में किसके यहा सूचना Attend करने गया था इसकी जानकारी नही है। करीब 8.30 बजे शाम को जागर्स पार्क चौराहे पर पहुचा था। राहगीरों का नाम पता नही है जिनसे सूचना मिली थी कि तीन–चार लोग खड़े है। मुझे खड़े होने का कारण पूछने का अधिकार है या नही यह मुझे जानकारी नहीं है। हम लोगो के पास हथियार नही होते है। यह कहना गलत है कि 6.30 बजे व जगदीश सिंह और उसकी पत्नी के साथ मारपीट व लूटपाट की। जब उन्होने थाने में शिकायत की बात कही तो फर्जी केस में फंसा दिया गया।*

*किसी राहगीर ने जगदीश सिंह और उनके साथियों द्वारा गाली गलौज देने के बारे में कोई F.I.R. नही की। राहगीरों का नाम भी नहीं नोट किया और ना ही उनका गवाह लिया गया। कांस्टेबल मान सिंह का मेडिकल 14.05.2020 को हुआ था। मैं भी साथ गया था। जगदीश सिंह का Medical हुआ था या नही यह जानकारी नहीं है। मारपीट दोनो पक्षों में हुई थी। चूंकि मैं सूचना देख रहा था इसलिए नहीं देख पाया कि किसने किसकों मारा। दया शंकर सिंह के पास हथियार था या नहीं था, यह मुझे ज्ञात नहीं है। किसने किसको पटका, यह मुझे ज्ञात नहीं है। मान सिंह का गला किसने दबाया था यह मुझे ज्ञात नहीं है क्योंकि मैं सूचना देख रहा था। हमको किसी ने नहीं मारा था। बीच–बचाव करने में अगर किसी का हाथ लग गया हो तो इस बारे में कुछ नहीं कह सकता। मुझे जानकारी नहीं है कि चौकी इन्चार्ज दयाशंकर सिंह के पास कोई हथियार, मौके पर था या नही। मैं थाने पर साथ में नहीं गया था। F.I.R. दयाशंकर सिंह ने करायी थी। मान सिंह ने F.I.R. क्यों नहीं करायी इसकी जानकारी मुझे नहीं है। मारपीट छन्दोइया चौराहे पर हुई। ना लूट हुई है और ना ही कोई बदतमीजी हुई है। यह कहना गलत है कि हम लोगो ने हाईकोर्ट के प्रति अपशब्द का प्रयोग किया और ना ही यह कहा कि यहॉ पर हमारी चलती है। इतनी धाराये लगाऊगां कि तीन साल तक जमानत नहीं होगी। हवालात में मारपीट में कौन–कौन शामिल था यह जानकारी मुझे नहीं है और ना ही यह मालूम है कि वहॉ पर कोई मारपीट हुई। यह कहना गलत है कि विद्युत विभाग में कार्यरत कर्मचारी हरद्वारी प्रसाद हमको बचा रहे थे इसलिए उनको भी मुल्जिम बना दिया। यह कहना गलत है कि चौकी पर काफी लोग बचाव करने आये थे लेकिन आप पुलिस के लोगो ने धमकी दी कि जो भी बचाव में आयेगा उसके खिलाफ केस दर्ज किया जायेगा। यह कहना गलत है कि मैं झूठा बयान दे रहा हू। जगदीश सिंह का I-C तक हम लोगो ने नहीं तोड़ा था। मुझे जानकारी नही है कि जगदीश सिंह*

*का I-Card तोड़कर थाने पर रखे रहे और कई दिन बाद वापस किये।"*

15. In the departmental enquiry, Sri Mohit Singh (Eye-witness) (E.W.4), Constable, Police Station - Kakori, District - Lucknow stated as under:

*Examination-in-chief*

*"मैं सशपथ बयान करता हूँ कि मैं लगभग दो वर्ष सात महीने से काकोरी थाने में बतौर कास्टेबल तैनात हू। दिनांक 13.05.2020 को हमारी ड्यूटी छन्दोइया चौराहे पर अपराहन 4.00 बजे रात्रि 12.00 बजे तक थी। मेरे साथ सिपाही विवेक सिंह भी तैनात थे। दिनांक 13.05.2020 को चौराहे के बगल में पुलिस बूथ के बाये तरफ कुछ आवाज आयी। आवाज सुनकर मै और मेरे साथ तैनात सिपाही वहॉ पहुॅचे। वहॉ मैने देखा कि दरोगा जी व एक सिपाही कांस्टेबल रतन सिंह, बीच बचाव कर रहे थे जमीन पर मान सिंह गिर गये थे। कुछ लोग उनको मार रहे थे। किसी का हाथ उनके गले पर था। चार लोग मार–पीट कर रहे थे। एक व्यक्ति जगदीश सिंह थे तथा बाकि का नाम याद नहीं है। फिर कहा कि एक कोई गुप्ता थे, बेगरिया के रहने वाले थे। एक नाम पता नही मालूम तथा एक अज्ञात थे। चारो लोग मार रहे थे। चारो लोग मान सिंह को मार रहे थे।*

*Cross Examination*

*घटना किस बात को लेकर शुरु हुई, यह मुझे ज्ञात नहीं है। मैं मुल्जिमान को पहले से पहचानता नहीं था। मैं यह नहीं कह सकता कि छन्दोइया चौराहे से पहले जगदीश सिह को मारे कि नहीं मारे। G.D. से हमारी रवानगी थाना क्षेत्र में 3.50 अपराहन पर हुई थी। फिर कहा कि 15.50 पर हुई थी। G.D. जिससे रवानगी हुई थी उसे मैने देखा था। G.D. में entry किस सिपाही ने किया था। यह मुझे पता नहीं है। रवानगी के समय Day Officer थाने का कौन था, यह मुझे पता नहीं है। अगर मान सिंह और रतन सिंह पहले मुल्जिमान को मारे थे तो यह मुझे पता नहीं है। मुल्जिमान को लेकर थाने पर मैं गया था और ऑफिस मे सुपुर्द किया था। तथा इसकी मदजतल G.D. में हुई थी। घटना रात्रि 8.30 बजे से रात्रि 9.00 बजे के बीच की है। थाने पर कितने बजे पहुचा यह याद नही है। जगदीश सिंह मेरे सामने नहीं मारे फिर कहा कि चारो लोग कांस्टेबल मान सिंह को चौराहे पर छन्दोइया चौराहे पर मारे थे। मुझे यह पता नही है कि जगदीश सिंह की डाक्टरी हुई है या नहीं। मुझे जानकारी नहीं है कि जगदीश सिंह का पहचान पत्र तोड़ दिया गया था। तलाशी में इनके पास कुछ नहीं मिला था। सन्तरी ने तलाशी लिया था। मैं और कांस्टेबल विवेक सिंह मौजूद थे। घटना स्थल छन्दोइया चौराहे के बगल में 50 मीटर की दूरी पर है। दरोगा जी के पास कौन सा हथियार था, यह मुझे ज्ञात नहीं है वहॉ अफरा–तफरी का माहौल था। जब हम पहुॅचे तो मान सिंह जमीन पर गिरे थे और ये चारो लोग मार रहे थे। हम लोग वहॉ पर बीच–बचाव कर रहे थे, मार–पीट नहीं कर रहे थे। जागर्स पार्क पर कोई घटना नही घटी थी। जगदीश सिंह और उनकी पत्नी के साथ कोई घटना नही घटी, बचाव में झूठा आरोप लगा रहे है। घटना स्थल पर गवाह जनता के लोग थे, मुझे यह जानकारी नही है कि कोई गवाह बनाया गया या नही। यह कहना गलत है कि पुलिस चौकी पर तथा ..... के बाद हवालात में हम लोगो ने जगदीश सिंह को मारा–पीटा और गाली गलौज किया। मान सिह को कोई शरीर पर खून नही दिखायी दे रहा था। मै मेडिकल के समय मान सिंह के साथ अस्पताल नहीं गया था। मान सिह को अंदरुनी चोट आयी थी यह मान सिंह बता रहे थे। अगर मान सिंह के शरीर पर अंदरुनी चोट का उल्लेख डाक्टर ना किया हो तो इसके बारे में मैं कुछ नहीं कह सकता। मान सिंह के शरीर पर कोई जानलेवा चोट थी या नही, भीड़ में मुझे यह ध्यान नही हैं। यह कहना गलत है कि मैं मौके पर मौजूद नहीं था, इसलिए मुझे पता नही कि मान सिंह को जानलेवा चोट आयी थी या नहीं। मैं छन्दोइया चौराहे की घटना के समय मौजूद था। जनता के किसी आदमी ने जगदीश सिह की शिकायत की थी या नही, यह दरोगा जी और मान सिंह जाने। यह कहना गलत है कि पुलिस वाले गाड़ी चेकिंग के नाम पर पैसा वसूल रहे थे जिससे विवाद हुआ यह कहना भी गलत है कि हम लोगों ने जगदीश सिंह की पत्नी के साथ छेड़खानी की व लूट–पाट किया। यह कहना गलत है कि जब जगदीश सिंह और उनकी पत्नी ने पुलिस वालों के खिलाफ शिकायत की बात की तो इन्हें फर्जी फंसा दिया गया। जगदीश सिंह की पत्नी को मैं नही जानता और ना ही ये मौके पर थी। यह घटना पूर्णतया फर्जी बना। हमारे*

*सामने दरोगा जी ने ना तो कोई धमकी दी ना ही हाईकोर्ट के बारे में कोई अपशब्द कहा और ना ही पहचान पत्र को तोड़ा ना ही पैरो से रगड़ा। यह कहना गलत है कि मौके पर पुलिस के लोग नशे में थे इसलिए जगदीश सिह की बात सुनने को कोई तैयार नही था। जगदीश सिंह और उनके साथी दारु के नशे में थे। ये लोग दारु पिये हुये थे तथा चिल्ला रहे थे। छन्दोइया चौराहे पर काफी लोगो की भीड़ लग गयी थी। मुझे यह पता नही है कि FIR में दारु पीने की बात लिखी है या नहीं। यदि FIR में दारु पीने की बात नहीं लिखी गयी तो कहा गलत है और फिर कहा कि ..... ..... कुछ नही कह सकते। अगर जगदीश सिंह दारु पीये थे तो मेडिकल में यह बात लिखी गयी होगी। G.D में यह बात लिखी गयी या नहीं, यह मुझे पता नहीं है।"*

16. In the departmental enquiry, Sri Vivek Kumar Singh (Eye-witness) (E.W.5), Constable, Police Station - Kakori, District - Lucknow, stated as under :-

*Examination-in-chief*

*"मैं सशपथ बयान करता हूँ कि मैं वर्ष 2019 से काकोरी थाने पर तैनात हूं। दिनांक 13.05.2020 को हमारी डयूटी छन्दोइया चौराहे पर थी। हमारी डयूटी 4.00 बजे दोपहर बाद से रात्रि 12 बजे तक थी। चौकी से लगभग 50 कदम दूर पर झगड़ा हो रहा था। झगड़ा कांस्टेबल मान सिह व कांस्टेबल रतन सिंह तथा S.I. दयाशंकर सिंह से हो रहा था। मैं और कांस्टेबल मोहित सिंह छन्दोइया चौराहे पर थे। कुछ लोग झगड़ा स्थल की तरफ जा रहे थे। हम लोग भी साथ में चल दिये। वहॉ पर मैने देखा कि मान सिंह को जमीन पर गिरा कर जगदीश सिह उनके उपर बैठे थे। कुल चार लोग थे और कह रहे थे आज इसको मार डालेगे। उस समय करीब नौ बजे का समय था। हम लोगो ने मिलकर छुडाया। दो लोगो को मौके पर पकड़ कर थाने ले गये बाकी दो लोग भाग गये। रिपोर्ट किसने लिखायी, यह हमें पता नही है। बाद में पता चला कि रिपोर्ट S.I. साहब ने लिखायी है।*

*Cross Examination*

*थाने से कितने बजे रवानगी हुई थी, यह मुझे पता नही है। मैं डयूटी पर सीधे अपने रुम से आया था। थाने पर जाकर वहॉ से रवानगी नही कराया था। 4.00 बजे छन्दोइया चौराहे पर पहुॅच गया था। चौराहे से 50–60 मीटर की दूरी पर झगड़ा हुआ था। झगड़े से पहले क्या विवाद हुआ था, मुझे पता नहीं है। मुझे पता नही है कि झगड़ा कैसे हो गया था। मेरे सामने झगड़े की शुरुआत नहीं हुई थी। अगर इस झगड़े के पूर्व पुलिस के लोग जगदीश सिंह व उनके साथियों को मारा पीटा हो तो इसकी जानकारी मुझे नहीं है। मुझे यह पता नहीं है कि जगदीश सिंह व उनकी पत्नी मोटर साइकिल से जा रहे थे, रोक कर उनकी गाड़ी चेक करने लगे और वाद–विवाद हो गया। मुझे पता नहीं है कि जगदीश सिंह की पत्नी के साथ कहॉ पर लूट–पाट व छेडखानी की घटना हुई।*

*मान सिह को कोई जाहिरा चोट नहीं थी। मान सिंह का मेडिकल हुआ या नही, यह मुझको पता नहीं है। कौन किसको पहले मारा, मैं नही बता सकता। क्योंकि मैं घटनास्थल पर घटना के दौरान पहुॅचा था। जगदीश सिह व उनके साथी निहत्थे थे। जगदीश सिह ने एक हाथ से गला दबाया था तथा एक हाथ से मार रहे थे। बाकी उनके तीन अन्य साथी जगदीश सिह का संरक्षण कर रहे थे और कह रहे थे कि इसको जान से खत्म कर दो। मुझे पता नही है कि दरोगा के पास पिस्टल था या नहीं।*

*प्रश्न आप मौके पर मौजूद नहीं थे इसलिए आपको पता नही कि दरोगा जी के पास पिस्टल था या नहीं?*

*उत्तर– क्योंकि घटना पहले से हो रही थी और काफी लोग एकत्र हो रहे थे हम लोग बाद में पहुॅचे इस वजह से हम पिस्टल का ध्यान नहीं कर पाये कि पिस्टल है या नहीं।*

*यह कहना गलत है कि मौके पर भीड़ नहीं थी यह भी कहना गलत है कि मैं मौके पर कुछ नहीं देख पाया।चौकी पर मुल्जिमान को नही ले जाया गया था। चौकी पर कोई मारपीट नहीं हुई थी। हमें यह जानकारी नहीं है कि दरोगा जी ने हाईकोर्ट का पहचान–पत्र तोड़ दिया था।मान सिंह को घटना के समय केवल जगदीश सिंह पकडे थे और उनके उपर बैठे थे। गाली सभी लोग दे रहे थे। मुझे पता नहीं कि मारपीट दोनो पक्षों में हो रही थी या नहीं।मैं घटना स्थल पर घटना के दौरान पहुचा था इसलिए मुझे पता नहीं कि दोनो पक्षों में पहले से मारपीट हो*

*रही थी या नहीं।हवालात में हुई मारपीट के बारे में कोई जानकारी नहीं है।यह कहना गलत है कि हाईकोर्ट के प्रति अपशब्द का प्रयोग कर रहे थे और गाली देरहे थे।"*

17. In the departmental enquiry, Sri Man Singh (Victim) (E.W.2), Constable, Police Station: Kakori, District Lucknow, stated as under :-

*Examination-in-chief*

*"मैं सशपथ बयान करता हूँ कि मैं PRV में march 2020 से तैनात हूं। PRV में थाने के हिसाब से duty लगती है। घटना दिनांक 13.05.2020 को मेरी duty थाना काकोरी क्षेत्र में थी। मैं दुबग्गा क्षेत्र में था। सूचना मैं आम्रपाली योजना से Attend कर वापस दुबग्गा आ रहा था। करीब 7.45 पर आम्रपाली योजना से वापस लौट रहा था। जैसे जागर्स पार्क चौराहे पर पहुँचा, वहां पर कुछ लोग थे। मेरे साथ कांस्टेबल रतन कुमार चौधरी PRV Two Wheeler पर थे। जागर्स चौराहे से छन्दोइया की तरफ चार लोग खड़े है, Public के लोगो ने यह भी बताया कि वो चारो लोग राहगीरो से गाली–गलौज कर रहे है तो हम दोनो च्त्ट के लोग मौके पर पहुँचे। वहा पर चार लोग जगदीश सिंह हरद्वारी प्रसाद, अनूप कुमार गुप्ता व एक अन्य जिनका नाम नही पता, खड़े थे। हम लोगो ने उससे खड़े होने का कारण पूछा। यह चारो लोग गाली–गलौज करने लगे और कहने लगे कि पुलिस की औकात बाल बराबर है और S.P. आकर सलामी ठोकते है। मैने उसके बाद चौकी इंचार्ज श्री दया शंकर सिंह को फोन किया। श्री दयाशंकर सिह मौके पर आ गये और इन लोगो को समझाने का प्रयास किया और कहा कि आप लोग घर जाइये और लड़ाई झगड़ा मत कीजिए परन्तु यह लोग नहीं माने।*

*चारो लोग आगे–आगे छन्दोइया की तरफ चल दिये और हम लोग पीछे–पीछे चल दिये। अचानक यह चारो लोग एक राय होकर हम तीनो पुलिस कर्मियों को मारने लगे और जान से मारने की धमकी देने लगे। जान से मारने की नियत से चारो लोग मुझको जमीन पर गिरा दिया और मेरा गला दबा दिये। छन्दोइया चौराहे पर ही कांस्टेबल मोहित व कांस्टेबल विवेक आ गये और सभी लोगो ने बीच बचाव किया। मौके के फायदा उठाकर दो लोग भाग गये एवं श्री जगदीश व हरिद्वारी प्रसाद को पकड़ लिया गया। इनके लोगो को पकड़ कर थाने ले गये और F.I.R. दर्ज करायी गयी।*

*Cross Examination*

*"आम्रपाली योजना से किसने सूचना दिया था यह याद नहीं है। Event No-0061 है। जागदीश चौराहे पर कितने बजे पहुँचा यह याद नहीं है। जागर्स चौराहे पर है। च्नइसपब के लोगो ने बताया था कि छन्दोइया चौराहे के पहले चार जवान लोग राहगीरो से गाली गलौज कर रहे है। किन लोगो ने हम लोगो को बताया, उनका नाम पता नहीं नोट किया गया और ना ही उनकी गवाही में नाम डाला गया है। राहगीर जिन लोगो को यह चारो लोग गाली गलौज दे रहे थे, वह लोग जब हम लोग वहॉ पहुँचे वहॉ नहीं थे। जिन राहगीरों को इन चारों लोगो ने गाली गलौज दिया था इनमें से किसी ने लिखित शिकायत थाना काकोरी या दुबग्गा चौकी पर नहीं की। साढ़े आठ–पौने नौ बजे के करीब इन लोगो (मुल्जिमान) के पास हम लोग पहुँच गये थे। वहॉ पर खड़े होने का कारण रतन कुमार चौधरी ने पूछा था, मैने नहीं पूछा था। जब मौके पर हम लोग पहुँचे तो इन चारो का अलावा वहॉ कोई और नहीं था। रतन कुमार चौधरी ने जब यह पूछा कि यहॉ क्यों खड़े हो तो उन लोगो ने कहा कि क्यो कपेजतइकर रहे ही। इतना याद नहीं है कि गाली किसने दी थी। चौकी इंचार्ज को मैने फोन किया था, कितने बजे किया था, यह याद नहीं है। चौकी इंचार्ज को कर आने में करीब चार छः मिनट लगा था। हमल दोनो पीआरवी के सिपाही के पास कोई हथियार नहीं था। चौकी इंचार्ज श्री दयाशंकर सिंह के पास सरकारी पिस्टल था। 2 पीएम से 10 पीएम के सिफ्ट में हमारी ड्यूटी थी।*

*कानून पुलिस को हथियार चलाने की अनुमति नहीं देता है। केवल दिखाने के लिए। फिर कहा कि मैं हथियार के बारे में नहीं बता सकता हथियार क्यों मिला हुआ है। दयाशंकर सिंह को किसने गाली दिया, यह याद नहीं है। यह नहीं पता कि किसने गाली दिया, किसन गाली नहीं दिया। समझाने के बाद यह लोग आगे चल दिये। यह नहीं पता कि अभियुक्तगण वहॉ से कितने बजे चले थे। हम लोग भी इनके पीछे चौकी की तरफ चल दिये। अचानक करीब चौकी से 50 मीटर*

*पहले यह चारो लोग रूक गये। चारो लोग रूक गये। चारो लोग फिर गाली गलौज करने लगे। दोनो पक्षो में मार पीट होने लगी। चारो लोग केवल हमी को पकड़े और हमारे साथ मौजूद कांस्टेबल रतन कुमार चौधरी व सब इन्सपेक्टर दयाशंकर सिंह जो हमारी मदद कर रहे थे और दो सिपाही वहॉ और आ गये ये जिनका नाम मैने उपर कांस्टेबल मोहित सिंह व कांस्टेबल विवेक सिंह बताया है जब हमको जमीन पर गिरा दिये थे तब उक्त दोनो सिपाही आये थे। जगदीश सिंह व उनके साथ के लोगो ने कोई हथियार नहीं प्रयोग किया था। मुझे याद नहीं है। कि मुझे किसने पटका था, यह भी याद नहीं है कि गला किसने दबाया था। पुलिस कि बाकी लोगों ने मिलकर मुझे छुड़ा लिया और मौके पर ही दो लोगो को पकड़ लिया और दो लोग मौके का फायदा उठाकर भाग गये मुझे यह याद नहीं है कि आम्रपाली योजना से सूचना कितने बजे मिली थी। इनके पास वायरलेस सेट नहीं था। mobile data terminal सेट था मैने दयाशंकर सिंह को सूचना एम डी टी से नहीं दिया था, मोबाइल फोन से दिया था। दयाशंकर सिंह का मोबाइल नम्बर याद नहीं है। हम इन लोगो के पास मौके पर गये। और खड़े होने का कारण पूछा। मेरा मेडिकल 14.05.2020 को लगभग 12 बजे दिन में हुआ, यह याद नहीं है कि एफ.आई.आर मेडिकल कराने के पहले दर्ज हो गयी थी। आई कार्ड किसने तोड़ा था यह मुझे पता नहीं है। मार पीट दोनो पक्षों से हुई थी। यह कहना गलत है कि हमने हाई कोर्ट में होने की औकात की बात की थी। हवालात में मार पीट होने की जानकारी से थाने नहीं गया था। मार पीट सबके साथ हुई थी। इसलिए एफ.आई.आर दयाशंकर सिंह ने करायी थी। मुझे यह जानकारी नहीं है कि जगदीश सिंह और उनकी पत्नी के साथ कोई घटना के सम्बन्ध में जॉच चल रही है। यह कहना गलत है कि जगदीश सिंह की पत्नी के साथ घटना हो रही थी और हरद्वारी सिंह जो ड्यूटी करके वापस लौट रहे थे उनके बीच बचाव करने पर उनको भी उल्टा फैसा दिया गया। यह कहना गलत है कि हमने फर्जी (गवाह में) रिपोर्ट तैयार करायी है (मेडिकल रिपोर्ट) मेडिकल रिपोर्ट में किसी चोट ना होने के बारे में कुछ नहीं कहना है। यह कहना गलत है कि उच्च अधिकारी के दबाव में मैने फर्जी मेडिकल रिपोर्ट बनवाया है। यह पता नहीं है कि किसने मेरा गला दबाया था।"*

18. Upon due consideration of the charges and the entire evidence available on record as also the report of the Inquiry Officer, the Registrar General of this Court, vide order dated 13.07.2021, exonerated the applicant from the charges levelled against him in the disciplinary proceedings/departmental inquiry no. 16 of 2020 and subsequently, the suspension of the applicant was revoked vide order dated 15.07.2021, which is evident from the order dated 15.07.2021, quoted herein-under:

> *"Under the orders of Learned Registrar General dated 13.07.2021, Shri Jagdish Kumar Singh, (Emp. No. 10834), Assistant Review Officer, High Court, Aliahabad is hereby exonerated from the charge levelled against him under Rule 3 U.P. Government Servants Conduct Rules, 1956. in Departmental Inquiry No. 16 of 2020.*
>
> *The suspension of Shri Jagdish Kumar Singh is hereby revoked immediately which shall be subject to outcome of criminal matter registered against him."*

19. It would be apt to indicate that this Court, vide order dated 02.12.2021, passed in **Writ Petition No. 25026 (M/B) of 2021 (Jagdish Singh vs. State of U.P. & Others)** directed re-investigation/further investigation in the matter. The operative portion of the order dated 02.12.2021 is extracted herein-under:-

> *"When we examine the complete facts of this case, what we find is that the F.I.R. in this case*

*has been lodged by the police personnel of Police Station Kakori, District Lucknow and investigation of the F.I.R. also appears to have been done by a police personnel belonging to the same police station.*

*In these circumstances, we provide that the competent officer of the police department of the Lucknow Rural shall ensure that investigation /further investigation of the F.I.R. is conducted by a police officer belonging to a police station other than the police station Kakori."*

20. In compliance of the order dated 02.12.2021 passed by this Court, Investigating Officer upon due investigation submitted his report on 16.04.2022 supporting the charge sheet No. 01 dated 14.07.2020.

21. The aforesaid writ petition was dismissed as infructuous vide order dated 24.08.2022 by this Court and to recall the order dated 24.08.2022 an application for recall was preferred which was also dismissed by this Court vide order dated 30.09.2022.

22. After the aforesaid, the applicant challenged the charge sheet No. 01 dated 14.07.2020 and entire criminal proceedings arsing out of FIR No. 0271 of 2020 dated 13.05.2020 before this Court by means of APPLICATION U/S 482 No. 2283 of 2023.

23. The applicant on 28.08.2023 also preferred the discharge application before Additional District Judge-VII, Lucknow, which was rejected vide order dated 04.06.2024 and thereafter, the APPLICATION U/S 482 No. 5413 of 2024 was filed.

24. Pressing the application(s) for the relief(s) sought, learned counsel for the applicant submitted that in the departmental proceedings in which witnesses namely Sri Daya Shankar Singh, Sri Man Singh, Sri Mohit Singh and Sri Vivek Kumar Singh were examined and all these witnesses would be examined before the trial Court as is apparent from the charge-sheet no. 01 dated 14.07.2020, the charge-sheet no. 02 dated 01.11.2020 and the charge-sheet no. 03 dated 16.02.2021 and after examining the statements of these witnesses in the departmental proceedings, which was initiated in the light of the allegations levelled in the FIR and the same is the basis of the pending criminal proceedings and allegations-charges in both the proceedings are same/identical, the applicant has already been exonerated by the order of the Registrar General of this Court vide order dated 13.07.2021 and subsequently his suspension was revoked vide order dated 15.07.2021 and accordingly, no useful purpose would be served in allowing the pending criminal proceedings to continue before the trial court.

25. It is stated that in the departmental proceedings, the person can be punished on the preponderance of the probability and in the criminal trial court, the prosecution has to establish/prove its case beyond doubt and when the applicant has already been exonerated on the same evidence to keep the proceedings continue before the trial Court would be futile exercise.

26. Shri S.P. Tiwari, learned AGA for the State opposed prayers sought in above noted applications.

27. Considered the aforesaid and perused the records.

28. The question which arises in the present matter for the consideration of this Court is that as to whether the proceedings arising out of Case Crime/FIR No. 0271 of 2020 which are premised on same/identical allegations on which disciplinary proceedings were initiated against the applicant are liable to be quashed once the applicant has been exonerated in the disciplinary proceedings.

29. In **P.S. Rajya Vs. State of Bihar, 1996 (9) SCC 1**, the appellant therein was exonerated of all the charges in the departmental inquiry conducted by the Central Vigilance Commission and the conclusion of exoneration was concurred by the Union Public Service Commission which led to the passing of final orders by the President in favour of the appellant. However, when the appellant moved the High Court under Section 482 CrPC for quashing the cognizance of the charge, the High Court dismissed the petition. The Hon'ble Apex Court formulated the following question in paragraph 3 of the judgment, which reads as under:

> *"3. The short question that arises for our consideration in this appeal is whether the respondent is justified in pursuing the prosecution against the appellant under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."...*

30. The Hon'ble Apex Court answered the above formulated question and quashed the criminal proceedings by observing as under:

> *"17. At the outset we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it. On these premises, if we proceed further then there is no difficulty in accepting the case of the appellant. For if the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the valuers one wonders what is there further to proceed against the appellant in criminal proceedings.....*
>
> XXXX XXXX XXXX XXXX
>
> *23. Even though all these facts including the Report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view that the issues raised had to be gone into in the*

*final proceedings and the Report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-19961 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs.*

31. In **Lokesh Kumar Jain Vs. State of Rajasthan (2013) 11 SCC 130**, an FIR was registered against the appellant therein alleging financial irregularities and misappropriation of Rs.4,39,617/-. In departmental proceedings with identical charges, the appellant was exonerated on the ground that it was not clear as to who received the payments for various transactions as the original and carbon copies of bills were not available. In the criminal case, the police submitted the final report to the Magistrate. The Magistrate based upon the statement of the complainant directed re-investigation. Thereafter, investigation remained pending for 12-13 years. The appellant being aggrieved approached the High Court under Section 482 CrPC seeking to quash the FIR lodged against him, but the High Court declined to quash the FIR. The Hon'ble Apex Court allowed the appeal and quashed the criminal proceedings. Relying upon the decision of P.S. Rajya (Supra), it was observed as under:

*"23. In P.S. Rajya v. State of Bihar, this Court noticed that the appellant was exonerated in the departmental proceeding in the light of report of the Central Vigilance Commission and concurred by the Union Public Service Commission. The criminal case was pending since long, in spite of the fact that the appellant was exonerated in the departmental proceeding for same charge.*

*24. Having regard to the aforesaid fact, this Court held that if the charges which are identical could not be established in the departmental proceedings, one wonders what is there further to proceed against the accused in criminal proceedings where standard of proof required to establish the guilt is far higher than the standard of proof required to establish the guilt in the departmental proceedings.*

*25. Having regard to the factual scenario, noted above, and for the reasons stated below, we are of the opinion that the present case of the appellant is one of the fit cases where the High Court should have exercised its power under Section 482 CrPC. It is not disputed by the respondent that the departmental proceeding was initiated against the appellant with regard to identical charges made in the FIR.....*

*xxxx xxxx xxxx xxxx*

*28. .....Considering the fact that delay in the present case is caused by the respondent, the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution*

*is thereby violated and as the appellant has already been exonerated in the departmental proceedings for identical charges, keeping the case pending against the appellant for investigation, is unwarranted, the FIR deserves to be quashed."*

32. In **Radheshyam Kejriwal vs. State of West Bengal and Anr. (2011) 3 SCC 581**, the question arose that after the exoneration of the appellant in the adjudication proceedings under the provisions of Foreign Exchange Regulation Act, whether criminal prosecution on the same set of facts and circumstances can be allowed to be continued. In this factual backdrop, the Hon'ble Apex Court observed as under:

*26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceedings cannot be said to be irrelevant in the criminal case. In B.N. Kashyap [AIR 1945 Lah 23] the Full Bench had not considered the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage of the said judgment: (AIR p. 27) I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41 of the Evidence Act, will have to be carefully examined.*

*XXXX XXXX XXXX XXXX*

*38.The ratio which can be culled out from these decisions can broadly be stated as follows:*

*(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*

*ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*

*(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*

*(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*

*(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;*

*(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground*

*and not on merit, prosecution may continue; and*

*(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.*

XXXX XXXX XXXX XXXX

39. *In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

33. In the case of **Ashoo Surendranath Tewai (Supra) Vs. Deputy Superintendent of Police, EOW, CBI and Another,** reported in **(2020) 9 SCC 636**, the Hon'ble Apex Court considered the report of Central Vigilance Commission (in short "C.V.C.") and the fact that in the criminal trial an order was passed on 27.06.2012 by the Special Judge, CBI (ACB), Pune, observing therein that in the facts of the case sanction under Section 197 Cr.P.C. is not required and the said order was affirmed by the High Court vide order dated 11.07.2014 and the Hon'ble Apex Court after taking note of the same and the principles related to standard of proof in departmental proceedings and criminal proceedings passed the final order and judgment dated 08.09.2020, whereby discharged the appellant from the offences under the penal code. Relevant portion of the report reads as under:

*"8. A number of judgments have held that the standard of proof in a departmental proceeding, being based on preponderance of probability is somewhat lower than the standard of proof in a criminal proceeding where the case has to be proved beyond reasonable doubt. In P.S. Rajya v. State of Bihar [P.S. Rajya v. State of Bihar, (1996) 9 SCC 1 : 1996 SCC (Cri) 897] , the question before the Court was posed as follows: (SCC pp. 2-3, para 3)*

*"3. The short question that arises for our consideration in this appeal is whether the respondent is justified in pursuing the prosecution against the appellant under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 notwithstanding the fact that on an identical charge the appellant was exonerated in the departmental proceedings in the light of a report submitted by the Central Vigilance Commission and concurred by the Union Public Service Commission."*

*9. This Court then went on to state: (P.S. Rajya case [P.S. Rajya v. State of Bihar, (1996) 9 SCC 1 : 1996 SCC (Cri) 897] , SCC p. 5, para 17)*

*"17. At the outset we may point out that the learned counsel*

*for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it."*

*10. This being the case, the Court then held: (P.S. Rajya case [P.S. Rajya v. State of Bihar, (1996) 9 SCC 1 : 1996 SCC (Cri) 897] , SCC p. 9, para 23)*

*"23. Even though all these facts including the report of the Central Vigilance Commission were brought to the notice of the High Court, unfortunately, the High Court took a view [Prabhu Saran Rajya v. State of Bihar, Criminal Miscellaneous No. 5212 of 1992, order dated 3-8-1993 (Pat)] that the issues raised had to be gone into in the final proceedings and the report of the Central Vigilance Commission, exonerating the appellant of the same charge in departmental proceedings would not conclude the criminal case against the appellant. We have already held that for the reasons given, on the peculiar facts of this case, the criminal proceedings initiated against the appellant cannot be pursued. Therefore, we do not agree with the view taken by the High Court as stated above. These are the reasons for our order dated 27-3-1996 for allowing the appeal and quashing the impugned criminal proceedings and giving consequential reliefs."*

*11. In Radheshyam Kejriwal v. State of W.B. [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] , this Court held as follows: (SCC pp. 594-96, paras 26, 29 & 31)*

*"26. We may observe that the standard of proof in a criminal case is much higher than that of the adjudication proceedings. The Enforcement Directorate has not been able to prove its case in the adjudication proceedings and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceedings cannot be said to be irrelevant in the criminal case. In B.N. Kashyap [B.N. Kashyap v. Crown, 1944 SCC OnLine Lah 46 : AIR 1945 Lah 23] the Full Bench had not considered the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage of the said judgment: (SCC OnLine Lah: AIR p. 27)*

*'... I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal*

*cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41 of the Evidence Act, will have to be carefully examined.'*

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*29. We do not have the slightest hesitation in accepting the broad submission of Mr Malhotra that the finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceedings cannot necessarily be held guilty in a criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case the entire burden to prove beyond all reasonable doubt lies on the prosecution.*

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*31. It is trite that the standard of proof required in criminal proceedings is higher than that required before the adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on the same set of facts can be allowed or not is the precise question which falls for determination in this case."*

*12. After referring to various judgments, this Court then culled out the ratio of those decisions in para 38 as follows: (Radheshyam Kejriwal case [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] , SCC p. 598)*

*"38. The ratio which can be culled out from these decisions can broadly be stated as follows:*

*(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*

*(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*

*(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*

*(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*

*(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;*

*(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*

*(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle*

*being the higher standard of proof in criminal cases."*

*13. It finally concluded: (Radheshyam Kejriwal case [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] , SCC p. 598, para 39)*

*"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

*14. From our point of view, para 38(vii) is important and if the High Court had bothered to apply this parameter, then on a reading of the CVC report on the same facts, the appellant should have been exonerated.*

*15. Applying the aforesaid judgments to the facts of this case, it is clear that in view of the detailed CVC order dated 22-12-2011, the chances of conviction in a criminal trial involving the same facts appear to be bleak. We, therefore, set aside the judgment [Ashoo Surendranath Tewari v. CBI, 2014 SCC OnLine Bom 5042] of the High Court and that of the Special Judge and discharge the appellant from the offences under the Penal Code.*

34. In the case of **J. Sekar Alias Sekar Reddy Vs. Directorate of Enforcement, reported in (2022) 7 SCC 370**, the Hon'ble Apex Court concluded as under:

*"20. In the said sequel of facts, the legal position as it emerges by the judgment of Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] is relevant in which this Court has culled out the ratio of the various other decisions pertaining to the issue involved and has observed as thus: (Ashoo Surendranath Tewari case [Ashoo Surendranath Tewari v. CBI, (2020) 9 SCC 636 : (2021) 1 SCC (Cri) 209] , SCC pp. 642-43, paras 12-14)*

*"12. After referring to various judgments, this Court then culled out the ratio of those decisions in para 38 as follows: (Radheshyam Kejriwal case [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] , SCC p. 598, para 12)*

*'38. The ratio which can be culled out from these decisions can broadly be stated as follows:*

*(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*

*(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*

*(iii) Adjudication proceedings and criminal*

*proceedings are independent in nature to each other;*

*(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*

*(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Criminal Procedure Code;*

*(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*

*(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.'*

*13. It finally concluded: (Radheshyam Kejriwal case [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] , SCC p. 598, para 39)*

*'39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court.'*

*14. From our point of view, para 38(vii) is important and if the High Court has bothered to apply this parameter, then on a reading of the CVC report on the same facts, the appellant should have been exonerated."*

*In Ashoo Surendranath Tewari [Ashoo Surendranath Tewari v. CBI, (2020) 9 SCC 636 : (2021) 1 SCC (Cri) 209] , this Court relied upon the judgment of Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] and set aside the judgment [Ashoo Surendranath Tewari v. Supt. of Police, 2014 SCC OnLine Bom 5042] of the High Court while exonerating the appellants because the chance of conviction in a criminal case in the same facts appeared to be bleak.*

*21. In view of the aforesaid legal position and on analysing the report of the IT Department and the reasoning given by CBI while submitting the final closure report in RC MA1 2016 A0040 and the order passed by the adjudicating authority, it is clear that for proceeds of crime, as defined under Section 2(1)(u) of PMLA, the property seized would be relevant and its possession with recovery and claim thereto must be innocent.*

*In the present case, the Schedule Offence has not been made out because of lack of evidence. The adjudicating authority, at the time of refusing to continue the order of attachment under PMLA, was of the opinion that the record regarding banks and its officials who may be involved, is not on record. Therefore, for lack of identity of the source of collected money, it could not be reasonably believed by the Deputy Director (ED) that the unaccounted money is connected with the commission of offence under PMLA. Simultaneously, the letter of the IT Department dated 16-5-2019 and the details as mentioned, makes it clear that for the currency seized, the tax is already paid, therefore, it is not the quantum earned and used for money laundering. In our opinion, even in cases of PMLA, the Court cannot proceed on the basis of preponderance of probabilities. On perusal of the Statement of Objects and Reasons specified in PMLA, it is the stringent law brought by Parliament to check money laundering. Thus, the allegation must be proved beyond reasonable doubt in the Court. Even otherwise, it is incumbent upon the Court to look into the allegation and the material collected in support thereto and to find out whether the prima facie offence is made out. Unless the allegations are substantiated by the authorities and proved against a person in the court of law, the person is innocent. In the said backdrop, the ratio of the judgment of Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] in paras 38(vi) and (vii) are aptly applicable in the facts of the present case.*

*22. As discussed above, looking to the facts of this case, it is clear by a detailed order of acceptance of the closure report of the Schedule Offence in RC MA1 2016 A0040 and the quashment of two FIRs by the High Court of the Schedule Offence and of the letter dated 16-5-2019 of the IT Department and also the observations made by the adjudicating authority in the order dated 25-2-2019, the evidence of continuation of offence in ECR CEZO 19/2016 is not sufficient. The Department itself is unable to collect any incriminating material and also not produced before this Court even after a lapse of 5½ years to prove its case beyond reasonable doubt. From the material collected by the Agency, they themselves are prima facie not satisfied that the offence under PMLA can be proved beyond reasonable doubt. The argument advanced by the learned ASG regarding pendency of the appeal against the order of adjudicating authority is also of no help because against the order of the appellate authority also, remedies are available. Thus, looking to the facts as discussed hereinabove and the ratio of the judgments of this Court in Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] and Ashoo Surendranath Tewari [Ashoo*

*Surendranath Tewari v. CBI, (2020) 9 SCC 636 : (2021) 1 SCC (Cri) 209] , the chance to prove the allegations even for the purpose of provisions of PMLA in the Court are bleak. Therefore, we are of the firm opinion that the chances to prove those allegations in the Court are very bleak. It is trite to say, till the allegations are proved, the appellant would be innocent. The High Court by the impugned order [J. Sekar v. SRS Mining, 2021 SCC OnLine Mad 13804] has recorded the finding without due consideration of the letter of the IT Department and other material in right perspective. Therefore, in our view, these findings of the High Court cannot be sustained.*

*23. Accordingly, we set aside the impugned order [J. Sekar v. SRS Mining, 2021 SCC OnLine Mad 13804] passed by the High Court. Consequently, this appeal is allowed. ECR CEZO 19/2016 including Complaint bearing No. 2 of 2017 stands quashed."*

35. The settled position from the above refereed judgments is to the effect that if an accused has been exonerated and held innocent in the disciplinary proceedings after the allegations have been found to be unsustainable, then the criminal prosecution premised on the same/identical set of allegations cannot be permitted to continue. The reasoning for this conclusion/proposition in the above referred judgments is that the standard of proceedings in criminal cases is beyond reasonable doubt which is far higher than preponderance of probability, the standard of proof required in disciplinary proceedings. When the same witnesses could not be able to prove/establish the same/identical charges in the disciplinary proceeding, there is no purpose in prosecuting the criminal proceedings where the standard of proof required to establish the guilt is far higher than the standard of proof required to establish the guilt in departmental proceedings.

36. The reliability and genuineness of the allegations against the applicant has already been tested during the disciplinary proceedings and the applicant has been exonerated after taking note of the statements of witnesses who would prove the same/identical charges in the criminal proceedings. Accordingly, this Court is of the view that in the present matter interference of this Court is required and criminal proceedings arising out of FIR No. 0271 of 2020 dated 13.05.2020, detailed above, are liable to be set aside in exercise of power under Section 482 Cr.P.C..

37. For the reasons aforesaid, both the application(s), indicated above, are allowed. Consequently, the entire proceedings arising out of FIR No. 0271 of 2020 dated 13.05.2020 are quashed/set aside qua the applicant/Jagdish Singh @ Jagdish Kumar Singh .

38. Office is directed to send a copy of this judgment to the trial Court forthwith.

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**(2024) 10 ILRA 369**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 25.10.2024**

**BEFORE**

**THE HON'BLE SAURABH LAVANIA, J.**

Application U/S 482 No. 5468 of 2024

**Suresh Kumar Shukla @ Suresh Dutt Shukla ...Applicant**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicant:**
Vimal Shukla

**Counsel for the Respondents:**
G.A.

**A. Criminal Law – Criminal Procedure Code,1973 – Section 216 – Deletion of charge – Permissibility – Expression 'alter' or 'add' is used – Scope – Six Principles laid down in the context of expression 'alter' – Held, already framed charge can be altered/ changed/ varied/ modified/ substituted/ amended at any stage before the judgment is pronounced. However, this should be done strictly in terms of law propounded by the Hon'ble Apex Court in this regard – High Court found no force in the submission that the charge cannot be deleted. (Para 34 and 35)**

**Application u/s 482 dismissed.** (E-1)

**List of Cases cited:**

1. Criminal Revision No. 1026 of 2023; Dev Narain Vs St. of U.P. & anr. decided on 20.07.2023

2. Sohan Lal & ors.. Vs St. of Raj.; (1990) 4 SCC 580

3. Vibhuti Narayan Chaubey @ Lala Chaubey & ors.. Vs St. of U.P.; 2002 SCC OnLine All 1413

4. Anant Prakash Sinha Vs St. of Har.; (2016) 6 SCC 105

5. Dr. Nallapareddy Sridhar Reddy Vs St. of Andhra Pradesh & ors..; (2020) 12 SCC 467

6. Selvi J. Jayalalitha Vs Additional Superintendent of Police; 2000 SCC OnLine Mad 1111

7. Tapti Bag Vs Patitpaban Ghosh; 1993 Crl.L.J. 3932

8. Ratilal Bhanji Mithani Vs St. of Maharashtra & ors..; (1979) 2 SCC 179

9. Dalbir Singh Vs St. of U.P.; (2004) 5 SCC 334

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant and Sri S.P.Tiwari and Sri Ajay Kumar Srivastava, learned counsel appearing for the State of U.P. and perused the record.

2. In view of proposition settled on the issue involved in this case as also the fact that two witnesses of prosecution have already been examined before the trial Court namely Arun Kumar/PW-1 and Dileep Kumar Tiwari/PW-2, notice to opposite party No.2 is dispensed with.

3. Present application has been filed by the applicant challenging the order dated 01.06.2024, whereby the Additional District and Session Judge, Court No.03, Gonda, (in short "trial Court"), deleted/changed the charge under Section 306 IPC, framed on 11.05.2023 and framed the charge under Section 302 IPC. Relevant portion of the order dated 01.06.2024 is extracted hereinunder:-

> *"अभियोजन का प्रार्थना पत्र 23 ख अन्तर्गत धारा-216 दं०प्र०सं० स्वीकार किया जाता है और धारा-306 भा०द०सं० का आरोप विलोपित कर धारा-302 भा०दं०सं० का आरोप विरचित किया जाना न्यायोचित है। अभियुक्त धारा-302 भा०दं०सं० के आरोप विचरण हेतु दिनांक-10-06-2024 को उपस्थित हो।"*

4. A perusal of order dated 01.06.2024, quoted above, indicates that based upon statement of Arun Kumar/PW-1 and Dlieep Kumar Tiwari/PW-2 an application was preferred on 23.04.2024 under Section 216 Cr.P.C. with the prayer that Charge under Section 306 IPC be altered to Section 302 IPC.

5. Brief facts of the case, which are relevant, as appears from the record, are to the effect that an FIR bearing No. 198 of 2022 was lodged on 01.09.2022 under Section 302 and 201 IPC. As per this FIR, the deceased is the wife of the applicant and the applicant is the main accused and he committed the alleged crime (murdered the deceased) on account of illicit relationship with her brother-in-law.

6. After lodging of FIR, the investigation was carried out and Investigating Officer, based upon the evidence collected during investigation, filed the Charge Sheet No.1, dated 08.01.2023 under Section 306 IPC.

7. Thereafter, the trial Court framed the charges under Section 306 IPC against the applicant and upon being denied by the applicant, he was put to trial. To establish its case, the prosecution examined namely Arun Kumar/PW-1 and Dileep Kumar Tiwari/PW-2 as witnesses of the fact. These witnesses in their statements before trial Court levelled specific allegations against the applicant, according to which, applicant had committed the crime.

8. Based upon the statements of Arun Kumar/PW-1 and Dileep Kumar Tiwari/PW-2 the application under Section 216 CrPC was preferred by the prosecution and the trial Court based upon the deposition/statement of PW-1 altered/framed the charge against the accused-applicant under Section 302 IPC.

9. Challenging the impugned order dated 01.06.2024, learned counsel for the applicant submitted that no doubt in exercise of power under Section 216 CrPC the trial Court can alter or add the charge at any stage of proceedings including while dictating the final judgment, but in exercise of power under Section 216 CrPC, the trial Court can't delete the charge. The charge can only be altered or added. In the instant case, the charge under Section 306 IPC, earlier framed, has been deleted and the charge under Section 302 IPC has been framed. As such, interference of this Court is required in the order dated 01.06.2024.

10. Learned counsel for the applicant in support of his contention placed reliance on the judgment dated 20.07.2023 passed by this Court in ***Criminal Revision No. 1026 of 2023 (Dev Narain vs. State of U.P. and Another).***

11. Learned AGA opposed the prayer, sought in the instant application. He stated that order of trial Court is not liable to be interfered with on the sole ground pressed that it has no power to delete the Charge. It is for the reason that after order dated 01.06.2024 the trial would proceed against the applicant under Section 302 IPC and it is trite law that after appreciation of evidence if it is found that an offence under Section 302 IPC is not made out and that the offence under Section 306 IPC is made out then in that event an accused can be convicted for offence under Section 306 IPC and if on appreciation of evidence no offence is made out, the accused can be acquitted. He also stated that this ground would be sustainable if on account of deletion of charge an accused would be discharged and trial comes to an end.

12. Considered the aforesaid and perused the record.

13. In order to decide the present matter, it would be appropriate to take note of some relevant provision(s) and the

pronouncement(s) related to the subject matter of the present case.

*14. Section 216 CrPC is extracted hereinunder:-*

***"216. Court may alter charge.—***

*(1) Any Court may alter or add to any charge at any time before judgment is pronounced.*

*(2) Every such alteration or addition shall be read and explained to the accused.*

*(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*

*(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.*

*(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."*

15. Section 222 CrPC, reads as under:-

***"222. When offence proved included in offence charged**.—(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.*

*(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.*

*(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged. (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."*

16. Section 224 CrPC, reads as under:-

***"224. Withdrawal of remaining charges on conviction on one of several charges**.—When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or*

*the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges and such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into, or trial of, the charge or charges so withdrawn."*

17. The Hon'ble Apex Court in the case of ***Sohan Lal and Others vs. State of Rajasthan, (1990) 4 SCC 580***; held that the accused-appellants namely Vijya Bai and Jiya Bai (appellants No. 4 and 5 therein) could be dealt with neither under Section 216 CrPC nor under Section 319 CrPC. In this case, these accused-appellants were discharged and thereafter in exercise of power under Section 216 and 319 CrPC the Magistrate summoned these accused alongwith others and the order of Magistrate was affirmed by the High Court of Rajasthan. Relevant paras, to the view of this Court, are extracted hereinunder:-

*"3. On April 21, 1980 one Shanti Lal lodged a report at Bikaner Police Station stating therein that the appellants and two others namely Uttam Chand and Hanuman Chand at about 2 p.m. that day were pelting stones at the informant's house causing damage to it and that Durgabai, Tara and Sunita who at the relevant time were sitting at the chowk of the house were injured. After recording FIR No. 22 dated April 21, 1980 and on completion of investigation police framed charges under Sections 147, 323, 325, 336 and 427 IPC and the charge-sheet was forwarded to the Judicial Magistrate No. 2 Bikaner under Section 173 CrPC. After taking cognizance and after hearing the arguments, the Judicial Magistrate, Bikaner by his order dated October 3, 1980 in Criminal Case No. 165 of 1980 had been pleased to discharge appellants 4 and 5, namely, Vijya Bai and Jiya Bai of all the charges levelled against them. Appellants 1, 2 and 3, namely, Sohan Lal, Padam Chand and Vishnu were ordered to be charged only under Section 427 IPC on the basis of site inspection and injury report.*

*4. On February 25, 1982 the Assistant Public Prosecutor submitted an application to the Magistrate under Section 216 CrPC signed by Durga Bai stating:*

*"The accused have been charged under Section 427 IPC, whereas from the entire evidence and the medical evidence prima facie case under various sections i.e. 147, 325 and 336 IPC is made out. Hence it is prayed that accused be charged in accordance with the evidence and the charge be amended in the light of the evidence."*

*5. After recording the plea of the accused persons, prosecution led evidence and examined PW 1 Shanti Lal, PW 2 Sampat Lal, PW 3 Chagan Lal on May 12, 1982 and PW 4 Durga Bai on July 8, 1982.*

*6. The learned Magistrate on September 8, 1982 after referring to the aforesaid application submitted by APP dated February 25, 1982 and hearing the APP and the learned advocate for the accused and discussing the evidence and observing that if any accused was discharged of any charge under any section then there would be no bar for taking fresh cognizance and reconsideration against him according to Section 216 CrPC and that the provision of Section 319 CrPC was also clear in that connection, recorded the following order:*

*"Hence cognizance for offences under Sections 147, 427, 336, 323, 325 IPC is taken against accused Sohan Lal, Padam Chand, Smt. Vijya Bai, Jiya Bai, Vishnu, Hanuman Chand and Uttam Chand. Orders for framing the charges against accused Sohan Lal, Padam Chand, Vishnu under the aforesaid sections are passed and accused Smt. Jiya Bai, Vijya Bai, Uttam Chand and Hanuman Chand be summoned through bailable warrants in the sum of Rs 500 each. File to come on October 20, 1982 for framing the amended charge against the accused present. Exemption from appearance of accused Vishnu Chand and Padam Chand is cancelled until further order. The advocate for the accused shall present the said accused in the court in future."*

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*xxxxxxxxxxxxxxxxxxxxxxxxx*

*12. Add to any charge means the addition of a new charge. An alteration of a charge means changing or variation of an existing charge or making of a different charge. Under this section addition to and alteration of a charge or charges implies one or more existing charge or charges. When the appellants Vijya Bai and Jiya Bai were discharged of all the charges and no charge existed against them, naturally an application under Section 216 CrPC was not maintainable in their case. In cases of appellants Sohan Lal, Padam Chand and Vishnu against whom the charge under Section 427 IPC was already in existence there of course could arise the question of addition to or alteration of the charge. The learned Magistrate therefore while disposing of the application under Section 216 CrPC only had no jurisdiction to frame charges against the appellants Vijya Bai and Jiya Bai. In his order the learned Magistrate did not say that he was proceeding suo motu against Vijya Bai and Jiya Bai though he said that Section 319 CrPC was also clear in this connection.*

*13. As regards the other three appellants, namely, Sohan Lal, Padam Chand and Vishnu they were already accused in the case. Section 216 CrPC envisages the accused and the additions to the alterations of charge may be done at any time before judgment is pronounced. The learned Magistrate on the basis of the evidence on record was satisfied that charges ought also to be framed under the other sections*

*with which they were charged in the charge-sheet. That was also the prayer in the APP's application. However the learned Magistrate invoked his jurisdiction under Section 319 CrPC which says:*

*"319. Power to proceed against other persons appearing to be guilty of offence.— (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

*(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*

*(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*

*(4) Where the Court proceeds against any person under sub-section (1) then—*

*(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;*

*(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."*

*14. The crucial words in the section are, 'any person not being the accused'. This section empowers the court to proceed against persons not being the accused appearing to be guilty of offence. Sub-sections (1) and (2) of this section provide for a situation when a court hearing a case against certain accused person finds from the evidence that some person or persons, other than the accused before it is or are also connected in this very offence or any connected offence; and it empowers the court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the section is wide enough to include cases instituted on private complaint.*

*15. There could be no doubt that the appellants 1, 2 and 3 were the accused in the case at the time of passing the impugned order by the Magistrate and as such Section 319 CrPC would not cover them. Could appellants 4 and 5 be brought under that section? Were they accused in the case? Precisely when a person can be called the accused?*

*16. Generally speaking, to accuse means to allege whether the*

*person is really guilty of the crime or not. Accusation according to Black's Law Dictionary means a formal charge against a person, to the effect that he is guilty of a punishable offence laid before a court or Magistrate having jurisdiction to inquire into the alleged crime. In this sense accusation may be said to be equivalent of information at common law which is mere allegation of prosecuting officer by whom it is preferred.*

*xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx*

*28. In the instant case, Vijiya Bai and Jiya Bai were discharged by the Magistrate of all the charges and the three other appellants were discharged of the sections other than Section 427 IPC. After the police submitted charge-sheet against them the order of discharge, according to Mr B.D. Sharma, could not be taken to be one under Section 203 but under Section 245 which is included in Chapter XIX and deals with trial of warrant cases by the Magistrates. This submission has not been refuted. That section says:*

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

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

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*30. The question therefore is whether the necessity of making a further inquiry as envisaged in Section 398 could be obviated or circumvented by taking resort to Section 319. As has already been held by this Court, there is need for caution in resorting to Section 319. Once a person was an accused in the case he would be out of reach of this section. The word "discharge" in Section 398 means discharge of an offence relating to the charge within the meaning of Sections 227, 239, 245 and 249. Refusing to proceed further after issue of process is discharge. The discharge has to be in substance and effect though there is no formal order. The language of the section does not indicate that the word "discharge" should be given a restricted meaning in the sense of absolute discharge where the accused is set at liberty after examination of the whole case. The cases of appellants 4 and 5 would be one of total discharge. But it could not be said that they were not some of the accused in the case, or that cognizance was not taken of the offences against them. A person may be accused of several offences and he may be discharged of some offences and proceeded against for trial in respect of other offences. This was the proposition regarding*

*appellants 1, 2 and 3, who were partially discharged.*

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*33. The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the persons discharged subject to revision under Section 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered (sic tempered) with though it may be, as Sir James Stephen says: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." (General View of the Criminal Law of England, p. 99). The APP's application under Section 216, insofar as the appellants 1 to 3 were concerned, could be dealt with under Section 216. Appellants 4 and 5 could be dealt with neither under Section 216 nor under Section 319. In that view of the matter the impugned order of the Magistrate as well as that of the High Court insofar as the appellants 4 and 5, namely, Vijya Bai and Jiya Bai are concerned, have to be set aside which we hereby do. The appeals are allowed to that extent."*

18. It would be apt to indicate that the Hon'ble Apex Court held in ***Sohan Lal (Supra)*** after considering Section 216 CrPC observed as under:-

*"12. Add to any charge means the addition of a new charge. An alteration of a charge means changing or variation of an existing charge or making of a different charge. Under this section addition to and alteration of a charge or charges implies one or more existing charge or charges."*

19. In the case of ***Vibhuti Narayan Chaubey @ Lala Chaubey and others vs. State of U.P., 2002 SCC OnLine All 1413***, considered by this Court while passing the judgment in the case of ***Dev Narain (Supra)*** (relied upon by the learned counsel for the applicant), this Court after considering Section 216 CrPC and the judgemnt passed in the case of ***Sohan Lal (Supra)***, concluded as under:-

*"1. The applicants are accused in S.T. No. 74 of 2001 pending in the Court of Additional Sessions Judge, Court No. 15, Varanasi. In this case the charges for offences under Sections 323/34, 307/34, 504, 506, I.P.C. were framed on 16-7-2001. Thereafter the statement of PW 1, Rajendra Prasad was recorded. The applicants then moved an application to alter the charge under Section 307/34, I.P.C. to 324/34 I.P.C. on the basis of his*

*statement. The application has been rejected by the impugned order dated 6-7-2002. Aggrieved by it, the present petition has been filed.*

*2. Learned counsel for the applicant has relied on clause (1) of Section 216, Cr. P.C. of which is as follows:*

*"Any Court may alter or added to any charge at any time before judgment is pronounced."*

*3. However, this clause does not provide for deletion of the charge and the charge for offence under Section 307/34, I.P.C. cannot be deleted. The word "delete" has intentionally been not used by the legislature.*

*4. However, learned counsel for the appellants, Sri Vinod Prasad has argued that this request is for alteration of the charge and not for deletion of any charge.*

*5. The argument is totally misleadings and perverse. The charge framed under Section 307/34, I.P.C. can not be struck off and in its place charge under Section 324/34, I.P.C. cannot be substituted. The real request, therefore, is to delete the charge under Sec. 307/34, I.P.C. and to frame the charge under Section 324/34, I.P.C. The application is therefore, not for alteration of the charge.*

*6. What is alteration of charge can be explained by one example. If the charge is framed with the help of Section 34, I.P.C. the charge may be altered as simpliciter. The word alteration has not been used in the above Section and therefore, the charge once framed cannot be deleted. This will also appear from the perusal of the provisions of Section 224, Cr. P.C. which provides for withdrawal of the remaining charges on conviction on some of the charges where the charges are for more than one heads. Therefore, once the charge is framed the case will result, other in acquittal or in conviction in accordance with the provisions of trials prescribed under the Chapters 18, 19 and 20 of the Cr. P.C. The charge can be withdrawn under Section 224, Cr. P.C. only after judgment and it cannot be deleted.*

*7. Sri Vinod Prasad, learned counsel for the applicant has also referred to the decision of the Apex Court in Sohan Lal v. State of Rajasthan, 1990 SCC (Cri) 650 : ((1990) 4 SCC 580 : AIR 1990 SC 2158). This case is mainly on Section 319, Cr. P.C. Regarding Section 219, Cr. P.C. the only observation is that "add to any charge means the addition of a new charge. An alteration of a charge means hanging or variation of an existing charge or making of a different charge." This decision is of no help to the applicants and does not provide for deletion of charge.*

*8. The petition is totally misconceived. The application was rightly rejected.*

*9. The petition is dismissed.*

*10. Petition dismissed."*

20. From a conjoint reading of paras 1, 2, 3 and 5, of the judgment passed in the case of ***Vibhuti Narayan Chaubey @***

***Lala Chaubey (Supra)***, it is evident that, after taking note of the charged framed for an offence under Section 307/34 IPC and prayer of the accused in the application preferred by him under Section 216 CrPC, this Court observed that the real/actual request is to delete the charge under Section 307/34 IPC and to frame the charge under Section 324/34 IPC and thereafter, dismissed the petition filed by the accused.

21. It would be apt at this stage to indicate that the judgment passed in the case of ***Dev Narain (Supra)*** would not be applicable in the instant case. It is for the following reason(s):-

(i) From a bare perusal of the judgment, it is evident that on 28.07.2015 an application seeking discharge by the accused Dev Narain was rejected and thereafter he approached this Court by preferring an application under Section 482 CrPC and this Court, after considering the facts of the case, dismissed the said application with observation that "it is open to applicant to move an application for alteration of charge under Section 216 CrPC before the trial Court".

(ii) Pursuant to the aforesaid observation of this Court, the accused Dev Narain, dever (brother-in-law) of the deceased, filed an application under Section 216 CrPC and the same was rejected vide order dated 23.01.2023, which was challenged before this Court by means of the Criminal Revision No. 1026 of 2023.

(iii) Considering the facts as stated, in brief, hereinbefore, this Court dismissed the said revision after observing that essence of the prayer sought in the application under Section 216 CrPC is for discharge.

(iv) The relevant portion of the judgment passed in the case of ***Dev Narain (Supra)*** reads as under:-

*"Accused Dev Narain, who is brother-in-law of the deceased moved an application for discharge before trial court, which was rejected by order dated 28.7.2017 and case was fixed for prosecution evidence. The accused Dev Narain, who filed a petition under Section 482 Cr.P.C. against rejection of his discharge application before this Court, which was dismissed by this Court with observation that "it is open to the applicant to move an application for alteration of charge under Section 216 Cr.P.C. before trial court". Pursuant to the observation of this Court, the sole accused Dev Narain, who is dewar of deceased has filed an application under Section 216 Cr.P.C., wherein he has stated that he has moved this application pursuant to the observation of Hon'ble High Court vide order dated 9.6.2017. The factum of death of husband of deceased Kamal Kishor @ Satyanarain and recovery*

*of his dead body from railway track was entered in GD Entry No.21, time 15:10 hours on 26.5.2016, police station Manikpur. There is no specific allegation of demand of dowry or subjecting the deceased to matrimonial cruelty is made by any witness examined by the Investigating Officer against the applicant. On the basis evidence collected during investigation. This appears that deceased Rashmi and her husband were residing in separate house and he was working in railway and they used to pickup quarrel on some issue. The key of house where dead body of deceased was lying was recovered from the pocket of cloths worn by the Kamal Kishore on recovery of his dead body. The deceased and her husband were residing separately from the revisionist and other family members and they were not concerned with daily affairs of each other. The revisionist could not be beneficiary of any demand of dowry allegedly made by husband of the deceased from deceased and her family members. There is no evidence that she was subjected to matrimonial cruelty soon or before her death. The ingredients of charges under Sections 498-A. 304-B and 323 IPC and Section 3/4 DP Act are not made out against the applicant. Therefore, the said charges are liable to be quashed and the applicant may be discharged from the charges. This application has been dismissed by the court below. Learned court below while rejecting the application has observed that on the basis of evidence on record, no error is found in charges made against the applicant on 6.9.2016, therefore, there is no question of alteration of charge. The evidence of PW-1- the informant has been recorded during trial in which he has supported his FIR version and he has stated in cross-examination also that in matter of killing of his sister, the complicity of her husband (late) and brothers-in-law Sri Narain, Dev Narain and other relatives is involved and these persons killed her.*

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*11. From perusal of prayer made in application under Section 216 Cr.P.C., it appears in essence that this is a prayer for discharge as the revisionist has stated that he may be discharged from charged*

*penal sections and the charges levelled against him be quashed. The trial court in exercise of its powers under Section 216 Cr.P.C. cannot delete the charges framed by it for the said offences as the criminal procedure code does not confers such powers on the court. The trial court can only alter to a charge or to add to a charge, which has already framed. The discharge application moved by the revisionist has already been dismissed and said order has attained finality.*

*12. This Court in Application U/S 482 No.2556 of 2023 (Nanhey Bhaiya @ Nanhan Singh And 2 others vs State Of U.P. Thru. Prin. Secy.) on 31.3.2023 held that the power of the Court under Section 216 Cr.P.C. to alter or add any charge at any time before the judgment is pronounced is exclusively confined to Court and no party has any vested right to seek any addition or alteration of charge.*

*13. Recently, the Hon'ble Supreme Court in P. Kartikalakshmi Versus Sri Ganesh and another reported in (2017) 3 SCC 347, in paragraphs No.6, 7 and 8 has held as under:-*

*"6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will*

*be open for the parties to work out their remedies in accordance with law.*

*14. This Court in the case of Vibhuti Narayan Chaubey Alias .. vs State Of U.P, 2003 CrLJ 196 held that Section 216 of the code did not provide for deletion of a charge and that the word "delete" had intentionally not being used by the legislature. I am in agreement with this conclusion. The petitioner is seeking the deletion of a charge of conspiracy altogether that is not permissible under Section 216 of the Code. The charge once framed must lead to either acquittal or conviction at the conclusion of trial. Section 216 of the Code does not permit the deletion of the same. Subsequently, Delhi High Court in the case of Verghese Stephen vs Central Bureau Of Investigation, 2007 Cr.L.J. 4080, placed reliance on aforesaid judgement of this Court in the case of Vibhuti Narayan Chaubey (supra).*

*15. Section 222 (2) of the Cr.P.C. provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."*

22. In the case of ***Anant Prakash Sinha v. State of Haryana, (2016) 6 SCC 105*** the Hon'ble Apex Court observed as under:-

*"8. The controversy as raised rests on two aspects. The first aspect that has emanated for consideration is whether without evidence being adduced another charge could be added. In this context, we may usefully refer to Section 216 CrPC which reads as follows:*

***"216. Court may alter charge.—(****1) Any court may alter or add to any charge at any time before judgment is pronounced.*

*(2) Every such alteration or addition shall be read and explained to the accused.*

*(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*

*(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.*

*(5) If the offence stated in the altered or added charge is one for the prosecution of which*

*previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."*

*9. The aforesaid provision has been interpreted in Hasanbhai Valibhai Qureshi [Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603 : (2004) 2 RCR (Cri) 463] wherein the Court has observed: (SCC p. 350, para 8)*

*"8. Section 228 of the Code in Chapter XVII and Section 240 in Chapter XIX deal with framing of the charge during trial before a Court of Session and trial of warrant cases by Magistrates respectively. There is a scope of alteration of the charge during trial on the basis of materials brought on record. Section 216 of the Code appearing in Chapter XVII clearly stipulates that any court may alter or add to any charge at any time before judgment is pronounced. Whenever such alteration or addition is made, the same is to be read out and informed to the accused."*

*10. In Hasanbhai Valibhai Qureshi case [Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603 : (2004) 2 RCR (Cri) 463] , reference was made to Kantilal Chandulal Mehta v. State of Maharashtra [Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166 : 1970 SCC (Cri) 19] wherein it has been ruled that (SCC p. 350, para 9) the Code gives ample power to the courts to alter or amend a charge provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or in not giving him full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred against him. Placing reliance on the said decision, it has been opined that if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate.*

*11. In Jasvinder Saini [Jasvinder Saini v. State (Govt. of NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] , the charge-sheet was filed before the jurisdictional Magistrate alleging commission of offences under Sections 498-A, 304-B, 406 and 34 IPC against Appellants 1 to 4 therein. A supplementary charge-sheet was filed in which Appellants 5 to 8 therein were implicated for the case to which Section 302 IPC was also added by the investigating officer. After the matter was committed to the Court of Session, the trial court came to the conclusion that there was no evidence or material on record to justify framing of a charge under Section 302 IPC, as a result of*

*which charges were framed only under Sections 498-A, 304-B read with Section 34 IPC. When the trial court was proceeding with the matter, this Court delivered the judgment in Rajbir v. State of Haryana [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149] and directed that all the trial courts in India to ordinarily add Section 302 to the charge on Section 304-B IPC so that death sentences could be imposed in heinous and barbaric crimes against women. The trial court noted the direction in Rajbir [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149] and being duty-bound, added the charge under Section 302 IPC to the one already framed against the appellant therein and further for doing so, it placed reliance on Section 216 CrPC. The said order was assailed before the High Court which opined [Jasvinder Saini v. State, 2011 SCC OnLine Del 4379 : (2012) 186 DLT 411] that the appearance of evidence at the trial was not essential for framing of an additional charge or altering a charge already framed, though it may be one of the grounds to do so. That apart, the High Court referred to the autopsy surgeon's report which, according to the High Court, provided prima facie evidence for framing the charge under Section 302 IPC. Being of this view, it declined to interfere with the order impugned.*

*12. This Court adverting to the facts held thus: (Jasvinder Saini case [Jasvinder Saini v. State (Govt. of NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] , SCC p. 262, para 15)*

*"15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC*

*(Cri) 149] . The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in Rajbir case [Rajbir v. State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149] , but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."*

*It is appropriate to note here, the Court further observed that the annulment of the order passed by the Court would not prevent the trial court from re-examining the question of framing a charge under Section 302 IPC against the appellant therein and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial court comes to the conclusion that there is any room for doing so. In that context, reference was made to Hasanbhai Valibhai Qureshi [Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603 : (2004) 2 RCR (Cri) 463] .*

*13. In Karimullah Osan Khan [CBI v. Karimullah Osan Khan, (2014) 11 SCC 538 : (2014) 3 SCC (Cri) 437] , the Court was concerned with the legality of the order passed by the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 for Bomb Blast Case, Greater Bombay rejecting the application filed by the Central Bureau of Investigation (for short "CBI") under Section 216 CrPC for addition of the charges punishable under Section 302 and other charges under the Penal Code and the Explosives Act read with Section 120-B IPC and also under Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. The Designated Court framed charges in respect of certain offences and when CBI filed an application for addition of the charge under Section 302 IPC and other offences, the Designated Court rejected the application as has been indicated earlier. In the said context, the Court proceeded to interpret the scope of Section 216 CrPC. Reference was made to the decisions in Jasvinder Saini [Jasvinder Saini v. State (Govt. of NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] and Thakur Shah v. King Emperor [Thakur Shah v. King Emperor, 1943 SCC OnLine PC 26 : (1942-43) 70 IA 196 : (1943) 56 LW 706 : AIR 1943 PC 192] . Proceeding further, it has been ruled thus: (Karimullah Osan Khan case [CBI v. Karimullah Osan Khan, (2014) 11 SCC 538 : (2014) 3 SCC (Cri) 437] , SCC p. 546, paras 17-18)*

*"17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in*

*the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.*

*18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court. (See Harihar Chakravarty v. State of W.B. [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] ) Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in Section 216 CrPC and other related provisions."*

*14. At this juncture, we have to appropriately recapitulate the principles stated in Harihar Chakravarty [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] . In the said case, a complaint was filed charging the appellant and another for the offences punishable under Sections 409, 406, 477 and 114 IPC. The complainant and his witnesses were examined and on the basis of the said evidence, the learned Magistrate had framed a charge under Section 409 IPC against the appellant. The appellant entered upon his defence and after the trial, the Magistrate acquitted the appellant and the other accused under Section 409 IPC. The complainant filed a criminal revision before the High Court which set aside the order of acquittal and remanded the matter to the Magistrate for decision for amendment of the charge by examining appropriate evidence. The said order was the subject-matter of assail before this Court.*

*15. This Court, addressing to the merits of the case opined thus: (Harihar Chakravarty case [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] , AIR pp. 267-68, paras 8-10)*

*"8. This was a private prosecution in which the complainant came forward with a story that he never ordered the appellant to purchase these shares and that therefore the shares did not belong to him, and he had no interest in them or title to them. In fact his case was that the shares were never purchased by the appellant under his instructions. All that was found to be false and it was found that he did order them to be purchased and that therefore the shares were his. The order which*

*was made by the learned Judge in effect meant that the complainant should abandon his original story to lay claim to the shares and prosecute the appellant for another and distinct offence which could only arise on a different set of facts coming into existence after the purchase of the shares. The appellant might or might not be guilty of this other offence, but he is certainly innocent of the offence with which he was charged and for which he was fully tried and therefore he is entitled to an acquittal and the learned Judge had no power to set aside that order so long as he agreed, as he did, that the appellant was not guilty of the offence with which he was charged. Once a charge is framed and the accused is found not guilty of that charge an acquittal must be recorded under Section 258(1) of the Criminal Procedure Code. There is no option in the matter and we are of the opinion therefore that the order setting aside the acquittal was in any event bad.*

*9. Next as regards the direction to alter the charge so as to include an offence for which the appellant was not originally charged, that could only be done if the trial court itself had taken action under Section 227 of the Criminal Procedure Code before it pronounced judgment. It could only have done so if there were materials before it either in the complaint or in the evidence to justify such action.*

*10. The complaint affords no material for any such case because it is based on the allegation that the shares did not belong to the complainant and that in fact they were never purchased. The learned Judge observed that the contention was that the shares belonged to the complainant and were dishonestly pledged by the appellant with the Nath Bank. We do not find even a word about this either in the complaint or in the examination of the complainant."*

*(emphasis supplied)*

*16. After so stating, the Court in Harihar case [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] opined that there was no material on which the trial court could have amended the charge under Section 227 CrPC and the learned Judge therefore had no power to direct an amendment and a continuation of the same trial as he purported to do. The purpose of laying stress on the said authority is that the trial court could issue a direction for alteration of the charge if there were materials before it in the complaint or any evidence to justify such action. On the aforesaid three-Judge Bench decision [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] , it is quite vivid that if there are allegations in the complaint petition or for that matter in FIR or accompanying material, the court can alter the charge.*

*17. In Thakur Shah v. King Emperor [Thakur Shah v. King Emperor, 1943 SCC OnLine PC 26 : (1942-43) 70 IA 196 : (1943) 56*

*LW 706 : AIR 1943 PC 192] , what the Court has held is that alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court. It does not necessarily mean that the alteration can be done only in a case where evidence is adduced. We may hasten to clarify that there has been a reference to the decision rendered in Harihar Chakravarty [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] but the said reference has to be understood in the context. Section 216 CrPC, as is evincible, does not lay down that the court cannot alter the charge solely because it has framed the charge. In Hasanbhai Valibhai Qureshi [Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603 : (2004) 2 RCR (Cri) 463] , it has been stated there is scope for alteration of the charge during trial on the basis of material brought on record. In Jasvinder Saini [Jasvinder Saini v. State (Govt. of NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] , it has been held that circumstances in which addition or alteration of charge can be made have been stipulated in Section 216 CrPC and sub-sections (2) to (5) of Section 216 CrPC deal with the procedure to be followed once the court decides to alter or add any charge. It has been laid down therein that the question of any such addition or alteration generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court. If the said decision is appositely understood, it clearly lays down the principle which is in consonance with Harihar Chakravarty [Harihar Chakravarty v. State of W.B., (1953) 2 SCC 409 : AIR 1954 SC 266 : 1954 Cri LJ 724] ."*

23. The Hon'ble Apex Court in the case of ***Dr. Nallapareddy Sridhar Reddy vs. State of Andhra Pradesh And Others (2020) 12 SCC 467***, observed as under:-

*18. In Anant Prakash Sinha v. State of Haryana [Anant Prakash Sinha v. State of Haryana, (2016) 6 SCC 105 : (2016) 2 SCC (Cri) 525] , a two-Judge Bench of this Court dealt with a situation where for commission of offences under Sections 498-A and 323 IPC, an application was filed for framing an additional charge under Section 406 IPC against the husband and the mother-in-law. After referring to various decisions of this Court that dealt with the power of the court to alter a charge, Dipak Misra, J. (as the learned Chief Justice then was), held : (SCC p. 116, paras 18-19)*

*"18. ... the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the*

*complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.*

*19. In addition to what we have stated hereinabove, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial."*

*9. In CBI v. Karimullah Osan Khan [CBI v. Karimullah Osan Khan, (2014) 11 SCC 538 : (2014) 3 SCC (Cri) 437] , this Court dealt with a case where an application was filed under Section 216 CrPC during the course of trial for addition of charges against the appellant under various provisions of IPC, the Explosives Act, 1884 and the Terrorist and Disruptive Activities (Prevention) Act, 1987. K.S.P. Radhakrishnan, J. speaking for the Court, held thus : (SCC p. 546, paras 17-18)*

*"17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.*

*18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be <u>amended, added or modified</u>. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court."*

*20. In Jasvinder Saini v. State (NCT of Delhi) [Jasvinder Saini v. State (NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] , this Court dealt with the question whether the trial court was justified in adding a charge under Section 302 IPC against the accused persons who were charged under Section 304-B IPC. T.S. Thakur, J. (as he then was) speaking for the Court, held thus : (SCC pp. 260-61, para 11)*

*"11. A plain reading of the above would show that the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court."*

*21. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words "at any time before judgment is pronounced" in sub-section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges. Sub-section (4) accordingly prescribes the approach to be adopted by the*

*courts where prejudice may be caused."*

24. In the authorities referred above, after taking note of expression(s) 'alter' and 'add' used in Section 216 CrPC, for explaining the power of Court under Section 216 CrPC various expression(s) have been used viz. *"alter", "add", "change", "modify", "amend", "alteration", "addition", "variation", "changing", "additional", "altering", "altered", "added", "modification", "amended", "modified"*.

25. In the context of instant case, expression 'alter' in Section 216 CrPC is to be taken note of. In this regard, in the authorities, referred above, the expression(s) *"change", "amend", "modify", "alteration", "variation", "changing", "modification", "altering", "amended"*, and *"modified"*, have been used.

26. As per Legal Glossary 7th Edition, published by Legislative Department (Official Language Section), Ministry of Law and Justice, Government of India, in the year 2015, Hindi meaning of expression(s) 'alter' is 'परिवर्तन करना'; 'amend' is 'संशोधित करना, संशोधन करना'; 'change' is 'तब्दीली, परिवर्तन, बदलना'' 'modify' is 'उपांतरण करना, उपांतरित करना' and 'variation' is 'फेरफार, अतंर, रूपभेद'.

27. According to above dictionary, the meaning of expression 'alter' is *'to make otherwise or different in some respect without changing the thing itself as also to modify'*.

28. As per Advanced Law Lexicon Dictionary, 3rd Edition, Volume 1, the meaning of expression 'change' is *'to exchange; to alter or make different'*. 'Change' means *'to make or become different, to transform or convert'*.

29. As per Legal Glossary 7th Edition, published in the year 2015, the meaning of expression 'change' is *'to exchange; to alter or make different'*.

30. As per Legal Glossary 7th Edition, published in the year 2015, the meaning of expression 'modify' is *'to make a modification; to alter without radical transformation'*.

31. As per Legal Glossary 7th Edition, published in the year 2015, the meaning of expression 'variation' is *'the act of varying; change in the form'*.

32. In the case of ***Selvi J. Jayalalitha v. Additional Superintendent of Police, 2000 SCC OnLine Mad 1111***, while dealing with the issue/question 'whether the alteration of a charge includes deletion also?' took note of Section 216 CrPC and dictionary meaning of expression 'alter' as also the judgment passed in the case of **Tapti Bag vs. Patitpaban Ghosh, 1993 Crl.L.J. 3932** and the judgment passed by the Hon'ble Apex Court in the case of ***Ratilal Bhanji Mithani vs. State of Maharashtra and Others, (1979) 2 SCC 179***, which relates to Code of Criminal Procedure, 1898 and upon due consideration, the High Court of Madras, concluded as under:-

*"3. Point No. (i). It would be useful to recall the provisions of Section 216 Cr.P.C. which recites as under:—*

*"216. Court may alter charge.:—*

*(1) Any Court may alter or add to any charge at any time before judgment is pronounced.*

*(2) Every such alteration or addition shall be read and explained to the accused.*

*(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*

*(4) If the alternation or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.*

*(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded:,*

*4. In Black's Law Dictionary, the word 'alter' is defined as under:—*

*"Alter. To make a change in; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially, to change in one or more respects, but without destruction of existence or identify of the thing changed to increase or diminish"*

*5. The Concise Oxford Dictionary of Current English says as under:—*

*Alter 1 tr. & intr. make or become different; change. 2. tr. US & Austral, castrate or spay, alterable adj. alteration n.*

*6. In Webster's New Twentieth Century Dictionary, it is stated as under:—*

*Alter 1; altered pt, pp.; altering, ppr. (ML. alterare, to make other form L. alter, other).*

*1. to change; make different; modify; as snow altered the landscape; age had altered the singer's voice.*

*2. to castrate (Dial).*

*3. to resew parts of (a garment) for a better fit."*

*7. In P. Ramanatha Aiyar's The Law Lexicon, it is stated as under:—*

*Alter. To make a change in to modify; to vary in some degree. See also 8 Bom 200.*

*The word 'alter' has merely to do with some change while maintaining the form, shape or figure. It has the shade of meaning similar to the word 'modify' and is opposed to such meanings constituted by such words like 'reserve' 'annual' or 'rescind'. Fulo Singh v. State, AIR 1956 Pat. 170, 173, (FB) (Criminal Procedure Code, 1898, Section 423(1)(0)).*

*……*

*Alter, Change, Amend. "This term (alter) is to be distinguished from its synonyms "change" and "amend". To change may import the substitution of an entirely different thing, while to alter is to operate upon a subject matter which continues objectively the same while modified in some particular. If a cheque is raised, in respect of its amount, it is altered;if a new cheque is put in its place, it is change. To "amend" implies that the modification made in the subject improves it, which is not necessarily the case with an alteration. An amendment always involves an alteration, but an alteration does not always amend". (Block).*

*8. A plain dictionary meaning of alteration would show that there can be peripheral modification without destroying the identity of the matter.*

*9. Apart from referring to these dictionary meanings, the learned Counsel for the petitioner cited the decision reported in Kesavananda Bharati v. State of Kerala1. Their Lordships of the Supreme Court have referred to Section 291 of the Government of India Act, 1935 and stated as under:—*

*"Here, the word "amendment" has been expanded, it may be that there really is no expansion because every amendment may involve addition, variation or repeal of part of a provision".*

*10. But, that is a case relating to amendment of a statute, namely, the Constitution, where by way of amendment a provision can be repealed. It cannot be said that the sense in which the word 'amendment' is used, in that the decision would apply to alteration of a charge now sought for.*

*11. The Learned Counsel for the petitioner referred to various decisions to stress that alteration would include substitution, amendment, variation and repeal, etc. I consider that it is not necessary to refer to those decisions, because we have to find out the purport of usage the word of "alteration" in Section 216 Cr.P.C. in the proper perspective of the object for which the provision is made in the Code of Criminal Procedure.*

*12. Perusal of Code of Criminal Procedure would show that there is no provision in the Code of Criminal Procedure for deletion of a charge. Though Section 216 Cr.P.C. would give scope for alteration and addition, the only question is whether alteration would also include deletion. According to the learned Counsel for the petitioner, alteration would cover all the other aspects excepting addition which is specifically provided for in the Section.*

*13. The purpose of Section 216 Cr.P.C. is to have such an addition and alteration in furtherance of a trial and not such an addition or alteration which would negate the further trial. Therefore, by no stretch of imagination, it can be said that the alteration would include deletion or erasing of charge which would*

*negate the further trial. Of course, it is left to the accused to prove that certain charge has not been proved. It can be done at the time of the trial by destroying the prosecution witnesses by cross-examination or letting in any defence evidence to nullify the probative value of the prosecution evidence or the accused may even rely on the admission made by the State, but the accused/petitioner herein cannot seek for the deletion of a charge in the guise of alteration which would negate the trial so far as that charge is concerned.*

*14. Why the word 'alteration' under Section 216 Cr.P.C. does not include deletion is answered in Tapti Bag v. Patitpaban Ghosh2 wherein a single Judge of the Calcutta High Court pointed out as under:—*

*"The question whether the Court which has already framed a charge under Section 228, Cr.P.C. can thereafter reconsider the charge and discharge the accused under Section 227, Cr.P.C. has to be examined not in light of provisions of Section 362, Cr.P.C. which deals with only judgment and final order disposing of a case but in the background of the other provisions relevant in this connection"*

*15. Deletion of a charge would indirectly mean discharge. To state an example, if there is a single charge against the petitioner and if deletion of the single charge is allowed, it would virtually amount to discharge of the accused. Question of discharging the accused would arise at the time of framing of charges and not later. In fact in paragraph No. 5 of the decision cited in Tapati Bag. v. Patitpaban Ghosh2, the Calcutta High Court has pointed out as under:—*

*"5. The learned Advocate for the petitioner attracted my attention to the provisions of Section 216, Cr.P.C. and argued that the said section empowers any Court to alter or add to any charge at any time before judgment is pronounced and this gives an implied power to discharge an accused at any state"...*

*16. Then after referring to Section 216 Cr.P.C. the Calcutta High Court has observed as under:—*

*"A plain reading of the said section would show that the alteration or addition referred to therein contemplates modification of or addition to charge but not discharging an accused in respect of a charge already framed so as to bring the trial itself to an end in respect of such accused. There maybe addition of a new charge or even substitution of a charge in an appropriate case but Section 216 does not contemplate discharge of an accused or the termination of the trial in respect of any accused. Sub-section (2) requires that every alteration or addition to a charge has to be read and explained to the accused. The question of reading and explaining such alteration or addition would be meaningless in a good number of cases if discharge is contemplated by such alteration or addition. Subsections. (3) and (4) speak of proceeding with the*

*trial or of directing a new trial or adjourning the trial. This also is a clear indication that any alteration or addition to charge shall not be of such nature as to get the accused discharged and bring the trial to an end in respect of that accused. Sub-section (5) requires that where the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained on the same facts. Here also the sub-section contemplates of proceeding with the trial with fresh sanction, if necessary, and not ending the trial in respect of any accused by any obliteration of the charged. It is therefore evident that Section 216 does not empower the Court to discharge an accused and bring the trial itself to an end in respect of an accused against whom a charge has already been framed, without following the procedure prescribed in the Code regarding the trial of a Case. Of course there are certain independent provisions prescribed in the Code itself which when brought into play in any particular case may result in ending the trial at an intermediate stage, as for example, where the prosecution is withdrawn with the consent of the Court under Section 321 or when an offence is validly compounded during trial under Section 320, but Section 227 being designed for a particular stage of the judicial proceeding one ˜::nnot revert to that position when that stage has already been crossed. I am therefore clearly of the opinion that the Court of Session has no power to discharge an accused under Section 227 once a charge under Section 228 has already been framed. The learned Additional Sessions Judge was, therefore, clearly in error in discharging the accused opposite party under Section 227, Cr.P.C. by his impugned order dated the 20th November, 1990 after charge had already been framed against the accused under Section 228, Cr.P.C. at any earlier stage"...*

*17. The Learned Public Prosecutor drew my attention to some pronouncements of the Supreme Court in this regard. In Ratilal Bhanji v. State of Maharashtra3 the Apex Court has held that once a charge is framed, the Magistrate has no power under Section 227 Cr.P.C. or by any other provision of the Code to cancel the charge and revise the proceeding to the stage or Section 273 Cr.P.C. to discharge the accused. What has been stated regarding a warrant trial holds good for a Sessions trial also. It is thus evident that once a charge is framed, the natural course is to proceed with the trial and pronouncement of judgment either holding that the accused guilty or acquitting him if he is not guilty. But, after framing a charge, the Court cannot discharge the accused. That is why, the deletion is not included in Section 216 Cr.P.C.*

*18. The learned Counsel for the petitioner drew my attention to the decision reported in Dwarka Lai v. Mahadeo Rai4 wherein a Single Judge of the Allahabad High*

*Court has referred to the act of Sessions Judge, who suo motu framed certain charges and at the time of the trial suo motu withdrew them. The learned Judge has observed "I think the word alter in Section 227 Cr.P.C. (old Provision) must be taken to include withdraw". With due reverence to the learned Single Judge. I could not persuade myself to subscribe my assent to that finding. I respectfully disagree with the learned Single Judge."*

33. In the case of ***Ratilal Bhanji Mithani (Supra)***, on the issue involved in the instant case, the Hon'ble Apex Court observed as under:-

*"24. At the outset, let us have a look at the relevant provisions of the Code of Criminal Procedure, 1898, which admittedly governed the pending proceedings in this case. The procedure for trial of warrant cases by Magistrates is given in Chapter XXI of that Code. The present case was instituted on a criminal complaint. Section 252 provides that in such a case, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence, as may be produced, in support of the prosecution. Sub-section (2) of that Section casts a duty on the Magistrate to ascertain the names of persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and to summon all such persons for evidence. Section 253 indicates when and in what circumstances an accused may be discharged: It says:*

*"253. (1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.*

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

*Section 254 indicates when and in what circumstances a charge should be framed. It reads:*

*"254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused."*

*Section 255 enjoins that the charge shall then be read over and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record that plea, and may convict him thereon.*

*25. Section 256 provides that if the accused refuses to plead or does not plead, or claims to be tried, he shall be required to state at the next hearing whether he wishes to cross-examine any of the witnesses for the prosecution whose evidence has been taken, and if he says he so wants to cross-examine, the witnesses named by him shall be recalled and he will be allowed to further cross-examine them. "The evidence of any remaining witnesses for the prosecution shall next be taken" and thereafter the accused shall be called upon to enter upon and produce his defence.*

*26. Section 257 is not material. Section 258(1) provides that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. Sub-section (2) requires, where in any case under this chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence on him in accordance with law.*

*27. From the scheme of the provisions noticed above it is clear that in a warrant case instituted otherwise than on a police report, "discharge" or "acquittal" of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of "discharge" and "acquittal" are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253(1) shows that as a general rule there can be no order of discharge unless the evidence of all the prosecution witnesses has been taken and the Magistrate considers for reasons to be recorded, in the light of the evidence, that no case has been made out. Sub-section (2) which authorises the Magistrate to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under Section 254 and frame charge against the accused. Section 254 shows that a charge can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case.*

*28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case,*

*instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973).*

*29. Excepting where the prosecution must fail for want of a fundamental defect, such as want of sanction, an order of acquittal must be based upon a "finding of not guilty" turning on the merits of the case and the appreciation of evidence at the conclusion of the trial.*

*30. If after framing charges the Magistrate whimsically, without appraising the evidence and without permitting the prosecution to produce all its evidence, "discharges" the accused, such an acquittal, without trial, even if clothed as "discharge", will be illegal. This is precisely what has happened in the instant case. Here, the Magistrate, by his order dated December 12, 1962, framed charges against Mithani and two others. Subsequently, when on the disposal of the revision applications by Gokhale, J., the records were received back he arbitrarily deleted those charges and discharged the accused, without examining the "remaining witnesses" of the prosecution which he had in the order of framing charges, said, "will be examined after the charge"."*

34. From the aforesaid, in the context of expression 'alter' used in Section 216 CrPC, the position which emerges out is as under:-

(i) Already framed charge can be altered/changed/varied/modified/substituted/amended at any stage before the judgment is pronounced. However, this should be done strictly in terms of law propounded by the Hon'ble Apex Court in this regard.

(ii) New/fresh charge in place of already framed charge can be framed if on appreciation of evidence the punishment/sentence could be given as per Section 222 CrPC for the charge earlier framed. For example, the Court, after considering the material on record can alter the charge by deleting the charge under Section 308 IPC and framing the charge under Section 307 IPC.

(iii) The Court can exercise the power under Section 216 CrPC, only when there exist some material/evidence before it, which has some connection or link with the charge(s) sought to be altered/modified/substituted/varied/amended/changed.

(vi) In given facts of a case, as observed in the case of ***Sohan Lal (Supra)***, an accused who was discharged could be dealt with neither under Section 216 CrPC nor under Section 319 CrPC.

(v) While considering the application under Section 216 CrPC the Court has to see the intention of preferring the

application which includes real request/prayer sought therein.

(vi) On alteration of charge, in exercise of power under Section 216 CrPC, if an accused is discharged from the offence for which charge was initially framed or the trial comes to an end for the said accused for the charge initially framed against him or if on appreciation of evidence the accused cannot be punished in the light of Section 222 CrPC for the offence he was initially charged, then in that eventuality, to the view of this Court, it would come within the purview of expression 'deletion of charge'.

35. In the instant case, the charge against accused-applicant was framed under Section 306 CrPC and the trial Court, after taking note of the evidence recorded before it, on an application under Section 216 CrPC, altered/changed the charge by deleting charge under Section 306 and framing charge under Section 302 IPC and in this view of the matter, the accused has not been discharged nor the trial has come to an end and in view of the judgment passed by the Hon'ble Apex Court in the case of ***Dalbir Singh v. State of U.P., (2004) 5 SCC 334***, the accused-applicant could still be punished/convicted for the offence under Section 306 IPC. As such, the submission of the learned counsel for the applicant that the charge cannot be deleted, has no force.

36. For the reasons aforesaid, the application is ***dismissed***. No order as to costs.

37. The Court records the valuable assistance given by Ms. Urmish Shankar, Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

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**(2024) 10 ILRA 399**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

**THE HON'BLE ANISH KUMAR GUPTA, J.**

Application U/S 482 No. 6789 of 2019

**Shrey Gupta ...Applicant**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Applicant:**
Irfan Hasan, Vijit Saxena

**Counsel for the Respondents:**
G.A., Jagdev Singh

**Criminal Law – Criminal Procedure Code, 1973 – Sections 161, 164, 209-A & 482 - The Indian Penal Code, 1860 - Sections 90, 375, 375-(a), 375-(b), 375-(c), 375-(d), 376 & 386 -** Application u/s 482 – for quashing the charges-sheet as well as entire criminal proceedings - FIR – offence of rape & extortion – when husband of the informant was suffering from a severe disease, applicant become very closed to the informant – since her husband would be alive only for few more days, both of them would marry, having confident and promise to marry in future, both have entered in physical relationship which are continued, even after death of her husband, in home as well as in hotels outside – when she knows about engagement of applicant with another lady, she lodged the FIR – chargesheet - court finds that, prosecutrix (aged about 49 years) herself was a married woman having two children and also having her husband alive, had entered into a physical relationship out of love, lust and

infatuation towards the applicant (aged about 26 years), due to incapacity of her husband, due to his illness and she continuously remained in such an adulterous physical relationship with the applicant for a period of 12-13 years knowing fully well that she has no capacity of marriage with the applicant – admittedly, the prosecutrix was in a dominant position over the applicant and there is no allegations of any use of force or cheating by the applicant to allure the prosecutrix at the time of inception of the relationship between them - held, if the parties were having long-standing continuously consensual physical relationship without there being any element of cheating from the inception, such relationship would not amount to rape – hence, in the instant case no offence of rape is made out - application is allowed – impugned charge-sheet as well as entire proceedings are quashed. (Para – 16, 42, 43, 45, 46)

**Application Allowed.** (E-11)

**List of Cases cited:**

1. Pramod Suryabhan Pawar Vs St. of Mah. - (2019) 9 SCC 608,

2. Dhruvaram Murlidhar Sonar Vs St. of Mah. - (2019) 18 SCC 191,

3. Maheshwar Tigga Vs St. of Jharkhand - (2020) 10 SCC 108,

4. Naim Ahamed Vs St. (NCT of Delhi) - 2023 SCC OnLine SC 89,

5. St. of Karnataka Vs L. Muniswamy - (1977) 2 SCC 699,

6. Anand Kumar Mohatta Vs St. (NCT of Delhi) - (2019) 11 SCC 706,

7. R.K. Vijayasarathy Vs Sudha Seetharam, (2019) 16 SCC 739,

8. Rashmi Chopra Vs St. of U.P., (2019) 15 SCC 357,

9. Jiyaullah Vs St. of U.P., 2023 SCC OnLine All 858,

10. Aruni Mittal Vs St. of U.P., 2023 SCC OnLine All 3961,

11. Kaini Rajan Vs St. of Kerala, (2013) 9 SCC 113,

12. Anurag Soni Vs St. of Chhattisgarh, (2019) 13 SCC 1,

13. Deepak Gulati Vs St. of Har., (2013) 7 SCC 675,

14. Yedla Srinivasa Rao VS St. of A.P., (2006) 11 SCC 615,

15. Uday Vs St. of Karn., (2003) 4 SCC 46,

16. St. of Har. Vs Bhajan Lal - 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426,

17. Vineet Kumar Vs St. of U.P., (2017) 13 SCC 369.

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

1. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Vijit Saxena, learned counsel for the applicant and Sri Jagdev Singh, learned counsel for the opposite party no. 2 and Mohd. Shoaib Khan, learned A.G.A. for the State-respondent.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of Charge-sheet dated 09.08.2018 in S.T. No. 826 of 2018 as well as the entire criminal proceedings in Case Crime No. 59 of 2018 under Sections 376 and 386 I.P.C., Police Station- Mahila Thana, District-Moradabad, pending in the court of Sessions Judge, Moradabad.

## FACTS

3. The brief facts of the instant case are that on 21.03.2018, the opposite party no.2 had lodged an F.I.R. being Case

Crime No. 0059 of 2018 for the offences u/S 376 and 386 I.P.C. at the Woman Police Station, District- Moradabad. It has been submitted by the opposite party no. 2/ the informant that she is the resident of Mohalla H-9, Lajpat Nagar near Guru Govind Singh Park, Police Station-Katghar, District- Moradabad. It is alleged that her husband- Sanjay Goyal, was suffering from disease of sugar for last 15 years and was unable to move frequently and despite various treatments given the same could not improve his condition. In the meantime, her husband has introduced the applicant/Shrey Gupta, and told the informant that the applicant is a faithful person and he will take her care after him. Gradually, the applicant became very close to the informant and allegedly told the informant that her husband would be alive only for few more days, thereafter, both of them would marry. Taking the informant in his confidence and promising her to marry in future, he started to have physical relationship with the informant. The husband of the informant had ultimately died on 29.05.2017 and even after the death of her husband the applicant continued to visit the home of the informant and continued to have physical relationship with the applicant in the home as well as in hotels outside. The informant had many a time asked him to marry her, then, he avoided the marriage telling that first let her sister be married and thereafter he will marry her. Subsequently, the informant came to know about the engagement of the applicant with one other lady on 31.12.2017. Then, the informant told the applicant that he was continuously raping her on the pretext of promise to marry and now he has got engaged with some other lady.

4. Then, on 17.01.2018 at around 6:00 P.M. the applicant allegedly gave a phone call to the informant asking her to come to Rampur Doraha, where he will marry her in a temple and after marriage they will get the marriage registered in court. It is further alleged in the F.I.R. that on such assurance of the applicant herein the informant had reached at Rampur Doraha, then, the applicant told her to come with him and they will marry and thereafter, the applicant had taken her at a godown situated at Rampur Doraha and thereafter by putting a countrymade pistol on the head of the informant, he forcibly committed rape on her and also prepared a video clipping and thereafter told that he will not marry her and if she tells about the incident to anyone else, her video clip shall be made public. Thereafter, the informant allegedly came back to her house and it is further alleged that thereafter the applicant has started demanding Rs. 50,00,000/- within 15 days and threatened that if his demand is not, fulfilled, then he will kill both her sons and make the video clip public.

5. On the aforesaid allegations the instant F.I.R. was registered against the applicant herein. Thereafter, the matter was investigated by the police official and after recording the statements of various persons, who have alleged that there was a financial dispute between the applicant and the informant with regard to an amount of Rs. 1,00,00,000/-, which is to be paid by the son of the informant to the applicant and the instant F.I.R. was lodged just to avoid the said payment of Rs. 1,00,00,000/-. Son of the informant has also admitted the fact that the applicant herein was working with his father and also used to visit his home but he is not aware about any relationship of the applicant with the informant.

6. During the investigation the Call Detail Records (C.D.R.) reports were also

received and wherefrom the Investigation Officer has concluded that the place of incident as alleged in the F.I.R., the C.D.R. report of applicant and the opposite party no.2 are negative and it was further stated that the informant is a fifty years old woman, who has two sons of 27 years and 25 years of age and the applicant herein is also aged about 26 years and after the death of the husband of the informant her son was running the business of his father and he was liable to make a payment of Rs. 1,00,00,000/- to the applicant and the medical report has also not supported the incident of rape.

7. On the basis of the aforesaid, the Final Report dated 06.05.2018 was prepared by the earlier IO. However, the aforesaid Final Report was cancelled by the Senior Superintendent of Police and further investigation was directed on the following points:

(i) What was the relationship between the informant and the applicant and since when and on what basis they came and became intimate to each other ? ;

(ii) The authentication of the 16 photographs, which were produced by the informant during her 161 and 164 Cr.P.C. statements and out of which, in photograph nos. 2, 5, 7, 9, 12, 15 & 16, where parties are looking in objectionable conditions are required to be verified;

(iii) The details of the hotels and record of their arrival and departure from the hotel, where and when the applicant, the informant had gone on which hotel after the death of the husband of the informant;

(iv)The Marriage Certificate issued by Arya Samaj Mandir, Amritpuri B (Reg.) New Delhi, which was found to be a false certificate are required to be reinvestigated and who had prepared the same and for what purpose. Was there consent between the the parties? If yes, then what was the object of obtaining such marriage certificate?;

(v) Subsequently, it came to the knowledge of the informant that on 31.12.2017 the applicant had got engaged with one other lady. When she talked to him he told that he had got engaged due to the pressure from the family but he would marry the informant. Thereafter, on 17.01.2018, the applicant had allegedly called her at Godown in Rampur Doraha, where he bluntly refused to marry her and thereafter had forcibly raped her while keeping pistol on her head and has also prepared video clip of such rape and thereafter he demanded Rs. 50,00,000/- else threatened to defame her and her family and will also to kill the entire family:

(vi) With regard to the other allegations that is on 17.01.2018 at 6:00 P.M. the applicant had allegedly called the informant at Rampur Doraha and had taken her to the godown, where he had committed rape after keeping the countrymade pistol on her head, for which the appropriate CDR reports are required to be examined and location of the applicant and the opposite party no. 2 is required to be verified.

(vii) By which vehicle the informant had gone to Rampur Doraha, the driver of the vehicle should also be enquired;

(viii) The guards situated at Rampur Doraha are also required to be examined and with regard to the person who came on the relevant date at the godown;

(ix) If any CCTV footage is available with regard to the godown situated at Rampur Doraha, the footage of the same be procured;

(x) With regard to the allegation of the informant that the applicant had prepared a video clip, thereby had demanded Rs.50,00,000/- and if not given he will kill both her sons, in this connection firstly the video clip should be obtained and if there is possibility of relationship, the mobile should be taken into possession and data should be recovered;

(xi) The final report has been prepared on the basis of there being dues towards the opposite party no. 2 to the tune of Rs. 1,00,00,000/- but when and for what purpose the said amount was given by the applicant, the evidence in this regard be collected; and

xii) With regard to amount of Rs. 1,00,00,000/-, the statement of Munshi Kaish Alam has been obtained whereas the informant has also given the affidavit of the said Kaish Alam, which has been alleged to have been obtained by the informant forcibly, therefore, whatever interrogation of said Kaish Alam was done, the videography of the same must be prepared in presence of the witnesses. During the investigation, the video recording in presence of the witness must be prepared.

8. On the basis of such directions of Senior Superintendent of Police the investigation was taken over by the SHO-Rajini Dwivedi, who has subsequently filed the charge-sheet dated 09.08.2018 and vide order dated 28.09.2018, the trial court has taken cognizance on the aforesaid charge-sheet and warrant was prepared under Section 209A Cr.P.C. against the applicant herein against which the instant application has been filed by the applicant herein.

9. After the cognizance was taken by the trial court, the applicant has approached this Court by filing Criminal Miscellaneous Bail Application No. 38272 of 2018 (Shrey Gupta vs. State of U.P.), which was disposed of vide order dated 09.10.2018 and the bail application of the applicant herein was allowed. While granting bail this Court has taken into consideration the long-standing acknowledged relationship between the informant and the applicant including physical relationship stretched across period of 12-13 years, as mentioned in the statement of the prosecutrix under Section 164 Cr.P.C. statement and the inherent nature of allegations regarding the incident dated 17.01.2018, delay in lodging the F.I.R. and the immediate cause for the prosecutrix to act upon learning that the applicant had been engaged to a younger woman and has committed breach of promise to marry the informant and the alleged Whatsapp messages from the informant to the applicant taken on their face value.

10. In her 164 Cr.P.C. statement, the informant has categorically admitted that the applicant herein became a family

friend in the year 2005, as her husband was ill since last 15 years and in relation to the said business of her husband the informant used to go alongwith the applicant to bank and office etc. and she has developed a love relationship and in these 12-13 years they had continuous physical relationship number of times. It is further stated by the informant that during this period the applicant has established his own business with the help of the informant and also by some misappropriation of money. Ultimately, the husband of the informant had died on 29.05. 2017. Thereafter, the informant has asked the applicant to marry her, which was avoided by the applicant on the pretext of his DIL case.

11. In the medical examination, which was conducted at District Hospital, Moradabad, on 26.03.2018, no alive or dead spermatozoa was found and as per the medical report no definite opinion about rape committed on the informant was given. There was no external injury on the body of the victim.

**SUBMISSIONS BY APPLICANT**

12. Learned Senior Counsel for the applicant submits even if the allegations made in the F.I.R. as well as in the statement under Sections 161 and 164 Cr.P.C., coupled with the medical report and the entire material available on record, it is crystal clear that the informant was having a continuous consensual physical relationship with the applicant for about 12-13 years. Even when her husband was alive and she was also having the children near the age of the applicant herein. Therefore, learned counsel for the applicant submits that by no stretch of imagination such an alleged continuously consensual physical relationship would amount to rape within the meaning of Sections 375 and 376 I.P.C.

13. In support of his submissions learned Senior Counsel for the applicant has relied upon the judgements of Apex Court in ***Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608, Dhruvaram Murlidhar Sonar vs. State of Maharashtra : (2019) 18 SCC 191, Maheshwar Tigga v. State of Jharkhand, (2020) 10 SCC 108, Naim Ahamed v. State (NCT of Delhi), 2023 SCC OnLine SC 89, State of Karnataka v. L. Muniswamy, (1977) 2 SCC 699, Anand Kumar Mohatta v. State (NCT of Delhi), (2019) 11 SCC 706, R.K. Vijayasarathy v. Sudha Seetharam, (2019) 16 SCC 739, Rashmi Chopra v. State of U.P., (2019) 15 SCC 357*** and the judgements of this Court ***in Jiyaullah v. State of U.P., 2023 SCC OnLine All 858 and Aruni Mittal v. State of U.P., 2023 SCC OnLine All 3961***, therefore, prays for quashing of the entire proceedings of the instant case against the applicant herein.

**SUBMISSIONS BY INFORMANT**

14. *Per contra*, learned counsel for the opposite party no.2 submits that even if the lady was having a consensual physical relationship for long a period of time, however, that does not give a license to forcibly establish physical relationship against her will. When such relationship between the parties becomes estrange and if such physical relationship is established at the gun point against the will of the informant, that will amounts to rape. It is further submitted by learned counsel for the opposite party no.2 that since from the beginning, the relationship of the informant

started with the applicant only on the basis of his promise to marry the informant after the death of the husband of the informant. Had there been no such promise on the part of the applicant, the informant would not have entered into such a relationship with the applicant herein and the applicant has continuously exploited the informant for a long period of time on the pretext of marriage and subsequently he has refused to marry the informant and has got engaged with some other lady and subsequent thereto, had forcibly raped the informant. Therefore, a clear case of rape, committed by the applicant is made out against him. Subsequently, the applicant has also prepared a video clip of such physical activity and on the pretext of the same he has started blackmailing the informant and had demanded Rs. 50,00,000/- from the informant and has threatened the informant to kill her sons and also defame her and kill her entire family. Therefore, the allegation as made are fully established and it cannot be said that no case whatsoever is made out against the applicant herein. Therefore, learned counsel for the opposite party no.2 submits that no interference is called for in the instant matter and allegation that the instant F.I.R. has been lodged just to avoid the payment of dues of Rs. 1,00,00,000/-, is a subject matter of trial and at this stage no definite opinion can be formed. Thus, he seeks dismissal of the instant application filed by the applicant herein.

**SUBMISSIONS BY STATE**

15. Learned A.G.A. submits that though from the facts as narrated in the F.I.R. as well as in the statements under Sections 161 and 164 Cr.P.C. it is clear that the applicant and the informant were having the continuous consensual physical relationship, however, despite such relationship it does not give him implied license to commit rape at any point of time against the will of the informant. On 17.01.2018, allegedly applicant has committed rape at the gun point, which has been alleged in the F.I.R. and also in her 164 Cr.P.C. statement, therefore, a prima facie offence under Section 376 I.P.C. is made out against the applicant. Further, allegations with regard to extortion of money is concerned there are sufficient allegations that a video clip was prepared and thereafter the applicant had tried to extort an amount of Rs. 50,00,000/- from the informant, failing which he has threatened her to kill both her sons and defame the informant if his demands are not fulfilled, by circulating the said video in public. Therefore, learned A.G.A. submits that there are sufficient allegations as well as the material available on record to establish the aforesaid offence against the applicant herein. Therefore, no interference is called for while exercising the jurisdiction under Section 482 Cr.P.C.

**CONSIDERATION BY COURT**

16. Having considered the rival submissions made by learned counsel for the parties, this Court has carefully gone through the record of the case. Undisputedly, the admitted fact in the instant case are that the informant, at the time of lodging the F.I.R. was aged about 49 years as is reflected from her statement under Section 164 Cr.P.C. and the applicant herein was much younger than the informant. In the instant case though the charge-sheet was filed for the offences under Section 376 as well as 386 I.P.C., learned Magistrate has taken cognizance against the applicant only for the offence under Section 376 I.P.C. Therefore, before proceeding further it would be relevant to

note the provisions of Sections 375 and 376 I.P.C., which reads as under:

***"Section 375. Rape-***

*A man is said to commit "rape" if he—*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:*

*under the circumstances falling under any of the following seven description:-*

*Firstly-* ***Against her will.***

*Secondly.-* ***Without her consent.***

*Thirdly.-* ***With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.***

*Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

*Fourthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.*

*Sixthly.- With or without her consent, when she is under eighteen years of age.*

*Seventhly.- When she is unable to communicate consent.*

***Explanations***

*1. For the purposes of this section, "vagina" shall also include labia majora.*

*2.* ***Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;***

*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

***Exceptions***

*1. A medical procedure or intervention shall not constitute rape.*

*2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

***Section 376. Punishment for rape.***

*1. Whoever, except in the cases provided for in sub-section* ***(2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.***

*2. Whoever—*

*(a) being a police officer, commits rape,*

*i. within the limits of the police station to which such police officer is appointed; or*

*ii. in the premises of any station house; or*

*iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or*

*(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or*

*(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or*

*(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or*

*(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or*

*(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or*

*(g) commits rape during communal or sectarian violence; or*

*(h) commits rape on a woman knowing her to be pregnant; or*

*(i) [******]*

*(j) commits rape, on a woman incapable of giving consent; or*

*(k) being in a position of control or dominance over a woman, commits rape on such woman; or*

*(l) commits rape on a woman suffering from mental or physical disability; or*

*(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or*

*(n) commits rape repeatedly on the same woman,*

*shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.*

*3. Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to*

*imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:*

***Provided*** *that such fine shall be just and reasonable to meet the medical expenses and rehablitation of the victim:*

***Provided further*** *that any fine imposed under this sub-section shall be paid to the victim. "*

17. From the plain reading of Section 375 I.P.C., if a man commits the activities described in Clause (a), (b), (c) & (d), against the will of a woman and without her consent or with her consent, when such consent is obtained by putting her or any person, in whom she is interested, in fear of death or hurt, is said to have committed rape on such woman. The consent has been defined in Explanation 2 to Section 375 I.P.C. and the consent means an unequivocal voluntary agreement when the woman by words, gestures or form of verbal or non verbal communication, communicates willingness to participate in any sexual act. However, mere non resistance of a woman could not be regarded as she consented to sexual activity and any person who commits rape on a woman, which is not covered under sub-section (2) of Section 376 I.P.C., would be punishable for a term, which shall not be less than 10 years, but may extend to an imprisonment for life.

**CONSENT**

18. Section 90 of the I.P.C. further defines the consent if given under fear or misconception is no consent. Section 90 of the I.P.C. reads as under:

***"S.90 Consent known to be given under fear or misconception****: A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or*

***Consent of insane person****.- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*

***Consent of child****. - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."*

19. In ***Dhruvaram Murlidhar Sonar (supra)***, the Apex Court has held that an inference as to consent can be drawn only based on evidence or probabilities of the case. Consent is also stated to be act of reason coupled with deliberations. It denotes an act, will of mind of a person to promote the doing of the act complaint of.

20. In ***Pramod Suryabhan Pawar (supra)***, the Apex Court has held that where a woman does not consent to the sexual act, described in the main body of Section 375 I.P.C., the offence of rape has occurred while Section 90 I.P.C. does not define the term consent. A consent based on misconception of fact is not consent in the eyes of law.

21. In ***Kaini Rajan v. State of Kerala, (2013) 9 SCC 113***, it has been held by the Apex Court, which reads as under:

*"12..... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. "*

*(Emphasis Supplied)*

22. Thus, for the purpose of the offence under Section 375 I.P.C., the consent needs the voluntary participation of the prosecutrix in the physical relationship with the accused. The consent of such physical relationship would only be vitiated when it was given under some misconception of fact or under fear of injury to the victim or any person in whom the victim was interested.

23. In the instant case, at the time of initiation of the physical relationship with the applicant the prosecutrix, her husband was alive. Therefore, the allegation that the applicant had promised her to marry was of no consequence as prosecutrix herself was not having any capacity to marry with the applicant at the relevant time and such consensual physical relationship between the applicant and the prosecutrix had continued for about 12-13 years without any objection on the part of the prosecutrix. Thus, in the considered opinion of the Court the aforesaid physical relationship between the applicant and the prosecutrix was a long-standing consensual adulterous physical relationship, which would not amount to rape within the meaning of Section 375 I.P.C.

**PROMISE TO MARRY**

24. In ***Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1***, the Apex Court has held as under:

*"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 IPC and can be convicted for the offence under Section 376 IPC."*

*(Emphasis Supplied)*

25. In ***Deepak Gulati v. State of Haryana, (2013) 7 SCC 675*** , the Apex Court has held as under:

*"21. .....There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the*

*prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently....."*

*.....*

*24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."*

*(Emphasis Supplied)*

26. In ***Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615***, the Apex Court has held as under:

*"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.....*

*(Emphasis Supplied)*

27. In ***Uday v. State of Karnataka, (2003) 4 SCC 46***, where the complainant was a college going student, when the accused promised to marry her, the complainant in statements submits that she was aware that there will be significant opposition from both the complainant and

accused family to their marriage, knowing fully well she engaged in sexual intercourse with the accused, however, kept such relationship secret from her family. In such circumstances the Apex Court has observed that the accused promised to marry the complainant was not of immediate relevance to the complainant's decision created in sexual intercourse with the accused, rather, it was motivated by her sexual desires and other factors. The Apex Court has observed as under:

> *"25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her,*

*but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.*

*(Emphasis Supplied)*

28. In ***Pramod Suryabhan Pawar (supra)***, on the facts where the complainant and the accused were known to each other for sufficiently long time and were also engaged in intimate relationship and they travel regularly together and reside in each other's house on multiple occasions and were engaged in sexual intercourse regularly over a course of five years and when the accused expressed his reservations about marrying the complainant after about 10 years of such continuous, consensual physical relationship, the Apex Court has held that subsequent failure of the accused to fulfil his promise of marriage made earlier, cannot be construed to make the promise itself was false, therefore, no offence of rape is made out, in which the Apex Court has observed as under:

*"19. The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:*

*19.1. The complainant and the appellant knew each other since 1998 and were intimate since 2004.*

*19.2. The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant.*

*19.3. The appellant expressed his reservations about marrying the complainant on 31-1-2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015.*

*20. The appellant is a Deputy Commandant in the CRPF while the complainant is an Assistant Commissioner of Sales Tax.*

*21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate*

*that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 IPC has occurred."*

*(Emphasis Supplied)*

29. Thus, from the aforesaid judgements it is apparent that each and every promise of marriage would not be considered as a fact of misconception for the purpose of consensual sexual intercourse unless it is established that such promise of marriage was a false promise of marriage on the part of the accused since the beginning of such relationship. Unless it is alleged that from the very beginning of such relationship there was some element of cheating on the part of the accused while making such promise, it would not be treated as a false promise of marriage. Once, a promise was made in good faith and subsequently after change of circumstances when the relationship between the parties went wrong for various other reasons, such breach of promise would not be treated as misconception for the purpose of consent of establishing physical relationship. When a woman of competent age, who has sufficient understanding of the physical activities in which she is involving herself on the basis of such promise of marriage, understands the risk of such physical relationship as there is big difference between marriage and promise of marriage.

30. In the instant case, the prosecutrix was a lady of matured age and was having two sons of matured age, equivalent to that of the applicant herein and at the time of initiating the physical relationship the prosecutrix has her husband alive, therefore, the promise of marriage as alleged in the instant case by the prosecutrix was of no consequence at all as the prosecutrix was herself incompetent to marry at the time of initiation of such relationship. Therefore, the prosecutrix herself involved the applicant in the physical relationship out of her own lust and cannot blame the applicant for breach of promise as the promise itself was not non-est at that time of beginning of the relationship between the applicant and the prosecutrix.

**EXERCISE OF POWERS U/S 482 Cr.P.C.**

31. In ***L. Muniswamy (supra)***, the Apex Court has held as under:

*"In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to*

*achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

*(Emphasis Supplied)*

32. In ***Anand Kumar (supra)*** the Apex Court has held as under:

*"15. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 CrPC and that this Court is hearing an appeal from an order under Section 482 CrPC. Section 482 CrPC reads as follows:*

***"482. Saving of inherent powers of the High Court.—*** *Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

*16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636, para 7 : 2000 SCC (Cri) 513. Umesh Kumar v. State of A.P., (2013) 10 SCC 591, para 20 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237] . Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."*

*(Emphasis Supplied)*

33. In ***R.K. Vijayasarathy (supra)***, the Apex Court has held as under:

*"8. The primary question before this Court is whether the High Court has erred in rejecting the plea of the appellants for*

*quashing the criminal proceedings against them. The question at the heart of the present dispute is whether the averments in the complaint disclose the ingredients necessary to constitute an offence under the Penal Code.*

*9. Section 482 of the Code of Criminal Procedure saves the inherent power of the High Court to make orders necessary to secure the ends of justice. In Indian Oil Corpn. v. NEPC (India) Ltd. [Indian Oil Corpn. v. NEPC (India) Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] , a two-Judge Bench of this Court reviewed the precedents on the exercise of jurisdiction under Section 482 of the Code of Criminal Procedure 1973 and formulated guiding principles in the following terms : (SCC p. 748, para 12)*

*"12.* ***

*(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

*(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

*(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

*(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.*

*(v)"*

*10. The High Court, in the exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, is required to examine whether the averments in the complaint constitute the ingredients necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence under the Penal Code. The*

*complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence under the Penal Code."*

*(Emphasis Supplied)*

34. In ***Rashmi Chopra (supra)*** the Apex Court has held as under:

*"21. The criminal prosecution can be allowed to proceed only when a prima facie offence is disclosed. This Court has observed that judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. If the High Court finds that the proceedings deserve to be quashed as per the parameters as laid down by this Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , the High Court shall not hesitate, in exercise of its jurisdiction under Section 482 CrPC to quash the proceedings."*

*(Emphasis Supplied)*

35. In ***Dhruvaram Murlidhar Sonar (supra)***, the Apex Court has held as under:

*"8. It is well settled that exercise of powers under Section 482 CrPC is the exception and not the rule. Under this section, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including procedural law and not otherwise.*

*9. This Court in* ***State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426]*** *, has elaborately considered the scope and ambit of Section 482 CrPC. Seven categories of cases have been enumerated where power can be exercised under Section 482 CrPC. Para 102 thus reads : (SCC pp. 378-79)*

*"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently*

*channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:*

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

*(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

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

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

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

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

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

*10. In Rajesh Bajaj v. State (NCT of Delhi) [Rajesh Bajaj v. State (NCT of Delhi), (1999) 3 SCC 259 : 1999 SCC (Cri) 401] , this Court has held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. If the factual foundation for the offence has been laid in the complaint, the court should not hasten to quash criminal proceedings during the investigation stage merely on the premise that one or two ingredients have not been stated with details.*

*11. In State of Karnataka v. M. Devendrappa [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , it was held that while exercising powers under Section 482 CrPC, the court does not*

*function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It was further held as under : (SCC p. 94, para 6)*

*"6. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."*

*(Emphasis Supplied)*

36. In ***Vineet Kumar v. State of U.P., (2017) 13 SCC 369,*** the Apex Court has held as under:

*"41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. ... Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. ... the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings.*

*It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which*

*cognizance has been taken, it is open to the High Court to quash the same in exercise of the inherent powers."*

*(Emphasis Supplied)*

**RAPE/CONSENSUAL SEX**

37. Further, in ***Dhruvaram Murlidhar Sonar (supra),*** the Apex Court has held as under:

*"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim*

*or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC."*

*(Emphasis Supplied)*

38. In ***Maheshwar Tigga (supra)***, the Apex Court has held that the misconception of the fact about promise to marry has to be in proximity of time to occurrence and cannot be spread over for long period of time. The Apex Court has observed as under:

*"13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eye of the law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.*

*14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be*

*quarrels at her home with her family members with regard to the relationship, and beatings given to her.*

*.....*

*.....*

*.....*

*18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her."*

*(Emphasis Supplied)*

39. In ***Naim Ahamed (supra)*** the Apex Court has held that it would be folly to teach each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376 I.P.C., the Apex Court has observed as under:

*"20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause - Secondly of Section 375 IPC.* ***In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceited the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376.*** *As stated earlier, each case would depend upon its proved facts before the court.*

*21. In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such allegations as 'rape' by the appellant, would be stretching the case too far. The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him during the subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loin of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr. P.C. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC."*

*(Emphasis Supplied)*

40. In ***Jiyaullah (supra***), this Court has held as under:

*"18. The expression "against her will" would ordinarily mean that the intercourse was done by man with a women despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation.*

*19. In the instant case, from the F.I.R. as well as from the Statements u/S 161 and 164 Cr. P.C., the following undisputed facts emerged that the relationship between the applicant herein and the opposite party no. 2 was of a consensual nature:*

*(i) Parties were known to each other for more than 15 years;*

*(ii) They were in active physical relationship with the approval of parents of opposite party no. 2, since more than 8 years. Therefore, there was an active and considered consent by the victim, with the approval of her parents and the physical relationship with her was not against her will;*

*(iii) Subsequently, the applicant herein has broken his promise to marry and refused to marry the opposite party no. 2 which resulted in the registration of the F.I.R. against the applicant herein;*

*(iv) From the allegations made, it is apparent that the promise to marry by the applicant herein was not false from its inception. Due to later developments, the applicant has denied to marry the victim.*

*20. Thus, from the proposition of law as enunciated in the above cited judgments, this Court is of the view that even assuming that all the allegations made against the applicant herein are true for the purposes of considering the application for quashing u/S 482 Cr. P.C., no offence u/S 376 is established as the relationship between the parties was of consensual nature and which has an approval of the family as well and the initial promise by the applicant herein was not false. It is only after subsequent developments between the parties, the applicant herein has refused to marry the applicant herein. Since, the relationship between the parties was longstanding and the victim as well as her family members knew the consequences of the relationship, therefore, any subsequent breach of such relationship would not amount to the offence of rape u/S 375 I.P.C."*

*(Emphasis Supplied)*

41. In ***Aruni Mittal (supra)***, this Court has held as under:

*"17. Thus, from the survey of the aforesaid case laws, the legal position in this regard is very clear that there is a distinction between the rape and consensual sex. In case of rape, besides other categories, there is absence of will and consent with regard to the sexual activities. Consent should always be free and voluntary in case of consensual sex. If consent is obtained under the misconception of fact in that case, consent cannot be considered to have been giving freely and voluntarily. There is a distinction between false promise to marry and breach of promise to marry. In the latter case, does not amount to a case of rape, if the circumstances were in the knowledge of the prosecutorix and were beyond the control of the accused. A false promise to marry amounts to the case of rape, if there*

*has been a false promise from the inception not to marry. Two tests are laid down under the law to establish whether the consent is vitiated by misconception of fact, arising out of a promise to marriage; (i) The promise of marriage must have been a false promise, given in a bad faith and with no intention of being adhered to at the time it was being given. (ii) The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. The misconception of fact has to be in approximity of time to the occurrence and cannot be spread over a period of nine years.*

*18. From bare and plain reading of allegations made in the FIR as well as statements recorded under Sections 161 Cr. P.C. and 164 Cr. P.C. of the prosecurtorix, the picture emerges, of which the salient features are as follows:—*

*(i) Prosecutorix (first informant) is a major lady and an active member of BJP and indulging in political activities;*

*(ii) Prosecutorix (first informant) has met the applicant no. 1 in the year 2003-2004 at the Oxford Institute while taking tuition together with him and, thereafter, she was in love till 2011;*

*(iii) Prosecutorix (first informant) has not stated that there has been a false promise to marry since begining/inception.*

*(iv) Prosecutorix herself has admitted that both, she and applicant no. 1 have accepted themselves as wife and husband before the presiding deity in Balaji Mandir, Meerut and she took vow before the deity as a wife of the applicant no. 1. and established physical sexual relationship.*

*(v) She was aware and had knowledge that their relationship was strongly objected and opposed by the family members of the applicant no. 1.*

*(vi) She mounted pressure for solemenizing the valid marriage but the applicant no. 1 could not manage valid marriage and kept physical and sexual relations till 28.12.2019. Thereafter, he maintained distance resultantly hot-talks occurred between them.*

*(vii) Applicant no. 1's family members misled him against her and her sister Rashmi Mittal, particularly, created atmosphere against her by stating that prosecutorix is a political lady and meetings will be held with other boys, if she gets married with her brother and she tried to tarnish and destroy her political image.*

*(viii) Prosecutorix visited different hotels over a period of time and established sexual relationship.*

*(ix) The physical and sexual relationship between the prosecutorix and applicant no. 1 remain active for a period of nine years.*

*(x) Prosecutorix never resisted or opposed the sexual relationship with the applicant no. 1 and there has been a consensual sex between the parties, though allegedly under the conception of fact.*

*19. Considering the facts and circumstances of the case and*

*perusal of records, it is apparent that allegations in the FIR do not on their face value, indicate that promise by the applicant no. 1 was false or that prosecutorix engaged in sexual relationship on the basis of that promise only. Relationship between them has been activated and prompte by love and affection also. There is no allegation in the FIR that when the applicant no. 1 accepted her as his wife before the deity in the temple, it was done in bad faith or with the intention to deceive her. The applicant no. 1's failure in 2019 to fulfill his promise made in 2011 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the prosecurtorix was aware that there existed obstacles to marrying the applicant no. 1 since beginning as applicant no. 1's family members were strongly against their relationship particularly, his sister was creating atmosphere against the prosecutorix, despite all this, the prosecutorix and applicant no. 1 continued to engage in sexual relations over a long period of time i.e. nine years, after their getting married had became a disputed matter. Even thereafter, the prosecutorix travelled to visit several hotels and remained there with the applicant no. 1 and had established sexual relations there. The allegations in the FIR belie the case that the prosecutrorix was deceived by the applicant no. 1's promise of marriage. Therefore, even if the facts set out in the prosecurtorix's statements are accepted in totality, no offence under Section 375 of IPC is made out, as such, the present criminal proceedings against the applicants is nothing but an abuse of process of law, which is liable to be quashed.*

*(Emphasis Supplied)*

42. Therefore, from the aforesaid line of judgements, it is crystal clear that if the parties were having long-standing continuous consensual physical relationship without there being any element of cheating from the inception, such relationship would not amount to rape.

43. In the instant case, the prosecutrix who herself was a married woman having two grown up children and also having her husband alive, had entered into a physical relationship out of love, lust and infatuation towards the applicant herein due to incapacity of her husband, due to his illness and for a period of about 12-13 years she continuously remained in such an adulterous physical relationship with the applicant and the prosecutrix had entered into such relationship knowing fully well that she has no capacity of marriage, when she started such relationship with the applicant. Therefore, the allegation that the promise of marriage was made which was dependent on the death of the husband of the prosecutrix, was a lame excuse given by the prosecutrix. Even if the applicant had promised to marry after the death of the husband of the prosecutrix, it was a no promise in law and the prosecutrix was a matured lady, having two adult children, had deliberately and consciously entered into such a relationship with the applicant herein. Admittedly, the applicant is much younger in age to the prosecutrix and was an employee in the business of the husband of the prosecutrix. Thus, she was having

undue influence over the applicant, whereby she had forced the applicant into physical relations with her. From the facts of the case it is apparent that the prosecutrix had allured the applicant herein due to subordination of the applicant, as he was dependent financially on the family of the prosecutrix and due to the aforesaid dependency the prosecutrix had allured and forced the applicant to entered into such a relationship, which was with the clear and categorical consent and will of the prosecutrix, therefore, by no stretch of imagination such relationship would amount to rape within the meaning of Section 375 of the Indian Penal Code. As per her own statement recorded under Section 164 Cr.P.C., the prosecutrix herself has helped the applicant to establish his own business so that she can stay with the applicant in future. Admittedly, the prosecutrix was in a dominant position over the applicant herein and there is no allegation of any use of force or cheating by the applicant to allure the prosecutrix at the time of inception of the relationship between them. The further story is that on 17.01.2018 the applicant had put a country-made pistol on her head and had forcibly raped her and prepared the video clip. From the record neither the video clip is recovered nor the said country-made pistol has been recovered from possession of the applicant or on the indication of the applicant herein.

44. From the record, it is apparent that initially the Final Report was prepared having categorically found that the call details of both the person did not match on the place of occurrence as alleged in the F.I.R. and the subsequently the charge-sheet has been filed without establishing the fact that the parties were present at the place of occurrence and no material has been concluded with regard to non-existence of the financial dispute between the parties, which was categorically alleged by the witnesses in the first round of investigation, as was directed by the Superintendent of Police.

45. Therefore, this Court is of the considered opinion that in the instant case no offence of rape is made out against the applicant herein and the instant F.I.R. has been lodged by the prosecutrix being annoyed with regard to the engagement of the applicant with some other lady and she was not willing to leave the applicant, therefore, the subsequent incident of forcible rape has been concocted by the prosecutrix only for the purpose of lodging the F.I.R., which is not substantiated during the investigation.

46. Therefore, the instant application is ***allowed*** and the entire proceedings of the Charge-sheet dated 09.08.2018 in S.T. No. 826 of 2018 as well as the entire criminal proceedings in Case Crime No. 59 of 2018 under Sections 376 an 386 I.P.C., Police Station- Mahila Thana, District- Moradabad, pending in the court of Sessions Judge, Moradabad, are hereby ***quashed.***

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**(2024) 10 ILRA 425**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 03.10.2024**

**BEFORE**

**THE HON'BLE ANISH KUMAR GUPTA, J.**

Application U/S 482 No. 27067 of 2019

**Pranjal Shukla & Ors. ...Applicants**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Applicants:**
Sri Pradeep Kumar Mishra, Sri Vinay Saran (Sr. Adv.)

**Counsel for the Respondents:**
Sri Bharat Singh Pal, G.A., Sri Prabhat Tripathi

**Matrimonial dispute-**general and vague allegations with regard to the demand of dowry etc.,- no specific incident as to who actually and when demanded such dowry -from the allegations as made in the instant F.I.R. as well as the St.ments of the opposite party no. 3, the allegations are with regard to their matrimonial obligations and physical relationship and a concocted story of demand of dowry-entire proceeding quashed.

**Application allowed.** (E-9)

**List of Cases cited:**

1. Geeta Mehrotra v. St. of U.P., (2012) 10 SCC 741

2. Achin Gupta Vs St. of Har. & anr.: 2024 SCC Online SC 759

3. Kahkashan Kausar Vs St. of Bihar, (2022) 6 SCC 599

4. Mohammad Wajid Vs St. of U.P., 2023 AIR Supreme Court 3784

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

1. Heard Shri Vinay Saran, learned Senior Advocate assisted by Shri Pradeep Kumar Mishra, learned counsel for the applicants, Shri Bharat Singh Pal, learned counsel for the opposite party no. 2 and Shri Pankaj Srivastava, learned A.G.A. for the State respondents.

2. The instant application has been filed seeking quashing of the cognizance/summoning order dated 30.05.2019 as well as the charge-sheet dated 20.04.2019 and entire proceedings of Case No. 395 of 2019 arising out of the Case Crime No. 83 of 2018 under Sections 498, 323, 504, 506, 509 I.P.C. and 3/4 D.P. Act, Police Station- Mahila Thana, District-Gautam Buddha Nagar, pending in the court of Civil Judge (Senior Division)/Fast Track Court, Gautam Buddh Nagar.

3. The brief facts of the case are that the opposite party no. 2 is the father-in-law of the applicant no. 1 herein. The daughter of the opposite party No. 2, namely Meesha Shukla/opposite party no.3, was married with the applicant no. 1/Pranjal Shukla, on 07.12.2015, as per Hindu rites and customs. It is alleged in the F.I.R. that in the said marriage the opposite party no. 2 has spent a huge amount of money. After the marriage the in-laws of the daughter of the opposite party no 2, namely Madhu Sharma and Punya Sheel Sharma, were not satisfied with the dowry and gifts given during the marriage. However, it has been categorically stated in the F.I.R. that prior to marriage there was no demand of money. However, when the marriage was settled, in the name of various customs, they demanded money. It is further stated in the F.I.R. that after the marriage the husband and the in-laws i.e., the applicants herein started making comments against her and said that her father has selected an IIT qualified groom, then, dowry ought to have been given. When the opposite party no. 3 told that her father is not having the capacity to meet all the demands, then, they started abusing and assaulting the daughter of the opposite party no. 2. His daughter was compelled too much that he had to give the articles worth Rs. 15 to 20 lakh and cash as well. Even after such payments and giving of the articles the applicant no. 1 was not satisfied and he used to misbehave and assault his daughter. When it was informed by the opposite party no.3 to her in-laws they also

did not pay any attention to the same and told that money has to be brought in. It is also stated that the applicant no.1 used to drink and also used to watch porn films and used to insist for unnatural sex with the opposite party no.3 and used to be nude before her and also used to masturbate. When the daughter of the opposite party no. 2 used to object to the same, he did not pay any heed to her objections. The applicant no.1, under the influence of alcohol and drugs, tried to kill his daughter and strangled her, when it was objected by the daughter of the opposite party no. 2, then, the applicant no.1 left the daughter of the opposite party no. 2 with her in-laws and went alone Singapore. When the opposite party no. 3 insisted to go to Singapore, then, the in-laws told her that unless all their demands are fulfilled, she will stay there at Mumbai only. When the opposite party no.2, did not fulfil their demands they have sent his daughter at Noida with the opposite party no. 2 and her husband started living at Singapore. When the daughter of the opposite party no.2 insisted to her husband to go to Singapore, he told her to bring money from her parents.

4. After staying for about eight to nine months at Noida the daughter of the opposite party no. 2 went to Singapore on 27.07.2017, where she found the applicant no. 1 consuming the drugs and the alcohol. It is further stated in the F.I.R. that for about a year the applicant no. 1 was torturing his daughter at Singapore and due to his activities his daughter had to seek employment and entire salary was spent by her to fulfil the demands of the applicant no. 1. When the opposite party no. 3 told all those incidents to the opposite party no. 2, then, again for the second time the opposite party no.2 went to Singapore to convince the applicant no. 1 but both times he behaved inhumanly with them and abused and threatened to kill his daughter. On the basis of such written report, an F.I.R. being Case Crime No. 83 of 2018 was registered on 23.7.2018. The matter was investigated by the police and after registration of the F.I.R. the intimation was also given to the Ministry of Foreign Affairs with regard to the criminal case pending against the applicant no. 1.

5. After registration of the F.I.R. the applicants have filed a *Criminal Misc. Writ Petition No. 23151 of 2018 (Pranjal Shukla and 2 Others vs. State of U.P. and 3 Others)* before this Court and matter was referred to the Mediation Centre Vide order dated 24.08.2018 and interim protection was granted to the applicants. Subsequent thereto, the applicants have cooperated with investigation and ultimately after conclusion of the investigation the charge-sheet was filed against the applicants herein. The mediation between the parties failed on 26.10.2018, due to non-cooperation of the opposite parties no. 2 and 3. However, after failure of the mediation the opposite party no. 2 through his counsel sent a notice to the Ministry of Foreign Affairs, Singapore requesting for freezing/hold of the passport of the applicant no. 1. Similarly, the opposite party no. 2 also sent the letters to the CEO of the company where the applicant no. 1 was employed, requesting for his return to India. In the meantime, the aforesaid Writ Petition No. 23151 of 2018 was disposed of vide order dated 30.01.2019 and investigation was directed to continue.

6. Pursuant to the aforesaid ordered, the charge-sheet was filed on 20.04.2019. The learned Magistrate, has taken cognizance of the charge-sheet filed

against the applicants herein. Vide order dated 30.05.2019, without any application of mind in a mechanical manner, by a cryptic order against which the instant application has been filed by the applicants. While entertaining the instant application, the matter was again referred to the Mediation Centre vide order dated 15.07.2019 and as per the report of the Mediation Centre dated 18.03.2021, the mediation between the parties could not succeed. Thereupon, the pleadings were exchanged and the matter is finally heard.

7. Learned counsel for the applicants submits that in the entire F.I.R. as well as in the statements of the opposite party no. 2, there are only general and vague allegations with regard to the demand of dowry etc., no specific incident as to who actually and when demanded such dowry has been made out either in the F.I.R. or in the statement of witnesses. Admittedly, the applicant no. 1 went to Singapore in connection of his employment and after the applicant no.1 has gone to Singapore, the opposite party no. 3 came back to her parents' home and stayed there for about eight-nine months and ultimately on 27.07.2017, the opposite party no. 3 was also taken to Singapore by the applicant no. 1. From the allegations as made in the instant F.I.R. as well as the statements of the opposite party no. 3, the allegations are with regard to their matrimonial obligations and physical relationship and the unnatural sexual activities by the applicant no. 1, which was objected by the opposite party no. 3. The assaults which are alleged in the statement by the opposite party no.3, are with regard to non-fulfilment of the sexual urges of the applicant no.1 by the opposite party no.3 and not for any cruelty meted out for demand of dowry. However, not a single date of any actual incident has been made out in the F.I.R. as well as in the statement of witnesses and only general and vague allegations have been made. Despite the specific query made by the Investigation Officer, she has not been able to point out any specific place of incident, which could be verified by the Investigation Agency. Therefore, learned Senior Counsel relying upon the judgements of the Apex Court in ***Geeta Mehrotra v. State of U.P., (2012) 10 SCC 741, Achin Gupta vs. State of Haryana and Another : 2024 SCC Online SC 759 and Kahkashan Kausar Vs. State of Bihar, (2022) 6 SCC 599***, submits that for want of any specific allegation, merely on general and vague allegations, the prosecution of the applicants herein is unwanted and is just a malicious prosecution. Further, learned Senior Counsel relying upon the judgement of the Apex Court in ***Mohammad Wajid v. State of U.P., 2023 AIR Supreme Court 3784*** submits that no offence under Sections 504, 506, 509 I.P.C., are made out against the applicants, therefore, learned Senior Counsel submits that none of the offences as alleged are made out from the entire material available on record. Thus, the instant proceeding is nothing but a malicious prosecution on the part of the opposite parties no. 2 and 3 against the applicants herein with ulterior motive. Therefore, learned counsel for the applicants seeks quashing of the entire proceedings of the instant case.

8. *Per Contra*, learned counsel for the opposite party nos. 2 & 3 submits that from the allegations as made, there are clear and categorical allegations with regard to the demand of dowry and torture for demand of dowry. Therefore, a *prima facie* case is made out against the applicants herein and the allegations have been found established during the

investigation, on the basis of which the charge-sheet has been filed by the applicants herein. Further, the trial court having found a prima facie case gainst the applicants herein has taken cognizance in the matter and has summoned the applicants herein, therefore, there is no illegality the instant proceedings initiated against the applicant and also in the charge-sheet as well as in the summoning order passed by the learned trial court.

9. Learned A.G.A. supports the submissions made by learned counsel for the opposite party nos. 2 & 3.

10. Having heard the submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case. From the record of the case, it is apparent that in the entire F.I.R. as well as in the statements of witnesses recorded during the investigation no specific allegation has been made out against the applicants herein. Only general and vague allegations have been made out with regard to the demand and torture for demand of dowry. However, from the close scrutiny of the F.I.R. as well as the statement of the victim, the torture or any assault, if any, is meted out not for any demand of dowry but on refusal of the opposite party no. 3 to fulfil the sexual urges of the applicant no. 1. So far as the applicant nos. 2 and 3 are concerned, there is not a single allegation against them. Even in the F.I.R., it has been categorically stated that prior to marriage there was no demand of dowry by the applicants, at any stage. From the close scrutiny of the F.I.R. as well as statement of the witnesses it is apparent that the dispute is with regard to the sexual incompatibility of the parties for which the dispute was there between the parties and due to the said dispute the instant F.I.R. has been lodged by the opposite party no.2, making out the false and concocted allegations with regard to the demand of dowry, torture and harassment. If man would not demand sexual favour from his own wife and vice-versa, where they will go to satisfy their physical sexual urges in a morally civilized society. In any of the event, no injury has ever been sustained by the opposite party no.3. Thus, from the facts of the case, in the considered opinion of this Court, by no stretch of imagination it can be said to be an offence of cruelty in terms of section 498-A I.P.C. There is no avernment with regard to any specific demand of dowry made by any specific person except the general and vague allegations.

11. Before proceeding further it would be relevant to take note of the provisions of Sections 498-A, 506 I.P.C. as well as 3/4 of the D.P. Act, for which the applicants have been charged.

**Sections 498A, 506 I.P.C.**

***Section 498-A. Husband or relative of husband of a woman subjecting her to cruelty***- *Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*

*Explanation.—For the purposes of this section, "cruelty means"—*

*(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health*

*(whether mental or physical) of the woman; or*

*(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]*

*"**Section 506. Punishment for criminal intimidation**.- Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

***If threat be to cause death or grievous hurt, etc** — and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, of with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

***Sections 3 and 4 of the D.P. Act.***

*"**3. Penalty for giving or taking dowry.—***

*(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable [with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]:*

*Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than [five years].*

*[(2)Nothing in sub-section (1) shall apply to, or in relation to,—*

*(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf):*

*Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;*

*(b)presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf):*

*Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:*

*Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given].*

***4. Penalty for demanding dowry**.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with*

*imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:*

*Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."*

12. In case of ***Geeta Mehrotra (supra)***, the Apex Court has observed as under:-

*"19. Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their names who have been included in the FIR but* ***mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially*** *if it happens soon after the wedding.*

*20. It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of G.V. Rao v. L.H.V. Prasad, (2000) 3 SCC 693 wherein also in a matrimonial dispute, this Court had held that* ***the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside****. Their Lordships observed therein with which we entirely agree that:*

*"there has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case.* ***There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude*** *and in that process the parties lose their young days in chasing their cases in different courts."*

*The view taken by the judges in this matter was that the courts would not encourage such disputes.*

*21. In yet another case reported in (2003) 4 SCC 675 : AIR 2003 SC 1386 in the matter of B.S. Joshi v. State of Haryana it was observed that there is no doubt that*

*the object of introducing Chapter XXA containing Section 498A in the Penal Code, 1860 was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punish the husband and his relatives who harass or torture the wife to coerce her relatives to satisfy unlawful demands of dowry. But if the proceedings are initiated by the wife under Section 498A against the husband and his relatives and subsequently she has settled her disputes with her husband and his relatives and the wife and husband agreed for mutual divorce, refusal to exercise inherent powers by the High Court would not be proper as it would prevent woman from settling earlier. Thus for the purpose of securing the ends of justice quashing of FIR becomes necessary, Section 320 Cr. P.C. would not be a bar to the exercise of power of quashing. It would however be a different matter depending upon the facts and circumstances of each case whether to exercise or not to exercise such a power."*

*(Emphasis supplied)*

13. In Kahkashan Kausar (supra), the Apex Court has observed as under:

*"10. Having perused the relevant facts and contentions made by the appellants and respondents, in our considered opinion, the foremost issue which requires determination in the instant case is whether allegations made against the appellant in-laws are in the nature of general omnibus allegations and therefore liable to be quashed?*

*15. In* ***Geeta Mehrotra v. State of U.P.*** *[Geeta Mehrotra v. State of U.P., (2012) 10 SCC 741 : (2013) 1 SCC (Civ) 212 : (2013) 1 SCC (Cri) 120] it was observed : (SCC p. 749, para 21)*

*"21. It would be relevant at this stage to take note of an apt observation of this Court recorded in G.V. Rao v. L.H.V. Prasad [G.V. Rao v. L.H.V. Prasad, (2000) 3 SCC 693 : 2000 SCC (Cri) 733] wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that : (SCC p. 698, para 12)*

*'12. ... There has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not*

*encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts.*

*16. Recently, in* ***K. Subba Rao v. State of Telangana*** *[K. Subba Rao v. State of Telangana, (2018) 14 SCC 452 : (2019) 1 SCC (Cri) 605] , it was also observed that : (SCC p. 454, para 6)*

*"6. ...* ***The courts should be careful in proceeding against the distant relatives in crimes pertaining to matrimonial disputes and dowry deaths. The relatives of the husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime are made out."***

*17. The abovementioned decisions clearly demonstrate that this Court has at numerous instances expressed concern over the misuse of Section 498-AIPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long-term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this Court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them.*

*18. Coming to the facts of this case, upon a perusal of the contents of the FIR dated 1-4-2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "****all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes****. Insofar as husband is concerned, since he has not appealed against the order of the High Court, we have not examined the veracity of allegations made against him. However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution.*

*21. Therefore, upon consideration of the relevant circumstances and in the absence of any specific role attributed to the appellant-accused, it would be unjust if the appellants are forced to go through the tribulations of a trial i.e. general*

*and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must, therefore, be discouraged."*

*(Emphasis supplied)*

14. In ***Achin Gupta (supra)***, the Apex Court has observed as under:

*"25.* ***If a person is made to face a criminal trial on some general and sweeping allegations without bringing on record any specific instances of criminal conduct, it is nothing but abuse of the process of the court.*** *The court owes a duty to subject the allegations levelled in the complaint to a thorough scrutiny to find out, prima facie,* ***whether there is any grain of truth in the allegations or whether they are made only with the sole object of involving certain individuals in a criminal charge, more particularly when a prosecution arises from a matrimonial dispute."***

*(Emphasis supplied)*

15. Therefore, in the considered opinion of this Court the instant F.I.R. is nothing but a concocted story of demand of dowry by making general and vague allegations against the applicants herein. Therefore, in view of the judgement of Apex Court in ***Geeta Mehrotra (supra), Achin Gupta (supra)***, as well as ***Kahkashan Kausar (supra)***, the instant application is ***allowed*** and the cognizance/summoning order dated 30.05.2019 as well as the charge-sheet dated 20.04.2019 and entire proceedings of Case No. 395 of 2019 arising out of the Case Crime No. 83 of 2018 under Sections 498, 323, 504, 506, 509 I.P.C. and 3/4 D.P. Act, Police Station- Mahila Thana, District-Gautam Buddha Nagar, are hereby ***quashed***.

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**(2024) 10 ILRA 434**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.10.2024**

**BEFORE**

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

Appeal u/s 37 of Arbitration & Conciliation Act 1996 No. 305 of 2024
alongwith
Appeal u/s 37 of Arbitration & Conciliation Act 1996 Nos. 306 of 2024, 307 of 2024, 308 of 2024 & 310 of 2024

**B.S.N.L. & Anr. ...Appellants**
**Versus**
**Chaurasiya Entp. & Ors. ...Respondents**

**Counsel for the Appellants:**
B.K. Singh Raghuvanshi

**Counsel for the Respondent:**
Daya Shankar, Mahendra Kumar Mishra

**A. Civil Law - Arbitration and Conciliation Act,1996-Section 37-BSNL floated tenders in 2015 for laying Optical Fibre Cable in District Bhadoi-dispute arose due to pending payments, and Chaurasiya Enterprises sought arbitration-Sole Arbitrator passed awards in favor of Chaurasiya Enterprises-BSNL filed objections u/s 34 which were rejected by the Commercial court Varanasi-BSNL appealed under section 37-The court held that BSNL's casual approach, non-**

**appearance despite being informed via calls, WhatsApp and registered post-The compliance of the section 23(4) is not mandatory as non-compliance does not automatically terminate the mandate-the Claim was filed within the prescribed time, excluding the COVID-19 period as per Supreme Court orders-BSNL failed to justify its absence or provide adequate grounds for delay-Hence, the Court upheld the Commercial court's decision rejecting BSNL's objections u/s 34 and dismissed all the appeals.(Para 1 to 30)**

**The appeals are dismissed.** (E-6)

**List of Cases cited:**

1. Yashovardhan Sinha HUF & anr. Vs Satyatej Vyapaar Pvt. Ltd., C.O. No. 4125 of 2023

2. Lachmi Narain Vs U.O.I. (1976) 2 SCC 953

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Challenge in these appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'A & C Act 1996') are the orders of the Commercial Court rejecting the objections preferred by the Bharat Sanchar Nigam Ltd. (in short 'BSNL') under Section 34 of the A & C Act, 1996 upholding the awards passed in favour of the Chaurasiya Enterprises (in short 'claimant').

2. Since common question of facts and law are involved in all the captioned appeals, thus, they are being decided by a common order.

**Facts**

3. Briefly stated facts, sans unnecessary details are that BSNL in the year 2015 in order to lay down underground Optical Fibre Cable in District Bhadoi floated tenders, seeking bids from the prospective bidders. The claimant is stated to have been issued work orders, however, owing to certain disputes/differences which arose between the parties in respect of different contracts, notices came to be issued by the claimants to the BSNL on 20.03.2019 to clear the outstanding dues within a period of 30 days and, in case, the said request is not acceded, then to appoint an arbitrator in term of Section 12(5) of the 7th Schedule of the A & C Act, 1996. A reminder was also sent by the claimant to the BSNL on 08.05.2019 and since nothing happened, the claimant approached this Court while filing an arbitration application purported to be under Section 11(4) of the A & C Act, 1996 for appointment of an arbitrator.

4. Sri Brahmdeo Mishra, a retired District Judge was appointed as the sole arbitrator. The arbitrator entered into the reference on 08.11.2019 and thereafter proceeded to pass awards in favour of the claimant.

5. Questioning the awards, objections under Section 34 of the A & C Act, 1996 came to be filed by the BSNL which was rejected by the Commercial Court, Varanasi.

6. Assailing the said orders, the present arbitration appeals have been preferred.

7. For the sake of clarity, the descriptions and the details of the proceedings which are subject matter of the present appeal are being recapitulated in the form of a tabular chart:-

| A | B | C | D | E | F |
|---|---|---|---|---|---|
| Description | Arbitrati | Date of | Quantu | Numbe | Date of |

| n of Appeals | on Case No. | Award | m of monetary benefits awarded to the claimant (in INR) | r of objections under Section 34 of the A & C Act, 1996 | the order of rejection of the application under Section 34 of the A & C Act, 1996 |
|---|---|---|---|---|---|
| Leading | 3 of 2019 | 05.04.2021 | 83,23,416 | 13 of 2021 | 06.05.2024 |
| Connected C1 | 6 of 2019 | 04.05.2021 | 15,24,931 | 14 of 2021 | 06.05.2024 |
| Connected C2 | 5 of 2019 | 03.05.2021 | 6,01,516 | 15 of 2021 | 06.05.2024 |
| Connected C3 | 4 of 2019 | 03.05.2021 | 13,96,465 | 12 of 2021 | 04.05.2024 |
| Connected C4 | 7 of 2019 | 04.05.2021 | 5,04,568 | 11 of 2021 | 04.05.2024 |

**Arguments of counsel for BSNL (Appellants)**

8. Sri B.K. Singh Raghuvanshi, learned counsel for the BSNL has sought to argue that the orders of the Commercial Court rejecting the objections under Section 34 of the A & C Act, 1996 upholding the awards cannot be sustained for a single moment inasmuch as the Commercial Court, Varanasi has misconstrued the entire controversy and has adopted an incorrect approach. Elaborating the said submission, it is submitted that though pursuant to the orders of this Court in the proceedings under Section 11(4) of the A & C Act, 1996, the sole arbitrator came to be appointed, however, the entire proceedings undertaken by the arbitrator are in the teeth of the procedure as envisaged under the A & C Act, 1996. Submission is that the present cases are classic example of violation of principles of natural justice and also equal treatment has not been meted to the BSNL as per Section 18 of the A & C Act, 1996 particularly when, though the claimant on 16.11.2019 submitted statement of claim to which a written statement came to be filed by the BSNL on 21.12.2019 and on 04.02.2020, a rejoinder affidavit also came to be filed by the claimant to the written statement submitted by the BSNL but on an objection being raised to the amendment sought in statement of claim of the claimant, the same stood rejected on 15.02.2020. Thereafter, on several occasions time was sought for filing another statement of claim and the same was ultimately filed on 24.06.2020 that too beyond the period stipulated under Section 23(4) of the A & C Act, 1996, since by all eventualities it was mandatory that the pleadings are to be completed within a period of six months from the date the arbitrator received notice in writing thereof, thus, in view of the provisions contained under Section 29A of the A & C Act, 1996 at that very stage, the mandate ought to have been terminated but the sole arbitrator continued with the

proceedings and proceeded to pass an ex parte award. It is further submitted that at that relevant point of time due to pandemic relating to Covid-19, the counsel who was appearing for the BSNL before the arbitrator became seriously ill and an application seeking further time to submit written statement was filed on 11.07.2020 and in the meantime the wife of the counsel appearing for the BSNL also expired on 27.04.2021 and the counsel for the BSNL was infected with corona virus but, without considering the genuine problems faced by the counsel for the BSNL the arbitrator proceeded to pass an ex parte award. In a nutshell, submission is that the Hon'ble Supreme Court considering the overall circumstances emanating from the pandemic relating to Covid-19 took suo motu cognizance and in the proceedings in COGNIZANCE FOR EXTENSION OF LIMITATION, IN RE, series of orders were passed on 23.03.2020, 08.03.2021, 27.04.2021, 23.09.2021 and ultimately on 10.01.2022, whereby the period from 15.03.2020 till 28.02.2022 was excluded in computing the period prescribed under Section 23(4) and Section 29A of the A & C Act, 1996. It is also submitted that despite the fact that a specific ground had been taken in the objections under Section 34 of the A & C Act for setting aside the award that the arbitrator was biased and he did not conduct the proceedings in an impartial manner, though, the same was noticed but not adverted to. It is, therefore, prayed that the orders of the Commercial Court be set aside and the appeal be allowed in toto.

**Arguments of Counsel for Claimants (Respondents)**

9. Countering the submission of the learned counsel for the BSNL, Sri Daya Shankar Dubey along with Sri Mahendra Kumar Mishra who appears for the claimants have submitted that the orders of the Commercial Court rejecting the application under Section 34 of the A & C Act, 1996 needs no interference in the present proceedings. It is submitted that the conduct of the BSNL itself dis-entitles it for grant of any relief particularly when in the arbitration proceedings before the sole arbitrator the BSNL acted in a very reckless and careless manner and did not bother to participate in the said proceedings. Submission is that it is not a case wherein the BSNL was not aware about the pendency of the proceedings before the arbitrator as BSNL for the very first time had put in appearance before the arbitrator on 16.11.2019 and responded to the statement of claim of the claimant on 07.12.2019. Not only this, BSNL also contested the amendment sought for in the statement of claim which came to be rejected on 15.02.2020 and thereafter on 24.06.2020 another statement of claim came to be filed by the claimant to which on 11.07.2020, 15 days' time was sought and thereafter, the BSNL and its counsel remained absent and did not participate in the said proceedings. However, despite several opportunities being accorded to file written statement on 22.09.2020 one of the parokar of the BSNL, Sri Sudhir Dumdum appeared and thereafter, neither the BSNL nor its counsel or representative chose to appear before the arbitrator. Contention is that the arbitrator cannot wait for time immemorial as it is also not a case that BSNL is an individual, however, it being a body corporate which functions through its officers and has a legal team, thus, it cannot be expected that they are ignorant or not conversant with the legal procedure.

10. With regard to the objection regarding termination of the mandate of the

arbitrator on the ground of alleged non compliance of the provisions contained under Section 23(4) of the A & C Act, 1996, it is being contended that the statement of claim came to be filed within a period of six months as mandated under the statute and it was on account of the delay on the part of the BSNL in not filing the written statement the proceedings stood lingered on. It is also contended that the period of six months for completion of the pleadings stood triggered on 08.11.2019 when the arbitrator entered the reference and the first claim stood submitted by the claimant on 16.11.2019 and thereafter post withdrawal of the statement of claim, the second statement of claim was submitted on 24.06.2020 as the claimant is entitled for exclusion of the period from 24.03.2020 to 23.06.2020 when on account of Covid-19 the proceedings stood deferred and while taking into consideration the said period obviously the claim was filed much before the lapse of six months period. It is also submitted that so far as the objection of the BSNL that the sole arbitrator was biased is concerned, the same is preposterous inasmuch as there is nothing on record except bald allegations. Submission is mere making of any allegation would not suffice as the same is to be substantiated through pleadings and record which is virtually lacking. It is also contended that each and every objection raised by the BSNL in the proceedings under Section 34 of the A & C Act, 1996 has been considered and no fault can be attributed in that regard. Thus, the orders impugned need no interference in the present proceedings.

11. Before proceeding to embark an inquiry upon submission of the rival parties, it would be appropriate to reproduce the translated version of the complete order sheet as well as the statutory provisions which have material bearing to the controversy in question.-

**Order Sheet**

**"Chaurasia Enterprises V/s Bharat Sanchar Nigam Ltd.**

| Date | Order |
|---|---|
| 08/11/2019 | Order regarding appointment of arbitrator was received from Hon'ble High Court. Notices be issued to both the parties to appear on 16/11/2019.<br><br>Signature of Arbitrator (illegible) 1-11-19 |
| 16/11/19 S/d- (illegible) Respondents | The Counsels for the petitioner and the opposite parties are present. On behalf of the petitioner, it has been stated that they are agree to participate in the arbitration proceedings to be conducted in the office located at the residence of the mediator. The Counsels for the opposite parties said that he would present the opinion of the department in this regard later.<br>The details of the proceedings will be noted in Hindi/English languages.<br>The fees shall be payable by both the parties as per Schedule IV of the Act. |

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| | The parties are required to deposit the costs of arbitration as per Sections 6 and 31A.<br>Petition filed by the petitioner. Opponents must file rejoinder by 7-12-19. Parties should pay fees/litigation expenses by the due date. Bill given.<br><br>Signature of Arbitrator (illegible)<br>16-11-19 |
| 7-12-19<br>(S/d-)<br>Amar Bahadur Chaurasia<br>S/d-<br>(illegible)<br>Respondents | Adjournment application on behalf of the opposite parties. WS be filed by 21-12-19. Parties to submit the cost of the suit.<br>Signature of Arbitrator (illegible) |
| 21-12-19<br>11/1/2020 | W.S. filed on behalf of the opposite party<br>Petitioners can file rejoinder on date 04-01-2020. Parties to bear the cost and fees till next date.<br>Signature of Arbitrator (illegible)<br>1-11-12 |
| 4/1/20<br>(sd/-)<br>Krishna Kumar | Petitioner has prayed for time.<br>Petitioners can file rejoinder by 11-01-2020.<br>Signature of Arbitrator (illegible)<br>4-1-20 |
| 11-1-20<br>21-1-20 | Petitioner has prayed for time.<br>Petitioner can file rejoinder by 21-1-20. |
| | Signature of Arbitrator (illegible)<br>11-1-20 |
| *21-12-19 | W.S. filed on behalf of the opposite party. Petitioners can file rejoinder on date 04-01-2020. Till then, parties shall bear the cost of case.<br>Signature of Arbitrator (illegible)<br>21-12-19 |
| *4-1-20 | Petitioner has prayed for time.<br>Petitioner can file rejoinder by 11-1-20.<br>Signature of Arbitrator (illegible)<br>4-1-20 |
| *11-1-20<br><br>21-1-2020<br>(sd/-)<br>Amar Bahadur Chaurasia | Petitioner has prayed for time.<br>Petitioner can file rejoinder by 21-1-20.<br>Signature of Arbitrator (illegible)<br><br>Petitioner has prayed for time.<br>Petitioner can file rejoinder by 4-2-2020.<br>Signature of Arbitrator (illegible)<br>21-1-2020 |
| 4-2-2020<br>(sd/-)<br>Amar Bahadur Chaurasia | Petitioner has filed rejoinder.<br>If the opposite party wants to make reply, they can do so by 15-2-2020.<br><br>Signature of Arbitrator (illegible)<br>4-2-20 |

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| 15-2-20 | Parties are present. Objection filed on behalf of the opposite party. Arguments of learned counsels of both the parties were heard on amendment application and objection. From the perusal of file, it is clear that petitioner has presented his claim through an affidavit. Since, it is not in accordance with law to make amendment in an affidavit, therefore, amendment application preferred by the petitioner is dismissed. File be placed on 20-2-2020 for further proceedings.<br>Signature of Arbitrator (illegible) 15-2-2020 |
| 20-2-2020 | Petitioner prayed for time to file claim. Petitioner to file in advance by 24/3/2020.<br>Signature of Arbitrator (illegible) 20-2-2020 |
| 24/3/2020 | Parties are not present due to Corona pandemic (Covid). All the Courts have been closed by the High Court. Therefore, the parties should take further action considering the condition of corona till the court opens.<br>Signature of Arbitrator (illegible) 24.03.20 |
| 24.06.2020 (signature) Illegible 24/6 (signature) Illegible 11/07/20 | The petitioner has filed an application and a Claim Petition to withdraw the statement which was filed earlier while not press it. On 11.07.20, the objection be submitted for disposal.<br>Signature of Arbitrator (illegible) 24.06.2020 |
| 11.07.2020 | A prayer was made to get the time of 15 days for filing the objection on behalf of opposite parties. The opposite party be filed the objection/W.S. till 28.07.2020 |

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| | Signature of Arbitrator<br>(illegible)<br>11/7 |
| 28.07.2020<br>(signature)<br>illegible<br>07/08/2020<br>(signature)<br>illegible<br>28/7 | Neither objection nor any adjournment application was filed on behalf of opposite parties. The learned counsel for petitioner is present. Was heard.<br>An application has been given to withdraw the previously filed statement by not pressing it on behalf of petitioner and a prayer has been made to accept the new claim petition filed in its place.<br>The reason given in the petitioner's application appears to be sufficient. Therefore, the application dated 24.06.2020 is accepted. The permission is allowed to include the filed claim petition in the file.<br>The opposite parties be filled the W.S. till 07.08.2020.<br><br>Signature of Arbitrator<br>(illegible)<br>28.07.2020 |
| 07.08.2020<br>(signature)<br>illegible<br>14/8<br>(signature)<br>illegible<br>7/8 | The learned counsel for petitioner is present. Nobody is present on behalf of opposite parties. An application was received by post from the Assistant General Manager (Legal Cell) Office of General Manager Telecom, District, Varanasi to me, the Arbitrator for separation from the trial of the case which is placed on the file.<br>A prayer was made to seek time on behalf of petitioner to file an objection in the above application.<br>Put up on 14.08.2020 for objections/ disposal.<br><br>Signature of Arbitrator<br>(illegible)<br>07.18.2020 |
| 14.08.2020<br>(signature)<br>illegible<br>14/8<br>(signature)<br>Amar Bahadur Chaurasiya | The petitioner is present with his counsel.<br>The opposite parties and their Counsel are not present. An objection was filled on behalf of petitioner.<br>An application was submitted to summon some documents from opposite party on the behalf of the petitioner.<br>Since, nobody is present on behalf of opposite parties. Therefore, the photocopy of the objection and application of the petitioner be sent to opposite parties through registered post.<br>On 25.08.2020, the file be put up for disposal of applications. |
| 25.08.2020 | The counsel for petitioner is present. Nobody is present on behalf of the opposite parties. Opposite party Principal G.M.K.P. Singh was informed about the suit over the telephone and was told that nobody is appearing on behalf of opposite party even after |

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| | getting information.<br>On 01.09.2020, the file be put up for disposal of application.<br>Signature of Arbitrator<br>(illegible) |
| 01.09.2020 | The delivery report of Speed Post Registry to the opposite parties is filed in the file in which delivery has been shown. The information was also given through phone and whatsapp but nobody is present on behalf of opposite parties. It is considered that notice has been served upon the opposite parties.<br>On 08.09.2020, the file be produced for disposal of application.<br>Signature of Arbitrator<br>(illegible)<br>01.09.2020 |
| 08.09.20<br>(signature)<br>illegible | Nobody is present on behalf of the opposite parties.<br>The counsel for petitioner is present.<br>The application dated 31.07.2020 submitted by Asst. GM was heard on behalf of the petitioner.<br>The order was got typed on a separate letter.<br>If the opposite parties wish, they can submit their defense counter-claim by 21.09.2020 otherwise the petitioner be submit the evidence affidavit in support of his statement by 28.09.2020.<br>The parties be pay all the suit expenses to the arbitrator by further date.<br>Signature of Arbitrator<br>(illegible)<br>08.09.2020 |
| 22.09.2020<br>copy<br>received<br>(signature)<br>22.09.2020 | Request by counsel for the opposite parties for providing a copy of the order dated 08.09.2020<br>A copy was given to the parokar Sudhir Dumdum of opposite parties.<br>Signature of Arbitrator<br>(illegible)<br>22.09.2020 |
| 28.09.2020 | A prayer was made to seek time for submitting evidence on behalf of the petitioner.<br>Signature of Arbitrator<br>(illegible)<br>28.09 |
| 30-9-2020 | On behalf of the petitioner, testimony affidavit and papers of Amar Bahadur Chaurasia are filed on the list.<br>Time was sought for some other evidence. Remaining evidence be filed by the petitioner by 24-10-2020.<br>Signature of Arbitrator<br>Sd/- illegible<br>30/9 |
| 24-10-2020 | The petitioner prayed for time to submit evidence and pay fees. Evidence be submitted and fee be paid by the petitioner by 28-10-2020.<br>Signature of Arbitrator<br>Sd/- illegible<br>24-10-20 |
| 28-10-2020 | The petitioner prayed for time of two months to submit evidence and pay |

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| | fee. Evidence be submitted and fee be paid by the petitioner by 28-12-2020.<br>Signature of Arbitrator<br>Sd/- illegible<br>28-10-20 |
| 28-12-2020 | The petitioner is absent. Time for submitting evidence was sought over phone.<br>Signature of Arbitrator<br>Sd/- illegible<br>28-12-20 |
| 25-2-2021 | Due to corona, the petitioner is absent.<br>Evidence be submitted by 26-3-2021<br>Signature of Arbitrator<br>Sd/- illegible |
| 26-03-2021<br><br><br><br>3-5-2021 | Due to Corona, the petitioner is absent. The counsel for the petitioner stated that now he does not have to provide any other evidence. Arguments of the counsel for the petitioner were heard.<br>File be put up on 3-5-2021 for order.<br>Signature of Arbitrator<br>Sd/- illegible<br>26-3-2021<br>The award was signed and announced.<br>Due to Corona, party is not present therefore, copy of award be sent to them.<br>Signature of Arbitrator<br>Sd/- illegible<br>3-5-2021 |
| 10-6-2021 | The petitioner prayed for a copy of the award.<br>Copy of the award was provided to the petitioner.<br>Copy of the award was sent to the opposite parties through registry.<br>Signature of Arbitrator<br>Sd/- illegible<br>10/6 |

**Note:-*** In the order sheets the order dated 21.12.2019, 11.01.2020 and 04.01.2020 has been shown to be on two places.

**Statutory Provisions**

"15. Termination of mandate and substitution of arbitrator.- (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Whether the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

**23. Statement of claim and defence**.-(1) Within the period of time agreed upon by the parties or determined

by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2A) The respondent, in support of his case, may or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

**25. Default of a party.**-Unless otherwise agreed by the parties, where, without showing sufficient cause.-

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited];

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

**29A. Time limit for arbitral award**.- (1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose off the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been

delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay:

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

**Analysis**

12. We have heard the learned counsel for the rival parties and perused the record carefully.

13. It is not in dispute that pursuant to the tender floated in the year 2015 by the BSNL for execution of the work of underground Optical Fibre Cable in District Bhadoi the claimants were awarded contracts. It is also not in dispute that dispute/differences stood arisen between them which entailed issuance of notices on 20.03.2019 and a reminder on 08.05.2019 for clearance of the outstanding dues and in case the request being not acceded to appoint an arbitrator in terms of Section 12(5) read with 7th Schedule of the A & C Act, 1996. Since BSNL did not appoint an arbitrator, thus, proceedings under Section 11(4) of the A & C Act, 1996 came to be instituted by the claimant which resulted in the appointment of the sole arbitrator.

14. Order sheet of the sole arbitrator reveals that on 08.11.2019 the sole arbitrator entered the reference requiring the parties to appear on 16.11.2019. On 16.11.2019, the BSNL and the claimants had put in appearance before the arbitrator and on that date the statement of claim came to be filed by the claimant. On 07.12.2019 the sole arbitrator directed the BSNL to file its written statement fixing next date on 21.12.2019. On 21.12.2019 written statement was filed by the BSNL to which time for filing reply was granted to the claimant. Again time was sought on 04.01.2020 by the claimant for filing reply to the written statement followed on 11.01.2020 and 21.01.2020. On 04.02.2020 reply to the written statement was submitted by the claimant. On 15.02.2020,

the arbitrator rejected the amendment application preferred by the claimant on being objected by the BSNL. On 20.02.2020, the claimant took time for filing another statement of claim and on 24.03.2020 an order seems to have been passed by the sole arbitrator deferring the arbitration proceedings on account of Covid-19. The next date fixed as per the order sheet is 24.06.2020 on that date the statement of claim was submitted by the claimant to which on 11.07.2020 the counsel for the BSNL took 15 days' time to submit its written statement.

15. Order sheet further reveals that on 28.07.2020 when the matter was taken up by the sole arbitrator though, the claimant was present but nobody appeared on behalf of the BSNL and after hearing the claimant the earlier (first) statement of claim was withdrawn while granting time to the BSNL to file its reply by 07.08.2020. The order sheet dated 07.08.2020 depicts that the counsel for the claimant was present but nobody appeared on behalf of BSNL. In the order sheet dated 07.08.2020, it is also recited that an application was received by the sole arbitrator under the signature of the Assistant General Manager, Legal Cell, in the office of the General Manager, Telecom, District Varanasi with a prayer to the arbitrator to recluse himself from the proceedings, to which the claimant was granted time to submit his reply/objection.

16. On 14.08.2020 the claimant was present but nobody appeared for the BSNL and on that date, a copy of the objection of the claimant to the application preferred by the BSNL for reclusion of the arbitrator was sent by registered post fixing 25.08.2020. On 25.08.2020 again nobody appeared on behalf of the BSNL though claimant was present and telephonically Principal, G.M., K.P. Singh was informed that nobody is appearing on behalf of the BSNL and the next date was fixed on 01.09.2020.

17. On 01.09.2020, the arbitrator recorded that the objection of the claimant to the application filed by the BSNL which was sent to the BSNL. Even information was also sent to the BSNL through whatsapp, however, nobody appeared so the next date fixed for 08.09.2020.

18. On 08.09.2020, nobody appeared on behalf of the BSNL though the counsel for the claimant was present and the objection dated 31.07.2020 of the BSNL was heard while granting time till 21.09.2020 to the BSNL to submit its reply. The order sheet further reveals that on 22.09.2020 the parokar of the BSNL, one Sri Sudhir Dumdum appeared before the arbitrator and got his signatures affected on the order sheet and received certain documents.

19. On 28.09.2020 the claimant took time to lead evidence and the next date fixed was 30.09.2020 and thereafter, on 30.09.2020 evidence was filed before the arbitrator and the next date was fixed on 24.10.2020 and on 24.10.2020 further date was fixed on 28.10.2020 and thereafter, next date was on 28.12.2020 on which date the claimant telephonically took time and thereafter, order sheet reveals that the awards came to be passed.

20. The order sheet of the sole arbitrator beyond shadow of doubt depicts that the BSNL was not serious and rather reckless in prosecuting the proceedings before the sole arbitrator. Though at the relevant time the nation was affected with

Covid-19 and there happened to be orders of the Hon'ble Supreme Court for excluding the period from 15.03.2020 to 28.02.2022 relatable to the proceedings 23(4) and 29A of the A & C Act, 1996 but, what is relevant is the conduct of the BSNL in pursuing the proceedings.

21. Learned counsel for the BSNL while inviting attention towards the supplementary affidavit sworn on 01.09.2024 of the Assistant General Manager (Legal) BSNL has contended that the counsel who used to appear in the arbitration proceedings before the arbitrator was at that relevant time 70 years old suffering from illness and he submitted an application on 11.07.2020 through its clerk apprising the sole arbitrator about the illness and requested 15 days' time for filing written statement, however, in the meantime the counsel as well as his wife got infected with Covid-19 and his wife expired on 27.04.2021 and he also stood hospitalized and on account whereof he could not appear before the sole arbitrator and, thus, the proceedings are per se illegal and is in contravention of the fundamental policy and is in violation of the principles of natural justice and, thus, awards are liable to be set aside.

22. The argument of the learned counsel for the BSNL though looks attractive at the first blush but it is not liable to be accepted for the simple reason that after filing of an application on 11.07.2020 by the clerk of the BSNL seeking 15 days' time nobody appeared on behalf of the BSNL. It is not a case wherein the BSNL was not aware about the pendency of the proceedings before the arbitrator. As a matter of fact order sheet reveals that telephonically, through post, whatsapp and fax the officers of the BSNL were apprised about non-appearance of the counsel and the representative in the arbitration proceedings before the sole arbitrator.

23. The recitals contained in the order sheet are self indicative of the fact that recklessly the proceedings was being prosecuted and not only this on one fine day i.e. on 22.09.2020 one of the representatives of the BSNL, Sri Sudhir Dumdum appeared and thereafter, the proceedings before the arbitrator remained unattended.

24. On a pointed query being raised to the learned counsel for the BSNL whether there happens to be any communication at the end of the BSNL, seeking further time barring the request letter dated 11.07.2020, nothing is forthcoming. Apparently, there happens to be nothing on record to show that there was any attempt on the part of the BSNL to apprise the arbitrator about the difficulties and the problems faced by the them while seeking further time. In absence of anything on record, the arbitrator was not supposed to wait for the time unlimited with the expectation that on a fine day somebody would appear on behalf of the BSNL to pursue their stand. The benefit of the judgment in the case of cognizance of extension and limitation, IN RE (supra) cannot be granted on mere asking particularly when it is not the case of the BSNL that they were not aware about the pendency of the proceedings as rather to the contrary we find from the order sheet that on certain dates, the BSNL through its counsel stood represented and on other dates remained absent.

25. As regards the submission of the learned counsel for the BSNL that the

mandate of the arbitrator stood terminated on account of non completion of pleadings under Section 23(4) of the A & C Act, 1996 and the time limit for arbitral award came to lapse after a period of one year therefrom under Section 29A of the A & C Act, 1996, therefore, the award is liable to be set aside is wholly misplaced for the simple reason that the sole arbitrator entered into the reference on 08.11.2019 while fixing 16.11.2019 for submission of statement of claim and on the said date the statement of claim came to be filed before the claimant. A written statement on behalf of BSNL came to be filed on 21.12.2019 to which rejoinder was filed by the claimant on 04.02.2020 and when an amendment application came to be filed by the claimant for amending the statement of claim the same was opposed by BSNL, which came to be rejected on 15.02.2020 and liberty was sought by the claimant to file another statement of claim, however, in the meantime due to Covid-19 the arbitrator adjourned the proceedings on 24.03.2020 fixing the next date on 24.06.2020 and on that date statement of claim came to be filed before the arbitrator. While computing the period of six months for completion of pleadings, the crucial date would be 08.11.2019 and the said period would lapse on 07.05.2020 and the period from 24.03.2020 till 23.06.2020 would stand excluded due to Covid-19 and the next date fixed was 24.06.2020 and on that date the statement of claim came to be filed by the claimant. Thus, the statement of claim was filed within time.

26. The issue as to whether the provisions of Section 23(4) of the A & C Act, 1996 is mandatory or not and what would be the consequences is no more res integra as the Hon'ble High Court of Calcutta in **C.O. No. 4125 of 2023 Yashovardhan Sinha HUF & Anr. Vs. Satyatej Vyapaar Pvt. Ltd.** decided on 19.02.2024 has held as under.-

> "49. Section 23 (4) also does not start with any non-obstante clause. The provision neither curtails the discretion of the parties to fix their own timeline for submission of the pleadings nor does it take away the power of the Arbitrator to fix the timeline for submissions of pleadings. The Hon'ble Apex Court in **Lachmi Narain vs. Union of India reported in (1976) 2 SCC 953**, held that If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of pre-emptory language in a negative form is per se indicative of the intent that the provision is mandatory.
>
> 50. Section 23 (1) has not been amended by introduction of Section 23 (4). In other words, Section 23 (1) has not been made subject to the provisions of Section 23 (4). If the court proceeds to hold that the time frame under Section 23 (1) should be interpreted to be a shorter time limit and not beyond six months from service of notice upon the learned Arbitrator, it would amount to rewriting the statute. This is not permissible in law.
>
> 51. There is another aspect which requires further consideration i.e., the consequence of default in not adhering to the time limit fixed under Section 23 (1) of the Act. The same has been provided in Section 25 of the said Act. Section 25 provides as follows:-

"25. Default of party. – Unless, otherwise agreed by the parties, where, without showing sufficient cause- (a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23, the arbitral tribunal shall terminate the proceedings;

(b) The respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceedings without treating the failure in itself as an admission of the allegation by the claimant [and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited];

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral may continue the proceedings and make the arbitral award on the evidence before it."

52. Even after introduction of Section 23 (4), Section 25 has not been amended. Section 25 is silent about the consequence of non-compliance of Section 23 (4). Section 25 is not subject to Section 23(4). Party autonomy to decide the time line for completion of pleadings as provided in Section 23(1) has also not been made subject to Section 23(4). Termination of mandate under Section 25 is also not automatic. Proceeding will terminate under this section, if the claimant is unable to show sufficient cause for condonation of delay in filing the statement of claim within the timeline fixed under Section 23 (1), for submission of pleadings. Discretion has also been left to the learned Arbitrator to either proceed ex parte against the respondent, without treating the failure to file the defence as an admission of the allegations of the claimant, or to condone the delay in submission of the defence. Non-adherence to the time limit prescribed under Section 23(4) will not attract termination of the mandate of the Arbitrator.

53. The learned Arbitrator rightly held that the law did not prescribe the time limit within which the respondent should submit a counter-claim or plead a set off, which was also a part of pleadings and the counter-claim could be introduced subsequently, unless ex facie barred. Thus, the question of mandatory application of Section 23(4) will not arise.

54. In my view, had the legislature contemplated Section 23(4) to be mandatory, in that event, consequence for non-compliance of Section 23(4) would have been inbuilt in the said provision or Sections 23(1) and 25(a) would have been made subject to Section 23(4). Section 23(4) was introduced while amending the Act, to ensure that the pleadings should be completed expeditiously, preferably within the time prescribed, otherwise, the very purpose of providing a speedy and efficacious mechanism for resolution of such disputes, would be defeated. Mention of Section 23(4), in Section 29-A should be read as a requirement for making the award within twelve months

from the date of completion of pleadings and not as a requirement of publication of an award within eighteen months from service of the notice upon the learned Arbitrator. The statute provides the circumstances under which a mandate terminates. Had the intention of the legislature been to incorporate a mandatory provision for completion of pleadings within six months as per Section 23(4), the consequence of non-compliance would have been provided in the statute itself, or the section would have been couched in a different language. The orders directing filing of pleadings have not been passed in wrongful exercise of jurisdiction."

27. The aforesaid judgment came to be challenged before the Apex Court in **Special Leave to Appeal (C) No. 5851 of 2024 Yashovardhan Sinha HUF & Anr. Vs. Satyatej Vyapaar Pvt. Ltd**. in which on 18.03.2024 the following order was passed.-

"1. We are not inclined to entertain the Special Leave Petition under Article 136 of the Constitution of India.

2. The Special Leave Petition is accordingly dismissed.

3. Pending applications, if any, stand disposed of."

28. Applying the above noted judgment in the facts of the case, we are of the firm opinion that the statement of claim stood submitted by the claimant within the time stipulated under Section 23(4) of the A & C Act, 1996 and it was on account of fault of the BSNL, the written statement could not be filed and due to their absence an ex parte award came to be filed.

29. Viewing the case from all points of angle, we do not find any patent illegality committed by the court below in rejecting the applications under Section 34 of the A & C Act, 1996 while upholding the awards.

30. Resultantly, the appeals are dismissed.

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**(2024) 10 ILRA 450**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.10.2024**

**BEFORE**

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

Appeal u/s 37 of Arbitration & Conciliation Act 1996 No. 590 of 2023

**State of U.P. & Ors. ...Appellants**
**Versus**
**M/S Virat Construction ...Respondent**

**Counsel for the Appellants:**
Ankur Agarwal

**Counsel for the Respondent:**
Jagat Narayan Mishra

**A. Civil Law - Arbitrartion and Conciliation Act,1996-Section 37-A contract was awarded to M/s Virat Construction for building a head regulator at the Margin Bandh to protect Banda City from flooding-the appellant alleged delays caused by the State due to failure in logistics, stock supply and other obstructions leading to financial losses-The sole arbitrator awarded Rs. 3,77,42,700 plus interest to the appellant-the State challenged the award u/s 34 before the Commercial Court Jhansi, the**

**commercial court upheld that the arbitrator acted within his authority – Again the State filed an appeal u/s 37 of the Act alleging therein delay in work was caused by the contractor-Held the court reiterated the limited scope of interference u/s 34 and 37-fresh grounds and evidence raised at the appellate stage were rejected as barred by limitation-the award was found consistent with law, as the arbitrator considered all materials and facts before deciding-Hence, the court upheld the arbitral award.(Para 1 to 45)**

**The writ petition is dismissed.** (E-6)

**List of Cases cited:**

1. St. of chht. & ors.Vs Sal Udyog Pvt. Ltd.(2002) 2 SCC 275

2. Associate Builders Vs DDA (2015) 3 SCC 49

3. Reliance Infra. Ltd. Vs St. of Goa(2023) 0 Supreme(SC) 495

4. MMTC Ltd. Vs Vedanta Ltd.(2019) 4 SCC 163

5. Dyna Tech.(P) Ltd. Vs Crompton Greaves Ltd.(2019) SCC Online SC 1656

6. Vastu Invest & Holdings Pvt. Ltd. Vs Guj. Lease Financing Ltd.(2000) SCC Online Bom. 729

7. The project Dir. National Highways No. 45E & 220, NHAI Vs M. Hakeem & anr.(2021) 9 SCC 1

8. PSA SICAL Terminals(P) Ltd. Vs Board of Trustees of V.O. Chidambaranar Port Trust Tuticorin & ors.(2021) SCC Online SC 508

9. Delhi Airport Metro Express Pvt. Ltd. Vs Delhi Metro Rail Corp. Ltd.(2022) 1 SCC 131

10. Haryana Tourism Ltd. Vs Kandhari Beverages Ltd.(2022) 3 SCC 237

11. St. of Mah. Vs Hindustan Construction Co. Ltd.(2010) 4 SCC 518

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

1. Heard Sri Manish Goyal, learned Additional Advocate General assisted by Sri Devansh Rathore, learned Additional Chief Standing Counsel for the State-appellants and Sri Jagat Narayan Mishra, learned counsel for the opposite party.

2. The instant appeal under Section 37 of 1996 Act[1] has been filed seeking quashing of the impugned judgment and order dated 14-02-2023 passed by the Presiding Officer, Commercial Court, Jhansi in Arbitration Case No. 31 of 2022 (State of U.P. Vs. M/S Virat Construction), arising out of Arbitration Case decided between the parties by the Sole Arbitrator on 03-05-2022.

**Relevant factual aspects and background**

3. A tender was invited on 01-08-2008 by the appellants for the construction of Head Regulator at Km.0.410 of Margin Bandh to protect the Banda City from the flood of Cane River. In response to it, the contractor/opposite party no.2/claimant applied and his bid was found to be responsive, when tender was opened on 10-09-2008. Accordingly, the tender was awarded to the claimant and letter of acceptance was issued on 07-11-2008. In accordance with the letter of acceptance dated 07-11-2008, the claimant was required to submit the balance security money plus stamp duty within ten days, which was duly complied by him. Thereafter both the parties entered into a contract agreement on 22-11-2008. As per the contract agreement the cost of the work was Rs.4,96,92,893.00 only. The date of commencement of the work was given as 22-11-2008 and the period of completion of the work was nine (09) months, hence the

stipulated date of completion was given as 21-08-2009.

4. It is claimed by the opposite party no.2/claimant that since the time for execution of the contract was only nine months, so he immediately mobilised his equipments, machines, labours, staffs and other construction materials to the site with sincere intention to complete the work within stipulated time. However, he could not start the work because the appellants failed to finalise the logistics of the work before execution of the contract. The appellants also failed to issue the stock materials namely cement and tor steel of different dia within stipulated time. The failure to finalise the logistics resulted in a prolonged delay and also resulted in a financial loss to the claimant.

5. The work remained suspended/closed at various times, due to which the claimant's staff, labours and machinery remained idle at work site without doing any work, and this was duly intimated to the appellants by the claimant. The effect of this delay was that the project started after lapse of six months and this delay could not be attributed to the contractor. Because of this inordinate delay and various other issues, the claimant claims that he had suffered a huge loss, which resulted into a dispute between the parties. As per the agreement, the matter was referred to the Arbitrator.

6. As per agreement, the Chief Engineer (Betwa) Irrigation and Water Resources, Department of U.P., Jhansi, who was actually the project proponent, appointed a Sole Arbitrator vide order dated 05-02-2021 for adjudication of the dispute. After the Arbitrator entered into the reference, the claimant had filed the statement of claims and the appellants filed the statement of defence. Thereafter, pleadings were complete, evidences were adduced and the parties were heard.

7. The Sole Arbitrator had considered the pleadings of the parties and contractual terms and conditions. He had also considered the oral/written arguments and legal submissions made by both the parties. He also considered the agreement and the provisions of I.D. Form No.111, which formed part of the contract as well as general conditions of the contract. He had also examined Clause 2 (A) of I.D. Form No.111, which stipulated that the time is the essence of contract. The Sole Arbitrator also considered and examined Clause-5 (Extension of time) of I.D. Form No.111, which provided the extension of time for completion of work on the ground of an avoidable hindrance to its execution, whereas G.C.C. Clause-5 (Construction Programme) also provided for progress of the work in different time period.

**Arbitration proceedings and award**

8. Finally, the Sole Arbitrator had summarized 17 points of issues, which were to be finalised in terms of the arguments/discussion. After long-drawn proceedings of arbitration with filing of claim, reply and counter claim, filing of various applications and written submission, the Sole Arbitrator passed the award on 03.05.2022. For ready reference, relevant paragraph nos.53 to 61 of the award are reproduced herein below:-

"53.00 Now therefore, the total awarded amount in respect of all claims comes as below:-

| Claim | Particulars | Claimed Amount | Awarded Amount |
|---|---|---|---|

| No. | | (In Rs. | (In Rs.) |
|---|---|---|---|
| 1. | Claim No.1 for payment of As-Executed work which uncontractually and illegally withheld/kept pending XIth alleged to be final | 1,13,22,751.00 | 1,13,22,751.00 |
| 2. | Claim No.2 payment regarding payment of compensation for idling resources i.e. Labour, Staff and Machinery on account of holdups and stoppage of works. | 1,02,84,060.00 | 44,38,585.00 |
| 3. | Claim No. 3 for payment of Overhead charges due to Idling and under utilization of resources on account of prolongation of Contract period | 1,52,52,937.00 | 70,00,000.00 |
| 4. | Claim No. 4 for payment of loss of productivity & profit due to deduction in turn over as a result of prolongation of contract period | 1,49,77,644.00 | NIL |
| 5. | Claim No. 5 for payment of Price Adjustment during the Extended/ Prolongated period of Contract | 70,02,135.00 | 35,01,067.00 |
| 6. | Claim No. 6 for payment on a/c of solatium/compensation for mental harassment and loss of business. | As per Decision of Ld, Sole Arbitrator | NIL |
| 7. | Claim No.7 for the cost of Arbitration as per section-31A of Arbitration & Conciliation Act-2015 | 10,00,000.00 | 8,54,990.00 |
| 8. | Claim No. 8 payment of As-Executed Extra Items | 3,50,000.00 | 3,50,000.00 |
| 9. | Claim No.9 for refund of 4% VAT, which wrongfully deducted more from Claimant's | 8,38,136.00 | 7,00,192.00 |

| | | | |
|---|---|---|---|
| | bills. | | |
| | **Total amount Rs.** | **6,10,27, 633.00** | **2,81,67, 585.00** |
| 10. | Claim No. 10 regarding payment of interest as per Section 31(7) of Arbitration & Conciliation Act-2015 | @18% per annum | Interest @7% per annum since 01.05.2022 to 03.05.2022 (Date of award) on amounting Rs. 2,73,12, 595.00 only (on awarded item No.1 to 6, 8 & 9) which comes to Rs. 95,75,122.00 |
| | **Total amount Rs.** | **Rs. 6,10,27, 633.00** | **Rs. 3,77,42, 707.00** |
| | Say | Rs. 6,10,27, 000.00 | Rs. 3,77,42, 700.00 |

Thus, total awarded amount comes to Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only).

54.00 Accordingly, the Respondent/State of U.P. is directed to make payment of Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) and plus (+) to refund the security deposit's F.D.R. amounting Rs.6,25,000.00 along with Bank Interest of F.D.R. upto date to the Claimant (M/s Virat Construction) as per this award.

55.00 The Claimant shall further be entitled to receive the future interest @ 7% p.a. (simple) from the Respondent on this awarded amount Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) from the date of award to the date of actual payment.

56.00 The Sole Arbitrator had directed the claimant to submit stamp papers of appropriate value for declaring the award. Accordingly, this award is being made and published on the stamp papers of the value of Rs.1000.00 supplied by the Claimant. Balance stamp papers as and when necessary shall have to be supplied by the Claimant. The Claimant shall, however, be entitled to recover 50% cost of such stamp papers from the Respondents.

57. The total awarded cost Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) and plus (+) to refund the security deposit F.D.R. amounting Rs.6,25,000.00 along with Bank interest upto date shall be payable to the Claimant by the Respondent within three months from the date of award for which no additional interest shall have to

be paid. However, in case of failure of payment within three (03) months of the declaration of the award, interest @ 7% p.a. (simple) shall have to be paid w.e.f. date of award to till release of payment on amount of Rs.3,77,42,700.00 only (Rupees Three Crore Seventy Seven Lac Forty Two Thousand Seven Hundred only) in addition to the awarded amount.

58.00 This Arbitral Award has been made by the Sole Arbitrator after considering all the documents, contractual provisions, pleadings of parties, documents, letters/correspondence and other documents filed on record, citations, oral and written arguments made and submitted by both the parties/Claimant and Respondent.

59.00 The Sole Arbitrator has deeply considered all aspects of this referred case and has duly applied his mind in making a fair and reasonable award against the Respondents as described above.

60.00 This arbitral award has been made and declared by me, Chob Singh Verma, Sole Arbitrator at Ghaziabad on 3rd May, 2022.

61.00 The Sole Arbitrator has set his hands to this award on the 3rd day of May, 2022 as under and have initiated each page having verified the contents of each page."

**Challenge to the award under Section 34 of 1996 Act.**

9. The award so made by the Sole Arbitrator was challenged by the State appellant under Section 34 of the 1996 Act before the Commercial Court. A vast variety of contentions urged on behalf of the parties were considered by the Commercial Court and the relevant points were answered in favour of the claimant and thereby, the award was upheld while rejecting the application under Section 34 of the 1996 Act. While questioning the award the appellants had taken broadly two grounds for setting aside the award in the application. The grounds taken in the application were:-

"1- Whether the opposite party which is unregistered firm can file his statement of claim before the Arbitrator and the same has not been considered by the Arbitrator, which amounts to illegality.

2- Whether the award dated 03-05-2022 ought to be set aside on the basis of grounds raised in the application"

10. The learned Commercial Court, Jhansi, after taking note of the submissions of parties, framed the points for determination and then, dealt with every point on the anvil of Section 34 of the 1996 Act. The court had also examined the award and found that the award was passed after hearing the parties and considering the conditions of the agreement, and thereafter vide judgment and order dated 14-02-2023 rejected the application filed by the appellants under Section 34 of the 1996 Act. The operative portion of the order dated 14-02-2023 passed by the learned Commercial Court, Jhansi is quoted hereunder:-

*''जहां तक आपत्ति में यह बिन्दु उठाया जाना कि बिना साक्ष्यों का विश्लेषण किये या संविदा से परे जाकर अपने निष्कर्ष निकाले गये हैं। इस सम्बन्ध में पूर्व में विश्लेषण किया जा चुका है कि संविदा के*

*बिन्दुओं का उल्लेख अवार्ड में आया है। किसी साक्ष्य को गलत विश्लेषण या गलत विवेचना मात्र ही किसी अवार्ड को इस न्यायालय के द्वारा समाप्त करने का अधिकार नहीं होगा, क्योंकि यह स्थापित सिद्धान्त दोनों ही पक्षों के द्वारा प्रस्तुत निर्णय से स्पष्ट हो जाता है कि साक्ष्यों व तथ्यों का विश्लेषण होना चाहिये तथा यदि विश्लेषण के दो निष्कर्ष हो सकते हैं जिन से एक निष्कर्ष आर्बीट्रेटर के द्वारा दिया गया है तथा एक निष्कर्ष उन्होंने नहीं लिया है। मात्र इस आधार पर कि दूसरा निष्कर्ष भी सम्भव था। आर्बीट्रेटर का अवार्ड अपास्त नहीं किया जायेगा। केवल उन तथ्यों में अवार्ड अपास्त होगा जब किया गया विश्लेषण प्रथमदृष्टया ही किसी भी प्रकार से विश्वसनीय न हो अर्थात् वह Patent illegality on the face of record की श्रेणी में आता हो। बिलों का जहां तक अधिक भुगतान का प्रश्न है इन बिन्दुओं को भी पूर्व में देखा जा चुका है। पक्षकारों के द्वारा प्रस्तुत अभिलेख के द्वारा भी टिप्पणी की जा चुकी है। सर्वप्रमुख यह बिन्दु सामने आता है कि एक बार ठेकेदार के बिलों का भुगतान करने के सन्दर्भ में विभाग व ठेकेदार की सहमति बनी तथा यह भी सहमति बनी कि वह आर्बीट्रेशन नहीं करेगा। जब ठेकेदार के द्वारा आर्बीट्रेशन कर दिया गया। तब यह आपत्ति उठा दी गयी। इस प्रकरण में आरम्भ में ही विभाग का रुख रक्षात्मक रहा है अर्थात् उनके द्वारा बिलों को भी स्वीकार किया गया। विलम्ब के कारणों को भी स्वीकार किया गया। जैसा विपक्षी के द्वारा प्रस्तुत अभिलेखों से विदित होता है तो उपरोक्त परिस्थितियों में अवार्ड को निरस्त करने का कोई आधार नहीं बनता है।*

*उपरोक्त विश्लेषण से स्पष्ट है कि अवार्ड दिनांकित 03.05.2022में ऐसी कोई भी त्रुटी नहीं है जो धारा-34माध्यस्थम् एवं सुलह अधिनियम 1996 के अन्तर्गत उसे अपास्त करने योग्य बनाता हो। प्रार्थीगण के द्वारा प्रस्तुत प्रार्थना पत्र निरस्त होने योग्य है।"*

*(English version)*

*As far as the objection raised that conclusions have been drawn without analyzing the evidence or by going beyond the contract, this has already been analyzed earlier, where it has been established that the terms of the contract have been mentioned in the award. Merely a wrong analysis or wrong interpretation of evidence is not a ground for this court to annul an award, because it is a well-established principle that both the parties have clarified through the decision presented that the evidence and facts should be analyzed, and if two conclusions can be drawn, with one being given by the arbitrator and the other not considered, the award will not be set aside merely on the ground that another conclusion was also possible. The award will only be nullified when the analysis is prima facie unreliable or falls under the category of "patent illegality on the face of the record."*

*As far as the question of overpayment of bills is concerned, these points have also been examined earlier. Comments have also been made based on the records presented by the parties. The most important point that emerges is that once the department and the contractor agreed on the payment of the contractor's bills and also agreed that there would be no arbitration, the objection was raised when the contractor went for arbitration. In this case, from the beginning, the stance of the department has been defensive, meaning they accepted the bills as well as the reasons for the delay, as is evident from the documents presented by the opposing party. Therefore, in the above circumstances, there is no basis to nullify the award."*

**Appeal under Section 37 of the 1996 Act**

11. Laying challenge to the order dated 14.02.2023 as passed by the Commercial Court, the State preferred Commercial Appeal under Section 37 of the 1996 Act on the grounds that the claimant had failed to fulfil the basic obligations and responsibilities, whereas the claimant had to complete the work within nine months but he started the work late, so the delay cannot be attributed to the appellant; the availability of stock material had been made in time by the appellant and no hindrance was created by the farmers/any third party; the payment of the firm was not released because of the unavailability of fund; the sufficient staff labours and machineries were not available at the site due to which the progress of the work got delayed and hence, penalty ought to be imposed on the claimant for delayed work. The claim nos.2 to 6 were not correct and the claim no.7 was not in accordance with the terms and conditions of the contract.

12. The claimant had not done any extra work or supplied any extra item; the interest awarded by the Arbitrator and approved by the Commercial Court was not correct as the same should have been in accordance with Section 31(1)(7)(b) of the 2016 Act; it was due to the revision of Drawing by I.I.T. Roorkee, the cost of the project has increased; the work of Erection of Gates were to be done by the Mechanical Division, Kanpur but due to delay in erection of Gates, the construction of Civil work was not to be affected; the award was passed contrary to the material available on record and evidence adduced in support thereof. The Arbitrator has not considered the measurement of work as per the measurement book; the Arbitrator has wrongly awarded the claim on account of extension of period of construction; towards infringement of the conditions of contract; 20,000 sacks of soil were placed in the river to avoid flood was not correct as there was no flood in that year; the delay cannot be attributed towards the appellant and the interest @ 7 per cent awarded by the Arbitrator was highly excessive.

13. During the pendency of the present appeal, the appellants firstly moved Civil Misc. Amendment Application No.06/2023 with a prayer to permit the applicant/appellant to amend the grounds preferred in the Arbitration Appeal and also to permit the applicant to take additional grounds for adjudication of the instant appeal. Another application was also moved under Order 41 Rule 27 Civil Procedure Code to permit the applicant to adduce additional evidence. The applications were moved with a plea to bring on record the tender document/agreement dated 22.11.2008 as the said document contains the arbitration clause, which was invoked by the claimant. It was also claimed that the said document was never placed before the Sole Arbitrator and the Sole Arbitrator, without examining the said document, proceeded to pass the impugned award dated 03.05.2022. Admittedly, fresh additional grounds/issues, which were neither raised before the Sole Arbitrator nor before the Commercial Court, Jhansi, in an application under Section 34 of the 1996 Act. For the first time, the appellants tried to press the applications in the instant appeal.

**Rival Submissions.**

14. Sri Manish Goyal, learned Additional Advocate General assisted by Sri Devansh Rathore, learned Additional Chief Standing Counsel for the State-

appellants had vehemently submitted that even though the scope of interference under Section 37 of the 1996 Act is limited and restricted to the grounds mentioned in Section 34 thereof, and if the view of the Arbitrator is a plausible view, the Court will not interfere or substitute its own view with that of the Arbitrator. He submitted that re-appreciation of evidence or review on merits is not permissible under the provisions of the 1996 Act unless the award is shown to be in conflict with the 'public policy of India' or vitiated by 'patent illegality appearing on the face of the award'.

15. Sri Manish Goyal, learned Senior Advocate submitted that the Sole Arbitrator had proceeded to pass the impugned award dated 03.05.2022 without even perusing the document/agreement dated 22.11.2008, which contained the arbitration clause, which was invoked by the opposite party. However, the said documents were never placed before the Sole Arbitrator and he, without examining the said document, proceeded to pass the award dated 03.05.2022. He submitted that only in this backdrop, both the applications were pressed to bring on record the document/agreement dated 22.11.2008 and therefore, the impugned award is vitiated by patent illegality appearing on the face of the award.

16. Even on merit, learned Senior Advocate submitted that the Commercial Court had erred in law in not considering the factual aspect of the matter that the claimant had not even started the concerned work even after substantial time of six months and indulged in malpractices by resorting to various excuses in relation to non-availability of cement, TNT bar and sometimes weather condition specially rains were also taken as excuses for non-commencement of the work and without completing the work, the Sole Arbitrator had passed an award in favour of the claimant/opposite party and in arbitrary manner, the same has been approved by the Commercial Court in appeal. Even the Sole Arbitrator had also erred in declaring an imaginary and far-fetching award in favour of the claimant ignoring the material fact/evidences adduced by the appellants in support of their case.

17. Sri Manish Goyal, learned Senior Advocate had strenuously argued that the Sole Arbitrator had passed an award without having the glance of the agreement and in absence of any consideration of the relevant clauses of the contract, such award is patently illegal. (Ref. **State of Chhattisgarh and ors v. Sal Udyog Pvt. Ltd.**[2] and **Associate Builders vs. Delhi Development Authority**[3]. Hence, it was contended that the award would also be liable to be set aside on the ground of patent illegality under Section 34 (2A) of the 1996 Act as the Commercial Court had failed to consider the said aspect of the matter. The Sole Arbitrator and the Commercial Court could not re-write the contract between the parties in absence of the material evidence, i.e. agreement document and the award was made in ignorance of vital evidence. He submitted that therefore, the award as well as impugned judgement and order dated 14.02.2023 passed by the Commercial Court are liable to be set aside.

18. Per contra, Sri Jagat Narayan Mishra, learned counsel for the opposite party/claimant vehemently opposed the instant appeal and submitted that the applications filed by the appellants were also moved with inordinate delay of more

than two years just to delay the disposal of the instant appeal. He further submits that as per Section 34 and 37 of the 1996 Act, the scope of interference by the Court is very limited and the Court can only interfere in a situation where the award is found to be contrary to the fundamental policy of Indian Law or is against the interest of India or the award suffers from justice or morality or if it is patently illegal. To buttress his argument, learned counsel for the opposite party had placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of ***Reliance Infrastructure Ltd. Vs. State of Goa[4].***

19. We have given anxious consideration to the rival submissions and have examined the record with reference to the law applicable.

**Relevant Statutory provisions.**

20. Since the present appeal relates to an arbitral award, which was carried in challenge under Section 34 of the 1996 Act and in appeal under Section 37 of the 1996 Act; and looking to the variety of submissions made, we may usefully take note of the relevant statutory provisions contained in Section 26, 28, 34, and 37 of the 1996 Act as follows:

> "**26. Expert appointment by arbitral tribunal**.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may—
>
> (a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and
>
> (b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.
>
> (3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.
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> **** **** ****
>
> 28. **Rules applicable to substance of dispute**.-(1) Where the place of arbitration is situate in India,—
>
> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> (b) in international commercial arbitration,—
>
> (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
>
> (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as

directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex-aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

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**34. Application for setting aside arbitral award**.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that – (i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part, or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

**** **** ****

37. **Appealable orders**.-(1) 15[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34]

(2) An Appeal shall also lie to a court from an order of the arbitral tribunal.-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

12.1 Section 31 (7) of the Act of 1996 as regards interest in award may also be usefully noticed which reads as under:-

"31. **Form and contents of arbitral award**.-

xxx xxx xxx

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b), A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.-The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)]

xxx xxx xxx"

**<u>The scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act</u>**

21. Having regard to the contentions urged and the issues raised, it shall also be apposite to take note of the principles enunciated by the Apex Court in some of the relevant decisions on the scope of challenge to an arbitral award under Section 34 of the 1996 Act and the scope of appeal under Section 37 of the 1996 Act.

22. The Hon'ble Supreme Court in the matter of **MMTC Limited v. Vedanta Limited**[5] has held as follows:-

> "11. As far as Section 34 is concerned, the position is well settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34 (2)(b) (ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of

natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts."

23. The Hon'ble Supreme Court in **Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd**[6] held as follows:-

"25. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.

30. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. **Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."**

In view of the above judicial pronouncement and the trite principles of the law of pleadings and estoppel and no patent illegality has been alleged against the award nor any submission to the effect of the same being against the public policy of India has been averred, thus the grounds so raised by the appellants may be deemed to be outside the purview of Section 37 of Arbitration and Conciliation Act, 1996.

31. **The Award made by the Arbitral Tribunal are not**

**amenable to interference either on the Section 34 or Section 37 of the Arbitration Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties or ex facie, perverse that interference by this Court, is absolutely necessary. The Arbitrator/Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Arbitration Act."**

**(Emphasis supplied)**

24. In the matter of **Vastu Invest & Holdings Pvt. Ltd. vs Gujarat Lease Financing Ltd.**[7], it was held that that a ground not initially raised in the petition to challenge the award could not be permitted to be subsequently raised by an amendment, if the application for amendment itself was beyond the period of limitation fixed for filing of the petition, challenging the award.

25. The Hon'ble Supreme Court in the matter of **The Project Director, National Highways No. 45E and 220, National Highways Authority of India v. M. Hakeem & Anr.**[8], wherein the Hon'ble Court whilst convassing the jurisprudence behind scope of Section 14 Arbitration and Conciliation Act, 1996 concluded as follows:-

"40. It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is co- terminus with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

26. In **PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others**[9] the Apex Court highlighted the limited scope of challenge under Section 34 of the 1996 Act and explained the relevant tests as under:-

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and re-appreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public

policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34 (2) (a) (iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, re-appreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award."

27. Hon'ble Supreme Court in the matter of ***Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited***[10] has observed that contravention of law not linked to public policy or public interest is beyond the scope of expression 'patent illegality;. What is prohibited is for Courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them.

28. Hon'ble Supreme Court in the matter of ***Haryana Tourism Ltd. Vs. Kandhari Beverages Ltd.***[11] has opined that in the appeal under Section 37 of the 1996 Act, reappreciation of evidence was not permissible at all.

29. The Hon'ble Supreme Court in the matter of ***Reliance Infrastructure Ltd. Vs. State of Goa***[12] has held that restraint is required to be shown while examining the validity of arbitral award by the Courts, else interference with the award after reassessing the factual aspects would be defeating the object of the Act of 1996. This is apart from the fact that such an approach would render several judicial pronouncements of this Court redundant if the arbitral awards are set aside by categorizing them as "perverse" or "patently illegal" without appreciating the contours of these expressions.

30. The Hon'ble Supreme Court in a plethora of judgments has clearly laid down that the scope of judicial intervention under Section 34 or Section 37 of 1996 Act should be minimum and the Court ought not to interfere with the findings of the Arbitrator unless the same is perverse, illegal and capricious and the award is such that shakes the conscience of the Court.

31. As far as allowing the appellants to adduce fresh evidence at the appellate stage is concerned, the Hon'ble Supreme Court in the matter of ***State of Maharashtra Vs. Hindustan Construction co. Ltd.***[13] has held that the amendment in a pleadings under Section 37 of the 1996 Act cannot be allowed after expiry or limitation period as stated under Section 34 (3) of the 1996 Act. The Apex Court has held as follows:-

> "16. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In Ganesh Trading Co. v. Moji Ram [(1978) 2 SCC 91 : (1978) 2 SCR 614] , this Court stated: (SCC p. 93, para 2)
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> "2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."
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> 17. Insofar as the Code of Civil Procedure, 1908 (for short "CPC") is concerned, Order 6 Rule 17 provides for amendment of pleadings. It says that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
>
> 18. The matters relating to amendment of pleadings have come up for consideration before the courts from time to time. As far back as in 1884 in Clarapede & Co. v. Commercial Union Assn. [(1883) 32 WR 262 (CA)] —an appeal that came up before the Court of Appeal, Brett M.R. stated:
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> **"… The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made…."**
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> 19. In Charan Das v. Amir Khan [(1919-20) 47 IA 255] the Privy Council exposited the legal position that although power of a court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

20. A four-Judge Bench of this Court in L.J. Leach & Co. Ltd. v. Jardine Skinner & Co. [AIR 1957 SC 357 : 1957 SCR 438] while dealing with the prayer for amendment of the plaint made before this Court whereby the plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of the Privy Council in Charan Das [(1919-20) 47 IA 255] granted leave at that stage and held: (L.J. Leach case [AIR 1957 SC 357 : 1957 SCR 438] , AIR p. 362, para 16)

> "16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

21. Again, a three-Judge Bench of this Court in Pirgonda Hongonda Patil [AIR 1957 SC 363 : 1957 SCR 595] in the matter of amendment of the plaint at the appellate stage reiterated the legal principles exposited in L.J. Leach & Co. Ltd. [AIR 1957 SC 357 : 1957 SCR 438] and Charan Das [(1919-20) 47 IA 255].

23. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order 41 Rule 2 CPC makes a provision that the appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the court. Order 41 Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal.

25. In light of the aforesaid legal position governing the amendment of pleadings in the suit and memorandum of appeal, the immediate question to be considered is: **whether the same principles must govern the amendment of an application for setting aside the award or for that matter, amendment in an appeal under Section 37 of the 1996 Act.**

27. In Popular Construction Co. [(2001) 8 SCC 470] this Court, while considering the question whether the provisions of Section 5 of the Limitation Act, 1963 are applicable to an application challenging an award under Section 34 of the 1996 Act, held: (SCC pp. 474-75, paras 12-15)

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, 'express exclusion' may follow from the scheme and object of the special or local law:

'17. … [Even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.' [Ed.: As observed in Hukumdev Narain Yadav v. Lalit Narain Mishra, (1974) 2 SCC 133, p. 146, para 17.]

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendable by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need 'to minimise the supervisory role of courts in the arbitral process' [Ed.: Part 4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.] . This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

'5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.'

15. The 'Part' referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act."

28. Again in Consolidated Engg. Enterprises [(2008) 7 SCC 169] this Court observed: (SCC p. 180, para 19)

"19. **A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period**

**of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court."**

**(Emphasis supplied)**

32. The history of scheme of Arbitration and Conciliation Act, 1996 supports the conclusion that the time limit prescribed under Section 34 to challenge the award is absolute and unextendable by Court. There is no application of Section 5 of the Limitation Act qua Section 34 of the Act, 1996. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives is the need to minimise the supervisory role of Court in the arbitral process. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention. The part referred to in Section 5 is part I of 1996 Act, which gave the domestic arbitration and therefore, it is subjective to the sweep of the prohibition contained in Section 5 of the 1996 Act. Hence, any amendment in the appeal would attract the revision of the Limitation Act.

**Analysis by the Court**

33. We have carefully considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, we have proceeded to peruse the pleadings, grounds taken in the appeal, annexures appended thereof.

34. Section 34 of the 1996 Act lays down that the application can only be entertained if the party making application establishes that the award made by the Arbitrator is contrary to (a) fundamental policy of Indian Law; or (b) the interest of India or ; (c) justice or morality; and (d) if it is patently illegal.

35. Patent illegality should be such an illegality which goes to the root of the matter. Even in other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". What is prohibited is for Courts to re-appreciate the evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award.

36. We have also carefully examined the award passed by the Sole Arbitrator. As mentioned above, the Sole Arbitrator while analysing and returning the findings in para-22 (i) & (ii) clearly proceeded to observe that the agreement is subject to the provisions of Form I.D. III forming part of the contract as well as to the general conditions of the contract. He had also considered Clause 2 (A) of the I.D. Form No.111, which stipulated that the time is the essence of the contract. All the 17 issues were considered in detail and categorical finding had been returned.

37. We also find that while preferring an appeal under Section 34 of the 1996 Act, no such ground had been taken by the appellant. Even the instant appeal had been preferred with considerable delay of around two years and no such ground had been taken. At this belated stage, an attempt had been made to bring on record the additional evidence.

**Conclusion**

38. In this case the Sole Arbitrator appointed by the appellants had passed an

award which was challenged by the appellants under Section 34 of the 1996 Act and the same was dismissed by means of the speaking order. Against which, the present appeal under Section 37 of the 1996 Act has been filed.

39. The appellant cannot be allowed to amend the appeal or to raise fresh grounds at the appellate stage in view of the ratio laid down by the Hon'ble Supreme Court in the matter of ***State of Maharashtra Vs. Hindustan Construction co. Ltd.****(supra).* The amendment obtained or raising fresh grounds virtually amounts to file a fresh appeal and would be barred by limitation as laid down under Section 34(3) of the 1996 Act. Hence, it is not open for the appellant to raise any new ground or adduce any fresh evidence in an appeal under Section 37 of 1996 Act.

40. As per Section 34 read with Section 37 of the 1996 Act, the award can only be set aside if the same is found to be contrary to (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality and (d) if it is patently illegal. In the present case, none of these aforesaid exceptions are said to be attracted in the present case.

41. The learned Commercial Court, Jhansi, after taking note of the submissions of parties, framed the points for determination and then, dealt with every point on the anvil of Section 34 of the 1996 Act. The learned Commercial Court dealing with Section 34 application was not acting as a Court of Appeal. Yet, looking to the long-drawn arguments, the Commercial Court enumerated the issue raised and then returned findings after examining the record and while rejecting the submissions made on behalf of the State-appellant. There had been no such flaw in the judgment and order passed by the Commercial Court which call for interference by this Court under the limited scope of Section 37 of the 1996 Act.

42. The ratio laid down in the aforesaid cases clearly postulate that the scope of judicial intervention in Section 34 or Section 37 of 1996 Act is minimum. The Court ought to intervene only if the findings of the Arbitrator are arbitrary, capricious or perverse, or the award is such that it shakes the conscience of the Court. Further, if the illegality in award is not trivial but goes to the root of the mater, then only the Court in extraordinary circumstances would interfere in the award passed by the Arbitrator. It has also been settled that the Court while entertaining Section 34 or 37 application does not sit in an appeal over the award and can only interfere on merits on a limited ground encapsulated under Section 37(2) of 1996 Act.

43. In view of the aforesaid facts and circumstances, we have no hesitation to hold that the appellants have failed to make out any case for interference under Section 37 of the 1996 Act. The Arbitrator after considering all the evidences and record had passed a detailed speaking award, dealing with every aspect of the claim separately, which is also approved by the Commercial Court. The appellants herein have failed to make out any case, which may call for interference by this Court.

44. Under the facts and circumstances, we do not find any merit to entertain both the applications and accordingly, the same stand rejected.

45. The present appeal under Section 37 of the 1996 Act, lacks merit, and is, accordingly **dismissed**.

46. Let original record be returned to learned counsel for the State appellants.

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**(2024) 10 ILRA 471**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 25.10.2024**

**BEFORE**

**THE HON'BLE SIDDHARTH, J.**
**THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Criminal Appeal No. 60 of 2011

**Upendra @ Balveer ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellant:**
Ajay Sengar, S.P. Lal

**Counsel for the Respondent:**
G.A.

**Criminal Law - Indian Penal Code, 1860 - Sections 316 & 302 - Punishment for murder - Life imprisonment - Indian Evidence Act, 1872 - Section 106 - The Code of Criminal Procedure, 1973 - Section 313 - As per F.I.R, deceased was married to appellant - Dowry was given in marriage, but appellant, his father, and mother were not satisfied and they send deceased back to her parental home - Informant lacks money to fulfil their excessive demand - On 20.05.2009, they killed his daughter - F.I.R. lodged against them on 21.05.2009 - Charges were framed. (Para 3, 4)**

**Prosecution failed to prove charges u/s 498-A / 304-B and ¾ D.P. Act, the trial court convicted appellant because two months old foetus was found inside womb of deceased - Trial court convicted him on premise that since deceased was residing with appellant, he was required to prove incident. (Para 20)**

**Court observed that prosecution has not brought forward any evidence which could establish that at time of occurrence, appellant was inside house - Appellant was not given opportunity to defend himself against charge for which he was convicted. (Para 23, 25, 26)**

**None of prosecution witnesses of fact supported prosecution case - Admitted it to be case of accident - P.W.-1, admitted that accused were so poor that demand of Rs. 1 lakh, one gold chain and motorcycle was not for them to make - Trial court convicted appellant on wrong appreciation of relevant law, but rightly acquitted his father and mother of all charges - Impugned order set aside. (Para 28)**

**Appeal allowed.** (E-13)

**List of Cases cited:**

1. Santosh Vs St. of U.P. 2021 0 Supreme (All) 173

2. Ramayan (Appellant) Vs St. of U.P., (Respondent), Jail Appeal No. 6157 of 2016 (Para 16 to 30)

3. Babloo Chauhan @ Dabloo Vs St. Government of NCT 247 (2018) DLT 31

4. Maneka Gandhi Vs U.O.I.AIR 1978 SC 597

5. S Nambi Narayanan Vs Siby Mathews & ors.AIR 2018 SC 5112

6. Rudul Shah Vs St. of Bihar 1983 AIR 1086

7. Bhim Singh Vs St. of J&K AIR 1986 SC 494

8. Nilabati Behera Vs St. of Orissa 1993 AIR 1960

9. Consumer Education and Research Center & ors.Vs U.O.I.1995 AIR 922

10. Sulemenbhai Ajmeri & ors. Vs St. of Gujarat, 2014 SCC 716

11. Virendra Singh & ors.Vs St. of U.P & ors., Criminal Appeal No. 6367 of 2010, decided on 12.09.2024

(Delivered by Hon'ble Siddharth, J.)

1. Heard Shri Amar Singh Kashyap, learned counsel for the appellant, Ms. Manju Thakur, learned A.G.A.-I for the State and perused the material on record.

2. The criminal appeal has been filed against the judgment and order dated 21.12.2010, passed by Additional Sessions Judge IIIrd, Jalaun, at Orai, in Sessions Trial No. 128 of 2009, State of U.P. Vs. Upendra @ Balveer and Others. By the said judgment and order, the appellant has been convicted under section 316 IPC for the period of five years rigorous imprisonment alongwith a fine of Rs. 1,000/-. The appellant has been further convicted under section 302 IPC for life imprisonment alongwith fine of Rs. 1,000/-; in default the payment of such fine, for an additional imprisonment of two months.

3. The prosecution case as per F.I.R. is that two years ago, deceased, Deepika, was married to appellant, Balveer, as per Hindu marriage rites. Dowry was given in marriage by the informant as per his capacity, but the husband of deceased, appellant, Balveer, his father, Raj Bahadur and Mother, Smt. Ramkali, were not satisfied with the dowry received in marriage. After marriage, they were demanding one motorcycle, a gold chain and Rs. 1 lakh and send the deceased back to her parental home. After the deceased informed the informant about the conduct of the aforesaid persons, he went to their house and stated that he lacks money to fulfil their demand and after leaving his daughter with them, he came back. They made many phone calls demanding dowry and on 20.05.2009, the aforesaid persons killed his daughter, information whereof was received by the informant on 20.05.2009 at 07:30 p.m. He reached there and lodged the F.I.R. against the accused persons on 21.05.2009 on the basis of written application at 01:00 p.m.

4. Charges were framed against accused under section 498-A, 304-B, 516 of IPC and ¾ of D.P. Act. They pleaded not guilty and sought trial.

5. The prosecution produced the following witnesses to prove the prosecution case:-

(A). P.W.-1, Pooran Singh, informant and father of the deceased; P.W.-2, Smt. Guddi, mother of the deceased; P.W.-3, Kumari Priti, sister of the deceased; P.W.-4, Anup, uncle of the deceased; P.W.-5, Dr. A.V. Singh, who conducted the autopsy of the dead body of deceased; P.W.-6, Mahesh Chandra Pathak, Naib Tehsildar, who prepared the inquest report of the deceased; P.W.-7, Amar Singh, witness of inquest; P.W.-8, Arun Kumar Sirohi, Investigating Officer of the case; P.W.-9, Ram Kumar Singh, witness of inquest report; P.W.-10, another witness of inquest report; P.W.-11, Raju, another witness of inquest; P.W.-12, Ranveer, also inquest witness; P.W.13, Constable, Ram Bahadur, who registered the F.I.R. before the police station at Madhavgarh, District- Jalaun, and P.W.14-, Yashvant Singh, who noted the information given by Karan Singh, Chowkidar, of the village that Smt. Deepika, resident of Village- Malheta, had died on account of burning on 20.05.2009 and information in this regard was

registered in G.D. No. 20 at 04:35 p.m.

6. Thereafter, statements of accused persons were recorded under sections 313 Cr.P.C., wherein they denied the allegations made against them.

7. P.W.-1, Pooran Singh, repeated the contents of the F.I.R. before the court in his examination-in-chief. In his cross-examination, he stated that after marriage his daughter had separated from her father-in-law, mother-in-law and was residing with her husband, Upendra @ Balveer, the appellant. He further stated that his daughter never informed him about the demand of motorcycle, a gold chain and Rs. 1 lakh. His daughter came to his house 15 days after her marriage and went back to her matrimonial home after 2-4 days. Thereafter, he never went to meet her and only when her death took place, he got information. The matrimonial home of his daughter was a small and kaccha house. His daughter was suffering from the disease of hysteria and while cooking food she accidentally got burned and died. The accused persons have 1 – 1.5 bigha of land. They survive by doing the job of labourer. His daughter was living with her husband separately from her father-in-law and mother-in-law. He had not read the application made at the police station and had only signed the same. The accused persons were so poor that they were unable to demand Rs. 1 lakh and motorcycle. Because of financial problem father-in-law and mother-in-law of his daughter were living separately from the couple. The deceased and her husband used to work as labourers to eek-out their living. He was in a state of shock and crying when his signatures were taken on the application. Later, he came to know that the F.I.R. has been lodged on false allegations. He requested the police personnels in this regard, but they said, now nothing can be done. He should get it corrected from the Court.

8. P.W.-2, mother of the deceased, also did not supported the prosecution case at all and was declared hostile. In her cross-examination, she admitted that her daughter was suffering from disease of hysteria and used to run towards the fire. She might have got burned while cooking food after suffering the fit of hysteria.

9. P.W.-3 and P.W.-4 also deposed accordingly and were declared hostile.

10. P.W.-5, Dr. A.V. Singh, proved that on 21.05.2009, he was posted in District Hospital, Orai, on the post of Physician. He conducted the post mortem of the dead body of the deceased alongwith Dr. Madan Lal. In the post mortem superficial to deep burns were found present all over the body (100%) of deceased. Sealed bundle of seven articles were provided by the police wherein one piece of cloth, which was found inside the mouth of the deceased was also there apart from other burned clothes and jewellery found on the body of the deceased. Carbon particles were found in her bronchi.

11. P.W.-6, proved that he prepared the inquest report of the dead body of the deceased. He also proved the samples of the earth taken by the investigating officer, challan of dead body and documents prepared for sending dead body to post mortem house. He further proved that he found a kerosene lamp and matchstick box near the dead body. All the matchsticks in the box were burnt. The kerosene lamp was found at about 2 feet distance from the

dead body of the deceased. There was a chappar nearby which was not burnt. He found cloth inside the mouth of the deceased. He stated that he did not took out cloth inside the mouth of the deceased in his possession hoping that it will come in the post mortem report.

12. P.W.-7, witness of inquest proceedings, stated that number of villagers had gathered after the incident. The mouth of the deceased was open and flies were going inside her mouth. On the direction of the people gathered there, the ladies had put a piece of cloth over mouth of the deceased to cover it so that the flies may be prevented from entering insider her mouth.

13. P.W.-8, Arun Kumar, Sirohi, Investigating Officer of the case, proved the proceedings of investigation conducted by him including the recording of the statements of the witnesses.

14. P.W.-9, proved that he had seen the dead body of the deceased. She was lying with her face towards the sky. Flies were sitting on her mouth. There was nothing in her mouth before he reached the place of incident. In cross-examination, he admitted that deceased had no grievance against her father-in-law and mother-in-law, who were living separately from the couple.

15. P.W.-10, another inquest witness, proved that he did not went near the dead body of the deceased because of the crowd of women. He further proved that the father and mother of appellant, Balveer, did not lived with the couple.

16. P.W.-11, also stated that he did not saw the dead body of the deceased. He only signed on the inquest report prepared by the Tehsildar and Inspector of Police. He also proved that the father and mother of the appellant used to reside separately from the couple.

17. P.W.-12, proved that at the time of inquest husband of deceased, her father-in-law and mother-law were present in the house. Later he came to know that she got burnt while cooking food. He further admitted that the father and mother of the appellant used to cook their food separately from the couple. The deceased died while cooking food at about 01:30 p.m.

18. P.W.-13 and P.W.-14, are formal witnesses, who proved the lodging of F.I.R. and receipt of information of the death of the deceased at police station.

19. The accused persons in their statements recorded under section 313 Cr.P.C., clearly stated that they have been falsely implicated. No incident as alleged took place. It was a case of accident and not a case dowry death. The trial court by the impugned judgment and order acquitted Raj Bahadur and Smt. Ram Kali, the father-in-law and mother-in-law of the deceased, but convicted the appellant her husband, under sections 316 and 302 IPC.

20. After hearing the rival submissions, this Court finds that the *Naib Tehsildar*, P.W.-6, has deposed before the court that he saw the cloth in the mouth of the deceased, but he did not took it out hoping that it shall be seen at the time of post mortem. P.W.-5, Dr. A.V. Singh, did not found any cloth in the mouth of the deceased rather a piece of cloth was found in the bundle of articles produced by the police before the P.W.-5, the doctor. There is no statement of P.W.-5 proving that any cloth was found, inserted inside the mouth

of the deceased at the time of post mortem. P.W.-6, further stated in his statement that where the dead body of the deceased was lying there were no signs of burning. There was kitchen inside the chappar (thatched roof) besides the dead body of the deceased. P.W.7 and P.W.-9 have clearly stated that the mouth of the deceased was open and flies were entering inside her mouth, therefore, the ladies of the village put a cloth on her mouth to cover the same and to prevent the flies from entering into her mouth. P.W.-9 clearly stated that there was nothing inside the mouth of the deceased. P.W.12, a neighbour of the deceased, clearly stated that the deceased got burnt while cooking food at about 01:30 p.m,. From the prosecution evidence, the charges under section 498-A / 304-B and ¾ D.P. Act could not be proved, but the trial court has convicted the appellant for committing the offences under section 302 and 316 IPC because two months old fetus was found inside the womb of the deceased. The trial court has convicted the appellant on the basis of section 106 of the Indian Evidence Act, on the premise that since the deceased was residing with the appellant, he was required to prove how the alleged incident took place.

21. As far as the concept of Section 106 of Indian Evidence Act is concerned, that is misread by the learned trial Judge because when the offence like murder is committed in secrecy inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 Indian Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution. Initial burden of proving that, as on the date of the alleged incident, the accused was present in the house or lastly seen with the deceased or that he was lastly in the company of the deceased at the time of the incident would be primarily upon the prosecution.

22. This High Court in the case of **Santosh Vs. State of U.P. 2021 0 Supreme (All) 173**, has discussed the law relating to Section 106 of Indian Evidence Act, which is quoted herein below:-

> *"35. Recently, this Court in Dharmendra Rajbhar Vs. State of U.P. (Supra) in similar situation has considered legal position as far as Section 106 of the Act, 1872 is concerned. We do not want to burden our judgment with reproduction of the said findings and analysis except para 40 of the said judgment wherein the Court has held as under:-*
>
> *"40. Section 101 to Section 114A of Chapter-VII of the Indian Evidence Act, 1872 deal with subject "OF THE BURDEN OF PROOF." Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proof to prove that fact is upon him. Section 106 is an exception to Section 101 of the Evidence Act which stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 106 of the evidence act has to be*

*read in conjunction with and not in derogation of Section 101 Evidence Act. Section 106 of the Indian Evidence Act does not relieve prosecution of it's primary and foremost duty to establish the guilt of the accused beyond all reasonable doubts independent of weaknesses of the defence. It is only when prosecution, for well perceptible and acceptable reasons, is unable to lead evidence because of circumstances beyond it's control including the reason that the fact required to be proved was "within the special knowledge of an accused alone" and prosecution could not have known it by due care and diligence, that Section 106 can be resorted to by shifting burden on the accused to disclose that fact which is "in his special knowledge" and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished. Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence."*

23. In our case, it is established fact that the appellant and his deceased wife used to reside in same house. Hence, the burden to prove factum of the death of the deceased cannot be shifted on the shoulders of the appellant unless the prosecution first of all discharged its burden by proving the fact that at the time of alleged occurrence or at the time when the deceased was put on fire, the appellant was also inside the house. Learned AGA, in this regard, has contended that appellant has not taken the plea that he was not in the house when the incident took place but this was the negative burden on the appellant accused. The prosecution has not brought forward any evidence which could at least establish the fact that at the time of occurrence, the appellant was inside the house. Hence, there is no applicability of Section 106 of Indian Evidence Act in this case.

24. Another aspect of the case is that the appellant was charged under sections 498-A, 304-B , 316 IPC and ¾ of D.P. Act, by the trial court, but the trial court has not found the charges under sections 498-A, 304-B and ¾ of D.P. Act proved against the appellant, but has convicted the appellant under section 302 and 316 IPC.

25. This Court finds that the appellant and also the acquitted accused were not questioned regarding commission of offence of murder of the deceased in their examination under section 313 Cr.P.C. The charge was altered only at the time of judgment. Therefore, the accused were not put to notice and opportunity of hearing regarding the altered charge under section 302 IPC. There is no doubt about the power of the trial court of altering of charge at any stage, but it cannot be done in a manner which is prejudicial to the interest of the accused. This Court in the case of Ramayan(Appellant) Vs. State of U.P., (Respondent), passed in **Jail Appeal No. 6157 of 2016**, had considered this aspect as follows:-

*"16. Learned counsel for the appellant has contended that the charge could not have been altered in the fashion and in the manner in which it has been done which has acted prejudicial to the*

*appellant herein and learned counsel has relied on the decision in R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383 and decision of this Court in Criminal Appeal No.234 of 2017 (Dharmendra Rajbhar Vs. State of U.P.), decided on 19.1.2021 so as to contend that accused requires to be given benefit of doubt as the prosecution has failed to prove the circumstances connecting accused to death of deceased.*

*17. Learned counsel for the State has vehemently submitted that the burden of proof has been shifted on the accused as per Section 106 of the Evidence Act, 1872 as the death was unnatural and at the dwelling place of husband.*

*18. Investigation of the case had taken place and the charge-sheet was laid under Section 498A, 306 of IPC but as we can see, convicted the accused under Section 302 of IPC after altering the charge.*

*19. It is further submitted by learned counsel for the appellant that once Trial Court came to the conclusion that no offence was committed under Section 498A of IPC, the presumption under Section 113-B of Evidence Act, 1872 could not be raised.*

*20. It would be pertinent to reproduce Section 216 of Cr.P.C. regarding alteration of charge which reads as follows:*

*"216. Court may alter charge.*

*(1) Any Court may alter or add to any charge at any time before judgment is pronounced.*

*(2) Every such alteration or addition shall be read and explained to the accused.*

*(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*

*(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.*

*(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."*

*21. The question which arises before us is that when no cogent evidence to convict the accused despite that the learned Judge has relied on what can be said to be his own conjectures which are not borne out even on interpretation of Section 106 of the Evidence Act, 1872 (hereinafter*

*referred to as 'Act, 1872') which reads as follows:*

*"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations*

*(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*

*(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

*21. Section 113B and 114 of the Act, 1872 reads as follows:*

*".1[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).]."*

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

*22. Provisions of Section 106 and 114 of Act, 1872 were raised by the learned Judge below but oral and other reliable evidence would not permit this Court to raise such presumption as the said presumption is rebuttable. The fact that the deceased died in the matrimonial home is not in dispute but whether it was accused who authored the act which would fulfill the ingredients of Section 300 of IPC and whether it would fall within its purview, such presumption cannot take place of proof. The learned judge with utmost respect could not have convicted the accused under Section 302 of I.P.C. on evidence which was not laid or rather the evidence which was led, was never put to him under Section 313 of Cr.P.C statement and, therefore, he was taken off guard. The presumption under Section 106 of Act, 1872 will not also come to the aid of the prosecution as it was not proved beyond reasonable doubt that the charge which was added did not even mention the satisfaction of the learned Judge below and the conviction was not from major to minor but was from minor to major offence.*

*23. The submission of learned A.G.A. is that no objection was raised at the time of alteration of charge.*

*24. We may hasten to mention here that the charge was added at the fag end of the trial. The accused could not have thought that the said alteration of*

*charge would be acted upon within seven days and the trial would culminate into returning the finding of punishment to him under Section 302 of IPC though the evidence was not completing the right of 1872, Act.*

*25. In our case, we can safely hold that the alteration of charge was bad and reliance is placed on the decision in R. Rachaiah (Supra) which will apply in full force.*

*26. In judging the question of prejudice as of guilt, the Trial Court was supposed to act with a broad vision and look to the substance and not to the technicalities. The main concern should be to see whether accused has/had a fair trial though he may know or not of what he was being tried for, once the evidence is over, he would not have a fair chance of cross-examination of the witnesses for the new charge added which is under Section 302 of I.P.C. and no evidence was recorded so as to bring home charge of Section 302 of IPC. No doubt the stage of framing new charge under Section 216 of the Cr.P.C. can be at any stage, but the charge for alteration or addition has to be so that the accused is put to circumstance which are against him. The basic feature for framing and/or altering charge in criminal trial is based on principle of fair play.*

*27. The charges which were levelled and in absence of any evidence, being proved and when there was no charge of murder, the Trial Court could not have altered the charge at the fag end of the Trial and raised presumption as to commission of offence under Section 302 of IPC.*

*28. The object and scope of altering the charge and the principles therein have been summarized by the Apex Court in Nallapareddi Sridhar Reddy Vs. State of A.P., (2020) 12 SCC 467, which are applicable in our case.*

*29. In this case, the learned Trial Judge perused the charges and suddenly after most of the witnesses were examined and when it appeared that he could not base the conviction, on the basis of presumption under Section 106 and 114 of the Evidence Act, 1872, he altered the charge to Section 302 of I.P.C.*

*30. The Apex Court in R. Rachaiah Vs. Home Secretary, 2016 0 Supreme (SC) 383 has held that alteration of charge in violation of mandate as per Sections 216 and 217 of Cr.P.C., and conviction recorded under altered charges seriously causes prejudice to the accused. Thereafter, this impropriety of the Trial Court stands vitiated and there could have been no conviction under altered charge namely under Section 302 of IPC."*

26. We can safely conclude that accused-appellant was not given opportunity to defend himself against the charge for which he was convicted. It is sorry state of affair that learned trial judge altered the charge even after recording the statement of accused-appellant under Section 313 Cr.P.C., therefore, the charge was fitted according to the prosecution evidence. There is no doubt that charge can

be altered at any stage of the trial but in such a case, the learned trial court should give proper and fair opportunity to the accused to defend himself against the altered charge so that his interest may not be prejudiced. He must get the opportunity of fair trial.

27. In our case, accused is highly prejudiced for not getting the fair and proper opportunity to defend himself against the altered charge and the impugned judgment and order is liable to be set aside.

28. In this case, we find that none of the prosecution witnesses of fact supported the prosecution case at all. They admitted it to be case of accident. P.W.-1, clearly admitted that accused were so poor that the demand of Rs. 1 lakh, one gold chain and a motorcycle was not for them to make. Yet the trial court convicted the appellant disregarding evidence on record and on wrong appreciation of relevant law, but rightly acquitted the father and mother of appellant of all charges.

29. In view of above, we are of the firm view that the judgment and order of the trial court cannot be sustained and is hereby **set aside**.

30. The appellant has already undergone about 13 years of imprisonment before being released on bail on 21.10.2022 for no fault on his part for which he is entitled to heavy compensation from State, but due lack of statutory framework, we are helpless.

31. For the hundreds of innocent persons, who are wrongfully prosecuted but later acquitted after years, our justice delivery system takes little pains to make amends. True that under the public law remedy, some isolated adjudications came by way of writ jurisdiction, but it failed to shape a set formula for development of this branch of compensation jurisdiction. Article 21 of the Constitution says, `no person shall be deprived of his life and personal liberty except in accordance with procedure established by law'. The loss of productive years of life, feeling of loss of freedom, the negation by society, damage to identity, dignity, and reputation, shame, fear etc. cause multiple psychic disorders for this hapless lot. The damage to health, loss of income, loss of property, litigation expenses, loss of family life, loss of opportunities for education and career progression, stigmatization etc., add to this horrible count. Above all, the emotional and physiological harm caused to the family of accused takes unimaginable proportions given the stigma carried forward for generations. Instances are not rare where marriage proposals get turned down for incarceration of kindred even in the ancestral line. True that at times, positive overtures in constitutional jurisdictions have addressed this issue. But still now no concrete judicial mechanism to have uniform application in cases of wrongful prosecution took shape in our jurisprudence to do some reparation.

The Delhi High Court in Babloo Chauhan @ Dabloo V. State Government of NCT 247 (2018) DLT 31 directed the Law Commission to undertake a comprehensive examination of the issue of wrongful prosecution and suggest a mechanism for compensation and rehabilitation of victims of wrongful prosecution.

32. The Law Commission in its 277th Report recommended for a legal and statutory frame work for establishing a mechanism for adjudicating up on claims

for wrongful prosecutions. Commission proposes a statutory obligation on the State to compensate the victims of wrongful prosecution with the right to be indemnified by the erring officers. The proposal for establishment of special courts for speedy disposal of claims for compensation is another notable suggestion by the Commission. A Draft Bill containing amendments to Code of criminal Procedure was annexed with the Report. The Bill seeks to incorporate definitions to `malicious prosecution' and `wrongful prosecutions', in addition to insertion of Chapter XXVII A containing procedural rules for laying claims. The definition of malicious prosecution as an "act of instituting the prosecution complained of without any existing reasonable or probable cause", to a great extent dissuades police over zeal in sponsored prosecutions. The all-encompassing narration of misdeeds constituting the act of 'wrongful prosecution' in the definition clause in the Bill is sufficient to ward off ambiguity in any form and provide clear pointers to the adjudicatory authority in deciding on the claim for compensation for wrongful prosecution. Making false or incorrect record or document, making false statement before officer authorized to take evidence, giving false evidence, fabricating false evidence, suppression of exculpatory evidence, filing a false charge, committing a person to confinement etc. are instances of inculpatory misdemeanours leading to a wrongful prosecution, which fortunately find a distinctive place in the exhaustive definition given to 'wrongful prosecution' in the Draft Bill.

33. Commission has considered Article 14(6) of the International Covenant on Civil and Political Rights 1966 (ICCPR) delineates the obligation of States in cases of miscarriage of justice resulting from wrongful prosecutions. It says *"when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new and newly-discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."* Article 9(5) of the ICCPR further underscores this right by declaring that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The United Nations Human Rights Committee explained the obligations contained in Article 14 of ICCPR: *"It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that payment is made within a reasonable period of time."* As nearly as 168 State parties, including India, have ratified ICCPR. But the incorporation of this international obligation into domestic legal frame work has been done only by a few countries.

34. Criminal Justice Act 1988 is the statute in England following ratification of ICCPR by the United Kingdom. Sections 133, 133A, 133B of the Act, in its combined synergy, provide for creation of a mechanism under the Secretary of State for determination and disbursement of compensation to victims of miscarriage of justice. A person who has suffered imprisonment consequent to wrongful conviction can approach the Secretary of State for Compensation if conviction is

reversed or pardoned on the ground of miscarriage of justice. The emergence of a new fact proving beyond reasonable doubt that the person has not committed the offence was the expanded version and norm for `miscarriage of justice' under the UK Law. But in 2011, in R (*on the application of Adams) V. Secretary of State for Justice*, the UK Supreme Court widened the scope of 'miscarriage of justice and the notion of innocence', by ruling that even those who cannot prove innocence beyond reasonable doubt also can lay claim for compensation. The Criminal Cases Review Commission (CCRC) working in the UK undertakes the exercise of review of the cases with possibility of miscarriage of justice working in the criminal courts in the UK. It can gather field information related to a case and carry out its own investigation for finding out the real truth in a pending case or a disposed case and accordingly apply for review of conviction, if miscarriage is found out. The UK Police Act 1996 makes the Chief Officer of Police liable in respect of any unlawful conduct of constables under his direction and control in the performance of functions, with clauses for payment of compensation. The distinguishing feature of UK compensation regime is that it fixes a compensation slab taking periods of imprisonment as bench marks to do full justice according to variables.

35. The United States Code deals with federal claims from persons unjustly convicted of an offence against the United States and imprisoned. Claimant is eligible for relief on grounds of pardon for innocence, reversal of conviction or of not being found guilty at a new trial or rehearing. The US Court of Federal Claims is the adjudicatory forum under the statute. The length of incarceration is the yardstick or variable for the determination of compensation. All States in the US have their State laws providing for compensation to victims of wrongful prosecution. While some States lay down fixed amount of compensation to be paid depending on period of incarceration, others have given discretion to the forum to decide compensation based on individual fact dossiers. In the State of Illinois, a tabular compensation formula based on period of incarceration is adopted. Non-monetary compensation is given for assisting victims in rehabilitation and reintegration into the society including transitional services like housing assistance, job training, assistance in terms of job search and placement services, referral to employees with job openings, physical and mental health services for enabling victims to reintegrate into society. Other Common Wealth countries like Canada, New Zealand and Australia have infused ICCPR treaty obligations for compensation into their domestic jurisprudence by appropriate legislations.

36. In the absence of clear statutory frame work in consonance with the commitments under ICCPR, the Indian courts have paraphrased in its numerous decisions what actually is miscarriage of justice resulting from wrongful prosecution, particularly in its constitutional remedy jurisdictions. Right to fair trial, an attribute of Article 21 of the Constitution, is the barometer for its forensic evaluation of wrongful prosecution. Journey from the *Maneka Gandhi AIR 1978 SC 597* case to S Nambi Narayanan v. Siby Mathews & others AIR 2018 SC 5112 marks the evolution of jurisprudence on violation of fundamental rights, particularly compensation for wrongful prosecutions. The apex court as

early as in 1983, while ordering compensation for illegal detention, observed in *Rudul Shah vs State of Bihar* ***1983 AIR 1086:*** *"one of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation*." ***Bhim Singh*** *v. State of J&K* **AIR 1986 SC 494** was another case in the episodic judgments followed in the compensation jurisdiction, where for an illegal arrest and detention the Supreme Court awarded ₹50,000 as compensation to the sufferer. ***Nilabati Behera v. State of Orissa 1993 AIR 1960*** underlined the principle that sovereign immunity is not available in an action for compensation for violation of fundamental rights, where the adjudication is under Article 32 and 226 of the Constitution. *Consumer Education and Research Center & others V. Union of India* reiterated the above principle. However, Supreme Court rejected the plea for compensation for the accused who were in jail for a decade and more but were subsequently acquitted in *Sulemenbhai Ajmeri & Ors. V. State of Gujarat*, 2014 SCC 716 popularly called, Akshardham Temple Case.

37. Private Law Remedy for the tort of malicious prosecution is not an effective remedy for victims for the inherent improbability in its successful finale. Given the tardy pace of civil litigation and the expenses like court fees and other litigation costs involved, private law remedy sounds not meaningful and user friendly for the victims.

38. Police Officers knowingly framing a person disregarding any direction of law, [Section 166 Indian Penal Code (IPC)] knowingly disobeying any direction of law regarding investigation [Section 166A(b)], framing or preparing documents to cause injury to any person (Section 167 IPC) invite criminal liability under Indian Penal Code. Chapter XI of the IPC contains punishments for various offences affecting administration of justice. Every event of a wrongful prosecution takes within its act of commission various prosecutorial misdeeds like fabricating false evidence, (Section 193 IPC) giving false evidence (Section 191 IPC), giving false information as to the commission of offence (Section 203 IPC), destruction of exculpatory evidence (Section 204 IPC), malicious prosecution (Section 211 of IPC), corruptly or maliciously filing report (Section 219 of IPC), maliciously confining person (Section 220 IPC) etc. Any possible act contributing to a wrongful prosecution can be dealt with on the criminal side for securing the conviction of erring state officials and private complainants launching malicious prosecutions as well. This enumeration of culpable conducts in Chapter IX and XI of IPC can be a handy indicia for constitutional courts and other civil courts to decide as to how a wrongful prosecution happens particularly in the context of deviation from the direction of laws relating to investigation, enquiry and trial.

39. Instead of creation of special courts to deal with claim for compensation as mooted by the Law Commission, pragmatism and convenience demand that the task may be done by the court acquitting the accused, be it trial, appellate or revisional court. Like the provision for compensation to victims of crime (Sections 357 and 357 A Code of Criminal Procedure/ or corresponding section 395 B.N.S.S. and 396 B.N.S.S), an empowering clause can be conferred on the court

acquitting the accused, to decide on claims for compensation in a summary and speedy manner.

40. A false accusation and the trauma that follows are imponderable events for any law court to compensate in terms of money. A virtual death occurs to the personhood of the individual arraigned in the process making it impossible for him to come back to ordinary life with order of acquittal. The lost years of free life cannot be given back to or re-enacted to please him. He and his family suffer for the cause of administration of criminal justice. Cash for casualty has little role to purge the sovereign of this unpardonable sin.

41. Considerable amount of public money, time and efforts of number of persons are consumed in preparation and submission of reports by Law Commissions. The government rarely accepts recommendations of Law Commissions. The data on record shows that only about 1/3rd of such reports have been only accepted by the Government. The 277th Report of Law Commission ought to have been accepted by the Government since the trial courts often convict accused in case of heinous offences due to fear of higher courts even in is clear cases of acquittal. They are fearful of wrath of the higher courts in such cases and only to save their personal reputation and carrier prospects such judgment and order of conviction are passed. This unfortunate side of our system was considered by this court in Criminal Appeal No. 6367 of 2010 (Virendra Singh and Others Vs. State of U.P and Others) decided on 12.09.2024. In such cases innocent individuals are subjected to trauma of unwanted incarceration in jail for number of years before their bail applications are allowed or their criminal appeals are decided by the High Court/Supreme Court. If ultimately they are acquitted, they find themselves unfit in their family and society, their place in the family gets filled by other members of the family, property is usurped by the other family members and they are seldom seen as a welcome member in the family after being in long incarceration in jail. The State can provide some pecuniary compensation to such accused which may provide them some solace and they would not be seen as a burden on their family after being acquitted of the unfounded charges levelled against them. The family of such persons also goes through the time and money consuming process of contesting trial, which is so tedious that it itself is not less than a major punishment. Sometimes the family looses all its means of survival in defending its near and dear one in courts at different level.

42. As yet the government has not implemented the recommendations of 277th report of Law Commission hence violation of Articles 14 and 21 of the Constitution of India for wrongly prosecuted and punished would continue unabated. Even in the much hyped Bhartiya Nagrik Suraksha Sanhita, 2023 there is nothing in consonance with Articles 14 and 21 of the Constitution of India for such unfortunate ones.

43. The Court has no other option but to simply allow this criminal appeal, having set aside the judgment and order of trial court earlier.

44. The criminal appeal is **allowed**.

45. The appellant is on bail. His bail bond is cancelled and sureties are discharged.

46. Let the record of trial court be returned and this judgment be notified to the trial court within two weeks.

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**(2024) 10 ILRA 485**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**
**THE HON'BLE MAYANK KUMAR JAIN, J.**

Criminal Appeal Nos. 4672 of 2007, 5743 of 2007, 5037 of 2007

**Veda @ Vedpal & Ors. ...Appellants**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Appellants:**
Sri Gaurav Kakkar, Sri D.K. Dwivedi, Sri Dushyant Singh, Sri Jai Shanker Audichya, Sri M.C. Singh, Sri Omvir Singh Rajpoot, Sri P.C. Srivastava, Sri Prakash Chandra Srivastava, Sri Ram Chandra Tripathi, Sri Vishnu Prakash

**Counsel for the Respondent:**
Sri Vikas Goswami (A.G.A.), Sri S.P.S. Chauhan, Sri Anil Raghav

**(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Sections 148, 302 r. w. Section 149, 120-B, Arms Act, 1959 - Section 25 - Murder - Unlawful Assembly - Arms Possession - Illicit relationship - conspiracy - firearms - recovery - torchlight identification - Disclosure statement of the accused must be recorded in the presence of public witness before making recovery - Merely, non-mentioning of the names of the appellants on the inquest report does not conclusively indicate that the first information report came into existence after inquest proceedings. (Para - 111,114)**

**(B) Criminal Law - The Code of Criminal Procedure, 1973 - Section 313 - Section 313 CrPC cannot be seen simply as a part of audi alteram partem - It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) Cr PC. (Para - 119)**

Appellants were convicted for murder of four individuals - armed with firearms - case involved allegations of an illicit relationship and conspiracy - Eyewitnesses claimed to have identified the accused in the light of torches and lanterns - torches, lanterns, and other items mentioned were not produced in court as evidence - No forensic report supported the recovery of firearms, leading to inconsistencies in the prosecution's case - Key eyewitnesses (Punji, Pappu, Sukhveer, Om Prakash, Singhveer) not produced by prosecution - appellants were convicted - hence appeal. (Paras 1-24, 52-77 ,124)

**HELD: -** Court found defence's evidence more convincing than prosecution's motive theory. Prosecution failed to establish guilt beyond reasonable doubt, leading to the appellants' acquittal. Deceased were done to death by some unknown persons and not by the appellants. Convictions were set aside. (Para - 124,125)

**Appeals allowed.** (E-7)

**List of Cases cited:**

1. Reena Hazarika Vs St. of Assam, 2018 0 Supreme (SC) 1106

2. Darshan Singh Vs St. of Punj., Laws (SC) 2024-1-18

3. St. of Karna. Vs Suvarnamma & anr., (2015) 1 SCC 323

4. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Maha., 2022 SCC Online SC 883

5. St. of Karna. Vs Suvarnamma & anr., (2015) 1 SCC 323

6. Durbal Vs St. of UP, Crl. Appl. no.1398 of 2008

7. Nallabothu Ramulu @ Seetharamaiah Vs St. of A.P., 2014 (12) SCC 261

8. Darshan Singh Vs St. of Punj. ,Crl. Appl. No. 163 of 2010

9. Subramanya Vs St. of Karna., (2023) 11 SCC 255

10. Boby Vs St. of Kerala, 2023 SCC Online SC 50

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Accused Veda @ Vedpal, Ganga, Jagan, Pyare, Rakesh, Babloo @ Balua, were tried together by the learned Additional Sessions Judge under Sections 148, 302 read with Section 149 IPC relating to Crime No.252 of 2004, Police Station Debai, District Bulandshahr and Section 25 Arms Act. They have been convicted under Section 302 read with Section 149 IPC and Section 25 Arms Act and sentenced to life and lesser sentences all of which are to run concurrently.

Accused Neetu, Vimlesh and Keshav Giri @ Naga Baba were tried under Sections 120-B read with Section 302 IPC relating to Crime No.252 of 2004, Police Station Debai, District Bulandshahr. Accused Keshav Giri @ Naga Baba was also tried under Section 25 Arms Act. They were acquitted after trial.

2. Aforesaid criminal appeals are preferred by the appellants against the judgment and order dated 30.6.2007 passed by Sri Raj Singh Verma, the then Additional Sessions Judge (Fast Track), Court No.20, Bulandshahr, whereby:

(a) All the six appellants, namely, Veda @ Vedpal, Ganga, Jagan, Pyare, Rakesh and Babloo @ Balua have been convicted and sentenced to one year rigorous imprisonment under Section 148 IPC, with a fine of Rs.500/- each, and sentenced to rigorous imprisonment for life under Section 302 IPC read with Section 149 IPC, with a fine of Rs.5000/- each in Sessions Trial No.625 of 2004, State vs. Veda @ Vedpal and 8 others;

(b) The appellant Rakesh has been convicted and sentenced to one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial No.766 of 2004, State vs. Rakesh;

(c) The appellant Veda @ Vedpal has been convicted and sentenced to one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial no.1138 of 2004, State vs. Veda @ Vedpal;

(d) The appellant Babloo @ Balua has been convicted and sentenced to one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial No.1139 of 2004, State vs. Babloo @ Balua;

(e) The appellant Jagan has been convicted and sentenced to one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial No.1140 of 2004, State vs. Jagan;

(f) The appellant Pyare has been convicted and sentenced to

one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial No.1141 of 2004, State vs. Pyare; and

(g) The appellant Ganga has been convicted and sentenced to one year rigorous imprisonment under Section 25 Arms Act, coupled with a fine of Rs.1000/- in Sessions Trial No.1142 of 2004, State vs. Ganga.

3. The trial Court further directed that in case of default of fine, each appellant shall undergo one-year additional imprisonment. It was also directed that all sentences shall run concurrently.

4. During the pendency of the present appeals, appellant Jagan died on 02.04.2014 and vide order dated 5.8.2024 of this Court, the appeal in respect of accused Jagan stands abated.

5. Since all the appeals arise out of a common judgment and order, therefore, they are being disposed off by this common judgment.

6. This is a case where four persons were done to death during one go of incident that occurred in the intervening night of 24/25.5.2004.

In the first occurrence, Zalim Singh was shot dead at his tube well, in the second occurrence, Santosh and Dinesh were done to death at their tube well and in the third occurrence, Kunwar Singh was shot dead by assailants at his tube well.

**The FIR**

7. The First Information Report was registered at Police Station Debai, District Bulandshahar on the basis of a written report submitted by informant Bunty, the son of deceased Dinesh on 25.05.2004 at 6:20 AM.

8. The case of the prosecution unfolded in the FIR is summarised thus:

(a) Accused Neetu W/o Pramod was having illicit relation with accused Veda @ Vedpal. Their relation was opposed by the informant and his family members. Veda and his family were prejudiced against the informant. They had started to hold grudge against them. They threatened to take care of the informant and his family.

(b) Accused Vimlesh and Naga Baba visited Village Aukhand and met Veda on 24.05.2004. Naga Baba and Vimlesh threatened the informant and his family members. They asked the informant that why they were stopping Neetu from going to Veda. On this, informant asked them how they were concerned with Neetu and Veda. Naga Baba and Vimlesh told the informant that Neetu and Veda were their friends and that Neetu and Veda love each other. They said that the informant must not intervene in their relationship, else they will have to face dire consequences.

(c) On the intervening night of 24/25.5.2004 at about 1:00-1:30 am, accused Veda, Jagan, Pyare, Ganga, Nahariya, Rakesh and one unknown person, armed with country-made pistols and guns, in

continuation to their common intention, reached at the tube-well of Zalim Singh. Zalim Singh was at his well. The uncles of the informant, namely Sheeshpal and Sukhveer Singh were irrigating their field. Upon reaching there, the accused shot Zalim Singh and he died. Witnesses Sheeshpal and Sukhveer Singh rushed towards the tube-well and identified them running away in the torch light.

(d) After this, the assailants reached the tube well of Santosh and Dinesh, who were irrigating their fields. They attacked and shot them dead. The informant along with Pappu and Punji identified them in the torch light.

(e) After this, they reached the tube-well of Kunwar Singh and shot him dead. His son Vinod, who was irrigating his field with his father, witnessed the incident. Besides this, Singhveer Singh and Om Prakash, who were on their tube-well, had also seen the assailants running away in the light of torch and bulb.

(f) Due to fear and in order to save their lives, they were unable to oppose the accused because they were armed with deadly weapons. The informant and witnesses were all empty-handed. The miscreants spread so much terror by firing that they could not go to their village at night.

(g) Accused Naga Baba, Vimlesh and Neetu had committed conspiracy to commit the murders of Zalim Singh, Dinesh, Santosh and Kunwar Singh.

**Investigation**

9. On the basis of the aforesaid written report (Ex.Ka.1), First Information Report (Ex.Ka.8) came to be registered under Sections 147, 148, 149, 302, 120-B IPC, as Case Crime No. 252 of 2004 at Police Station Debai, District Bulandshahr. The investigation was entrusted to Station House Officer, Yashveer Singh.

10. Inquest of the bodies of deceased Kunwar Singh (Ex.Ka.51), Santosh (Ex.Ka.56), Dinesh (Ex.Ka.61) and Zalim Singh (Ex.Ka.66) were conducted. The dead bodies were sent for postmortem with relevant documents.

11. The autopsy of deceased Kunwar Singh was conducted by Dr. A.K. Bansal on 26.5.2004 at 11:00 AM. Report (Ex. Ka. 12) was prepared. The following injuries were noted:

*(i) Firearm wound of entry 4 cm x 4 cm x chest cavity deep on the front of outer part Rt Chest below Rt clavicle. Blackening tattooing present all around.*

*(ii) Firearm wound of entry 4 cm x 4 cm x chest cavity deep on the front of Lt side chest 8 cm above Lt nipple. Blackening and tattooing present all around wound.*

12. The autopsy of the deceased Santosh Kumar was conducted by Dr. A. K.

Bansal on the same day at 11:30 am. Report (Ex. Ka.13) was prepared. Following injuries were noted:

*(i) Firearm wound of entry 4 cm x 4 cm x chest cavity deep on the front of Lt side chest 4 cm below Lt clavicle. Blackening and tattooing all around.*

13. The autopsy of the deceased Zalim Singh was conducted by Dr. A. K. Bansal on the same day at 12:45 pm. Report (Ex. Ka.14) was prepared. Following injuries were noted:

*(i) Firearm wound of entry 1.5 cm x 1.5 cm over front of chest 10 cm from Rt nipple at 2'O clock position. Blackening and tattooing all around wound.*

*(ii) Firearm wound of Ext. 2 cm x 2 cm over Lt side back of lower part chest 6 cm Lt to mid line.*

14. The autopsy of the deceased Dinesh was conducted by Dr. A. K. Bansal on the same day at 12:15 pm. Report (Ex. Ka.15) was prepared. Following injuries were noted:

*(i) Firearm wound of entry 3 cm x 3 cm x chest cavity deep on Lt side chest just below Axilla (out ax line). Blackening and tattooing all around present.*

*(ii) Lac wound 2 cm x 1 cm over front of chest middle in between nipple x subcut tissue deep.*

*(iii) ab. contusion 2 cm x 3 cm adjacent to Injury no.2.*

*(iv) Lac wound 2 cm x 1 cm x muscle deep over front of Rt Thigh Middle Part. Fracture femur Rt Traumatic swelling around.*

15. The Investigating Officer visited the places of occurrence. Out of the pointing of the informant, he prepared site plans of the places where deceased Kunwar Singh (Ex. Ka.16), Santosh & Dinesh (Ex.Ka.17) and Zalim Singh (Ex.Ka.18) were done to death.

16. The appellant – Babloo @ Balua was arrested on 28.5.2004 and on the basis of his disclosure statement, a country made pistol of 315 bore, one fired cartridge in its barrel and seven live cartridges were recovered out of his pointing in the presence of independence witnesses Vinod Kumar and Pappu. Recovery memo (Ex.Ka.28) was prepared. Case Crime No.254 of 2004 under Section 25 Arms Act was registered against him.

17. On the same day, the appellant-Veda @ Vedpal was arrested and on the basis of his disclosure statement, one country made pistol of 12 bore, six live cartridges and one fired cartridge in its barrel were recovered out of his pointing in the presence of independent witnesses Vinod Kumar and Pappu. Recovery memo (Ex.Ka. 28.) was prepared. Case Crime No.253 of 2004 under Section 25 Arms Act was registered against him.

18. On 3.6.2004, the accused–Keshav Giri @ Naga Baba, during Police Custody Remand (PCR), got recovered out of his pointing out a country made pistol of 12 bore, one fired cartridge in its barrel and two live cartridges of 12 bore in the presence of independent witnesses Mohar Singh and Ravindra Singh. Recovery memo (Ex.Ka. 29) was prepared and Case

Crime No.260 of 2004 under Section 25 Arms Act was registered against him.

19. On 5.6.2004, the appellant – Rakesh was arrested. One SBBL gun of 12 bore, one fired cartridge in its barrel and two live cartridges were recovered out of his pointing in the presence of independent witnesses, Mohar Singh and Kamal Singh. Recovery memo (Ex. Ka. 30) was prepared and Case Crime No.261 of 2004 under Section 25 Arms Act was registered against him.

20. Appellants – Jagan, Pyare and Ganga, during Police Custody Remand (PCR), got recovered out of their pointing three country-made pistols of 12 bore, two fired cartridges in the barrel and six live cartridges in the presence of witnesses, Kamal Singh and Mohar Singh. Recovery memo (Ex.Ka.34) was prepared. Case Crime Nos.265, 266 and 267 of 2004 under Section 25 Arms Act were registered against them respectively.

21. During the investigation, recovered arms and cartridges, clothes of the deceased and other articles were sent for forensic examination. FSL Report (Ex.Ka. 92) is brought on record.

22. During the investigation, statements of the informant and the eyewitnesses were recorded. Torches were taken by the Investigating Officer from informant-Bunty, Singhveer Singh, Sukhveer Singh, Sheeshpal Singh, Punji Singh, Pappu, Om Prakash and Vinod Kumar, the witnesses alleged to have seen the incident. Recovery memos (Ex. Ka. 42 to 49) were prepared. The torches were returned to the aforesaid persons, with a direction that they shall produce them before the Court/Police when required.

23. After investigation, charge-sheet (Ex. Ka. 50) came to be filed against all the appellants under Section 147, 148, 302/149 and 120-B of IPC. Simultaneously, charge-sheets under Section 25 Arms Act were also filed by the Investigating Officer against appellant – Rakesh (Ex.Ka.72), Keshav Giri @ Naga Baba (Ex.Ka. 80), appellant – Jagan (Ex. Ka.85), appellant Pyare (Ex. Ka.86), appellant Ganga (Ex. Ka. 87), appellant – Veda @ Ved Pal (Ex.Ka.75) and appellant Babloo @ Balua (Ex.Ka.76).

24. The case was committed to the Court of Sessions by learned Chief Judicial Magistrate, Bulandshahr. It was registered as Sessions Trial No.625 of 2004 (State vs. Veda @ Vedpal and 8 others). Similarly, cases under Section 25 Arms Act were also committed to the Court of Sessions and were registered as Sessions Trial Nos.766 of 2004 (State vs. Rakesh), 1138 of 2004 (State vs. Veda @ Vedpal), 1139 of 2004 (Babloo @ Balua), 1140 of 2004 (State vs. Jagan), 1141 of 2004 (State vs. Pyare) and 1142 of 2004 (State vs. Ganga).

**The Charges**

25. Charges were framed against appellants, namely, Veda @ Vedpal, Ganga, Pyare, Nahariya, Jagan, Rakesh and Balua @ Babloo under Sections 148, 302 read with Section 149 IPC, whereas charges were framed against appellants, namely, Keshav Giri @ Naga Baba, Vimlesh and Neetu under Section 302 read with 120-B IPC. Separate charges under Section 25 of the Arms Act were framed against appellants – Rakesh, Keshav Giri @ Naga Baba, Ganga, Pyare, Jagan, Veda @ VedPal and Babloo @ Balua. All the appellants denied with the charges and claimed to be tried.

**Documentary Evidence**

26. The prosecution witnesses proved the following documents, executed during investigation, as exhibits:-

(1) Ex. Ka.1 – Written Report

(2) Ex. Ka.2 – Chik FIR

(3) Ex. Ka.3 - Copy of Report

(4) Ex. Ka.4 - FIR

(5) Ex. Ka.5- Copy of Report

(6) Ex. Ka.6- FIR

(7) Ex. Ka.7- Copy of Report

(8) Ex. Ka.8- FIR

(9) Ex. Ka.9- Copy of Report

(10) Ex. Ka.10- FIR.

(11) Ex. Ka.11- Copy of Report

(12) Ex. Ka.12- Postmortem report of Kunwar Singh

(13) Ex. Ka. 13- Postmortem report of Santosh Kumar

(14) Ex. Ka. 14- Postmortem report of Jalim Singh

(15) Ex. Ka. 15- Postmortem report of Dinesh Kumar

(16) Ex. Ka.16- Site plan – Kunwar Singh

(17) Ex. Ka.17- Site plan – Dinesh & Santosh (18) Ex. Ka. 18- Site plan of Jalim Singh

(19) Ex. Ka. 19- Site plan of Jalim Singh

(20) Ex. Ka. 20- Recovery Memo of blood stained and plain earth.

(21) Ex. Ka. 21- Recovery Memo of blood stained and plain earth.

(22) Ex. Ka. 22- Recovery Memo of blood stained and plain earth.

(23) Ex. Ka. 23- Recovery Memo of blood stained and plain earth.

(24) Ex. Ka. 24- Recovery of empty cartridge.

(25) Ex. Ka. 25- Recovery of empty cartridge

(26) Ex. Ka. 26- Recovery of blood stained Ban of Cot

(27) Ex. Ka. 27- Recovery of blood stained Khus

(28) Ex. Ka. 28- Recovery of Tamancha, empty and live cartridges

(29) Ex. Ka. 29 - Recovery of Tamancha, empty and live cartridges

(30) Ex. Ka. 30- Recovery of SBBL gun, live and empty cartridges

(31) Ex. Ka. 31- Statement of Maharaj

(32) Ex. Ka. 32- Statement of Raghvendra

(33) Ex. Ka. 33- Tehrir – CD

(34) Ex. Ka. 34- Recovery memo of 3 Tamancha, empty and live cartridges

(35) Ex. Ka. 35- Site plan of recovery by Keshav Giri @ Naga Baga

(36) Ex. Ka. 36- Site plan of recovery by Jagan

(37) Ex. Ka. 37- Site plan of recovery by Pyare

(38) Ex. Ka. 38- Site plan of recovery by Ganga

(39) Ex. Ka. 39- Site plan of recovery of 12 bore pistol

(40) Ex. Ka. 40- Site plan of recovery by Babloo @ Balua

(41) Ex. Ka. 41- Site plan of recovery by Veda @ Vedpal

(42) Ex. Ka. 42- Recovery Memo and supurdiginama of Torch

(43) Ex. Ka. 43- Recovery Memo and supurdiginama of Torch

(44) Ex. Ka. 44- Recovery Memo and supurdiginama of Torch

(45) Ex. Ka. 45- Recovery Memo and supurdiginama of Torch

(46) Ex. Ka. 46- Recovery Memo and supurdiginama of Torch

(47) Ex. Ka. 47- Recovery Memo and supurdiginama of Torch

(48) Ex. Ka. 48- Recovery Memo and supurdiginama of Torch

(49) Ex. Ka. 49- Recovery Memo and supurdiginama of Torch

(50) Ex. Ka. 50- Charge-sheet under Sections 147, 148, 149, 302, 120-B of IPC

(51) Ex. Ka. 51- Panchayatnama of Kunwar Singh

(52) Ex. Ka. 52- Letter RI

(53) Ex. Ka. 53- Letter to CMO

(54) Ex. Ka. 54- Photo of dead body

(55) Ex. Ka. 55- Chalan – Dead body of Kunwar Singh

(56) Ex. Ka. 56- Panchayatnama of Santosh Kumar

(57) Ex. Ka. 57- Letter RI

(58) Ex. Ka. 58- Letter to CMO

(59) Ex. Ka. 59- Photo of dead body

(60) Ex. Ka. 60- Chalan – Dead body of Santosh

(61) Ex. Ka. 61- Panchayatnama of Dinesh Kumar

(62) Ex. Ka. 62- Letter to CMO

(63) Ex. Ka. 63- Letter RI

(64) Ex. Ka. 64- Photo of dead body

(65) Ex. Ka. 65- Chalan of dead body of Dinesh

(66) Ex. Ka. 66- Panchayatnama of Jalim Singh

(67) Ex. Ka. 67- Letter RI

(68) Ex. Ka. 68- Letter to CMO

(69) Ex. Ka. 69- Photo of dead body

(70) Ex. Ka. 70- Chalan of dead body of Jalim Singh

(71) Ex. Ka. 71- Site plan for recovery u/s 25 Arms Act by Rakesh

(72) Ex. Ka. 72 – Charge-sheet – Rakesh

(73) Ex. Ka. 73- Order DM

(74) Ex. Ka. 74- Site plan for recovery u/s 25 Arms Act by Veda

(75) Ex. Ka. 75- Chargesheet u/s 25 Arms Act by Veda

(76) Ex. Ka. 76- Chargesheet u/s 25 Arms Act by Babloo

(77) Ex. Ka. 77 – Order DM – Veda

(78) Ex. Ka. 78- Order DM – Babloo

(79) Ex. Ka. 79- Site plan for recovery u/s 25 Arms Act by Keshav Giri

(80) Ex. Ka. 80 – Charge-sheet against Keshav Giri u/s 25 of Arms Act

(81) Ex. Ka. 81 – Order DM – Keshav Giri

(82) Ex. Ka. 82- Site plan for recovery by Jagan

(83) Ex. Ka. 83- Site plan for recovery by Pyare

(84) Ex. Ka. 84- Site plan for recovery by Ganga

(85) Ex. Ka. 85- Charge-sheet against Jagan u/s 25 Arms Act

(86) Ex. Ka. 86- Charge-sheet against Pyare u/s 25 Arms Act

(87) Ex. Ka. 87- Charge-sheet against Ganga u/s 25 Arms Act

(88) Ex. Ka.88- Order DM – Jagan u/s 25 Arms Act

(89) Ex. Ka. 89- Order DM – Pyare u/s 25 Arms Act

(90) Ex. Ka. 90 – Order DM – Ganga u/s 25 Arms Act

(91) Ex. Ka. 91- FSL Report – dead body

(92) Ex. Ka. 92 – FSL Report of CMP and Gun.

**Oral Evidence**

27. To prove its case, the prosecution produced the following witnesses,

during the trial:

(i) (PW-1) Bunti (informant)

(ii) (PW-2) Sheeshpal Singh, the eye witness

(iii) (PW-3) Vinod Kumar, the eye witness,

(iv) (PW-4) Constable Clerk Murari Lal

(v) (PW-5) Constable 1241 Shishupal Singh

(vi) (PW-6) Bunti S/o Om Pal Singh, witness of conspiracy

(vii) (PW-7) Raghvendra Singh, witness of conspiracy

(viii) (PW-8) Maharaj Singh, witness of conspiracy

(ix) (PW-9) HCP 178 – Rameshwar Singh

(x) (PW-10) Dr. A. K. Bansal

(xi) (PW-11) Inspector Yashveer Singh (I.O.)

(xii) (PW-12) Sub Inspector Nahar Singh

(xiii) (PW-13) SI Rajan Lal Yadav

(xiv) (PW-14) Sub Inspector Ram Avtar Sharma

(xv) (PW-15) Sub Inspector Anil Kumar.

28. After conclusion of the evidence of the prosecution, statements of the appellants under Section 313 Cr.P.C. were recorded.

29. All the appellants categorically denied that they committed the murder of deceased Zalim Singh, Dinesh, Santosh and Kunwar Singh on the intervening night of 24/25.5.2004 with firearm weapons. Further, they denied any recovery of firearm weapons and cartridges made on the basis of their pointing. They stated that the witnesses, Bunti, Sheeshpal and Vinod Kumar, were having enmity with them, so they deposed against them.

30. The appellant Babloo @ Balua stated that there was party-bandi in his village. He is falsely implicated at the behest of opposite parties.

31. The appellant Veda @ Vedpal stated that he had no relation with Neetu. He was doing the trading of Milk and had given advance money to Bunti, Sheeshpal and Vinod Kumar, but they did not supply the Milk. They did not return his money and stopped supply of milk. His father was village Head. They started holding grudge

against his family. There was rivalry between the informant and the witnesses from the time of the tenure of his father as village head. Bunty was having enmity with his Fufa and his family members on account of dowry death of his Bua. Bunty was the informant, deceased Dinesh, Santosh and Kunwar Singh were witnesses, and Zalim Singh was doing pairvi in that case. It is possible that due to this rivalry, deceased were done to death by unknown persons.

32. The appellant Pyare stated that informant Bunty, witnesses Vinod Kumar and Sheeshpal had rivalry with appellant Veda due to money lending in milk trade. His brother Harfool had contested the election of village head. Due to this rivalry, he is falsely implicated in this matter.

33. The appellant Ganga repeated the version of appellant Pyare.

34. Appellant Rakesh stated that he is implicated for being a relative of Vimlesh.

35. Copy of FIR relating to Crime No.108/03, under Sections 498-A, 304, 201 of IPC and ¾ of Dowry Prohibition Act, P.S. Debai, District Bulandshahr and charge-sheet are filed on behalf of the appellants as documentary evidence in defence. Bunty, the informant of the present case, is also nominated as a witness (as informant) in the charge-sheet. Besides this, deceased Santosh Kumar and Dinesh Kumar were nominated as witnesses of fact.

**Appellants' Contention**

36. Sri P. C. Srivastava, Sri Pankaj Kumar Tyagi and Ms. Kanchan Chaudhary, learned counsels for the appellants submitted that it is the case of the prosecution that the occurrence had taken place, in a series, in the intervening night of 24/25.5.2004 between 1:00 am to 1:30 am. In the first occurrence, Zalim Singh was done to death, in the second occurrence Santosh and Dinesh were done to death and in the third occurrence, Kunwar Singh was done to death. At the time of first occurrence, Sheeshpal and Sukhveer Singh were irrigating their field. During the second occurrence, informant Bunty, Pappu and Punji were irrigating their field, while during the third occurrence, Vinod along with Singhveer Singh and Om Prakash were present at their Tube-well. The alleged eyewitnesses such as Sukhveer Singh, Pappu, Punjji, Singhveer and Om Prakash, were not produced by the prosecution during the trial. The motive attributed to the appellants to commit murder of four persons is alleged that they were opposing the relationship of Neetu and Veda @ Vedpal. On the eve of the occurrence, Keshav Giri @ Naga Baba, Vimlesh and Neetu visited the informant and lodged their protest over the opposition made by the informant and his family members.

37. It is submitted that admittedly, the intervening night of 24/25.5.2004 was dark. The identification of the appellants at the place of occurrence is highly doubtful since there was no source of light. It is stated by the witnesses that they along with other persons, who were with them, were having torches. Besides this, lanterns were also lighting near the place of occurrence. No such lantern was recovered by the Investigating Officer. Therefore, the existence of a lantern at the place of the occurrence is completely false. Secondly, it is stated that PW-1 Bunty, PW-2 Sheeshpal

and PW-3 Vinod Kumar, who claim themselves to be the eyewitnesses to the incident, were having torches. They identified the appellants, armed with firearms weapons and committing murder of Zalim Singh, Santosh, Dinesh and Kunwar Singh in torch light.

38. The Investigating Officer, during investigation, took the torches from these witnesses. He prepared recovery memos. The torches were returned to them. These witnesses were directed to produce these torches at the time of their deposition during trial. These witnesses failed to produce torches before the trial Court when their testimony was recorded. No explanation was offered by them for the non-production of such torches. Even during the deposition of Investigating Officer, these torches were not produced by the prosecution before the trial Court. Therefore, this theory cannot be relied upon that the witnesses identified the appellants in the torchlight.

39. It is also submitted that as per the prosecution version, the occurrence took place between 1:00 am to 1:30 am. FIR was lodged at 6:20 am, while the inquests of the deceased were prepared from 1:00 pm to 5:00 pm. There is no recital of the name of the accused persons on the inquest report. The Investigating Officer had stated that he reached at 6:50 am at the place of occurrence, but no entry in General Diary about his Ravangi is brought on record. Therefore, the FIR is ante time. It has also come into evidence of the witnesses that the First Information Report was lodged after due deliberations.

40. It is also vehemently argued on behalf of the appellants that the conduct of all the three alleged eyewitnesses such as PW-1, PW-2 and PW-3 is highly unnatural. When the father of informant, Dinesh along with Santosh were already done to death, the informant did not disclose this fact to Sheeshpal and other persons, when he went to the place where Zalim Singh was done to death. As per his testimony, he did not even approach to the place where the bodies of Dinesh and Santosh were lying. He immediately started towards the tube-well of Zalim Singh in the morning without attending his father and uncle.

41. It is also submitted that so far as the recoveries of firearm weapons and cartridges out of the pointing of the appellants are concerned, all the recoveries are shown from the field of Karanwas, in and around the Ashram of Keshav Giri @ Naga Baba. The learned trial Court completely ignored the conclusion drawn by the Forensic Laboratory through its FSL report.

42. It is further submitted that no motive has been attributed to the appellants to commit the murder of the deceased persons. Neetu is not directly related to the informant and his family, therefore, there was no occasion for the informant and his family members to oppose the relationship between Neetu and Veda @ Vedpal. There are material contradictions in the statements of the witnesses as well as version of the FIR. No specific role has been assigned to any of the appellants in the FIR. During testimony of the alleged eyewitnesses, it was not stated as to which of the appellant committed the murder of which of the deceased. It is also submitted that the appellants are in jail since 18 years and with remission, it comes to 24 years.

43. It is further submitted that none of the independent witnesses before whom

country made pistols and other ammunitions were alleged to be recovered were examined during trial. Therefore, the recovery is planted.

44. It is further contended that accused Babloo @ Balua was not named in the FIR. Informant Bunty has admitted, during his deposition, that he was knowing Babloo @ Balua since before the occurrence and he identified him at the time of occurrence, but he did not mention his name in the FIR.

45. It has been further argued on behalf of the appellants that the postmortem report of deceased Dinesh shows the presence of pellets in his body, which does not appear to have been fired by a firearm of 315 bore, though it appears to have been fired by a firearm of 12 bore. Recovery of a country made pistol of 315 bore along with one fired cartridge and seven live cartridges has been shown out of the pointing of appellant-Veda @ Vedpal. Postmortem report of Dinesh does not show any injury of 315 bore. PW-1 Bunty has deposed that appellant Veda @ Vedpal fired upon his father Dinesh and committed his murder. This factum demonstrates that PW-1 is not an eyewitness to the incident. FSL report does not corroborate that Veda fired with the country made pistol of 315 bore since it was not found to be matched.

46. In support of their submissions, learned counsels for the appellants placed reliance upon the following judgements of the Hon'ble Apex Court:

(i) **Reena Hazarika vs. State of Assam**, 2018 0 Supreme (SC) 1106;

(ii) **Darshan Singh vs. State of Punjab, Laws** (SC) 2024-1-18; and

(iii) **State of Karnataka vs. Suvarnamma & Anr**., (2015) 1 SCC 323.

**State's Reply**

47. Per contra, learned AGA Sri Vikas Goswami, vehemently argued that in the present case, four persons were done to death. All the three witnesses, namely, PW-1-Bunty, PW-2-Shishpal and PW-3-Vinod Kumar are the eyewitnesses to the incident. These witnesses identified the appellants at the time of incident, armed with firearm weapons. There is no contradiction, improvement or embellishment in their testimony. According to the prosecution case, entire incident happened in three phases. The appellants, in furtherance to their common intention, firstly, committed the murder of Zalim Singh. Thereafter, they committed the murder of Dinesh and Santosh and lastly, they committed the murder of Kunwar Singh. They threatened the informant and other witnesses at the place of occurrence. It is also submitted that out of the pointing of the appellants, country made pistols, live and empty cartridges were recovered. All the four deceased died on the spot. In the injuries of deceased Zalim Singh, Dinesh, Santosh and Kunwar Singh, blackening and tattooing were noted at the time of postmortem, which indicate that the appellants fired from the close proximity to ensure that in all probabilities, the deceased would die.

48. It is also submitted that it is the specific case of the prosecution that the eyewitnesses were having torches with them and they identified the appellants at the time of occurrence in the torch light. The torches were taken by the Investigating Officer and recovery memos were also executed, which are duly proved. It has also

come in the testimony of the eyewitnesses that lanterns were also lighting at the time of incident.

49. Learned AGA further argued that the informant, appellants and the witnesses were known to each other because they are the residents of the same village. On the eve of the incident, accused Keshav Giri @ Naga Baba, Vimlesh and Neetu visited the informant and extended threat that they would face dire consequences, if they continue to oppose the relationship of Neetu and Veda @ Vedpal.

50. He further submitted that the statements of the witnesses have to be read as a whole and not in piecemeal. Minor contradictions are bound to occur during the testimony of the witnesses since they are rustic villagers. He vehemently argued that where direct evidence is available, the motive loses its importance. However, in the present case, the motive is also proved beyond doubt against all the appellants by cogent evidence.

51. Reliance is placed by learned AGA on the judgment rendered by the Hon'ble Apex Court in **Shahaja alias Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra**, 2022 SCC Online SC 883. The relevant paragraphs are extracted below:

> *27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:*
>
> *I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.*
>
> *II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.*
>
> *III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.*
>
> *IV. Minor discrepancies on trivial matters not touching the*

*core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.*

*V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.*

*VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

*VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

*VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

*IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

*X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

*XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

*XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.*

*XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if*

*the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.*

*[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096:(1983) 3 SCC 217:AIR 1983 SC 753, Leela Ram v. State of Haryana,(1999) 9 SCC 525:AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]*

*28. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.*

***

*30. In the aforesaid context, we may refer to a decision of this Court in the case of State of U.P. v. Anil Singh: AIR 1988 SC 1998, wherein in para 15, it is observed thus: "15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other Both are public duties which the Judge has to perform."*

**Testimony of the witnesses**

52. PW-1 Banty, is the informant and the son of deceased Dinesh. During his statement, he stated that Neetu was having illicit relation with Veda @ Vedpal. On 24.5.2004, accused Vimlesh and Keshav Giri @ Naga Baba visited his village. They lodged their protest about opposition of the relationship between Veda @ Vedpal and

Neetu by informant and his family members.

In the intervening night of 24/25.5.2004, he was irrigating his field along with his father Dinesh and uncle Santosh. Pappu and Punjji were also there. At around 1:00-1:30 am, the appellants committed the murder of Zalim Singh on his tube-well. Thereafter, they came to their fields. Accused Nahariya and Pyare committed the murder of Santosh, while Veda @ Vedpal and Rakesh committed the murder of his father Dinesh. He along with Pappu and Punjji witnessed the incident. After committing the murder of Zalim Singh, Dinesh and Santosh, the appellants had gone towards the tube-well of Kunwar Singh.

53. PW-2 Shishpal, is the real brother of deceased Zalim Singh. He supported the prosecution version and stated that Bhola and Balua committed the murder of his brother Zalim Singh with firearm weapon. Other appellants were also with them. He identified the appellants. He saw the incident in the light of torch and the lantern. He also supported the motive as alleged by the prosecution.

54. PW-3 Vinod Kumar, is the son of deceased Kunwar Singh. He stated that on the intervening night of 24/25.5.2004, he along with Om Prakash and Singhveer was at his tube-well. At around 2:00 am, appellants, armed with firearm weapons, came to his field. They hurled abuses to his father. Appellant Ganga exhorted the other appellants. Accused Rakesh, Jagan and Balua fired upon his father. His father died as a result of firearm injuries. Lantern was hanging outside the Kothari. He also supported the motive as alleged by the prosecution. This witness has also supported the recovery of firearm weapons made out of the pointing of appellants Veda @ Vedpal and Babloo @ Balua, in his presence.

55. PW-4 C/C 329 Murari Lal, has proved the execution of chik FIR of Crime No.260 of 2004 (State Vs. Keshav Giri @ Naga Baba) under Section 25 Arms Act registered by him on the basis of recovery memo. It was duly entered in the General Diary on Rapat No.25 at 16:00 hours. Further, on 10.6.2004, on the basis of recovery memo, he prepared chik no.118 relating to Crime No.265 of 2004:State vs. Jagan, Crime No.266 of 2004:State vs. Pyare, under Section 25 Arms Act. This witness has proved the related documents as Ex.Ka. 2, 3, 4 and 5.

56. PW-5 C/1241 Shishupal Singh, has stated that he prepared chik on the basis of recovery memo against appellants - Veda @ Vedpal and Babloo @ Balua under Section 25 Arms Act. Crime Nos. 253 and 254 of 2004 were registered by him. Chik is proved as Ex.Ka. 6 and GD Entry is proved as Ex.Ka. 7.

57. PW-6 Bunty S/o Ompal Singh, PW-7 Raghvendra Singh and PW-8 Maharaj Singh, are the witness of perpetrating of conspiracy by accused Vimlesh, Keshav Giri @ Naga Baba, Rakesh, Jagan and Rajkumar. These witnesses did not support the version of the prosecution and were declared hostile.

58. PW-9 HCP 178- Rameshwar Singh, stated that he prepared chik FIR relating to Crime No.252 of 2004 under Sections 147, 148, 149, 302, 120-B IPC against the appellants, which is proved as (Ex. Ka.8.). GD entry is proved as Ex.Ka.9. Further, he stated that on the same day, he

prepared Chik FIR relating to Case Crime No. 261/2004: State Vs. Rakesh which is proved as Ex.Ka. 10 and GD entry is proved as Ex.Ka. 11.

59. PW-10 Dr. A. K. Bansal, conducted the postmortem of the deceased, Kunwar Singh and noted that blackening and tattooing were present. Pellets were recovered from the Lungs. Injuries were caused by the firearm weapons. They were sufficient to cause death in ordinary course of nature.

60. During the postmortem on the dead body of deceased Santosh, blackening and tattooing were found. Injuries were caused by the firearm weapons. They were sufficient to cause death in ordinary course of nature. Pellets were taken out from the body.

61. During the postmortem on the dead body of deceased Zalim Singh, blackening and tattooing were found. Injuries were caused by the firearm weapons. They were sufficient to cause death in ordinary course of nature.

62. During the postmortem on the dead body of deceased Dinesh Singh, fracture on left thigh was noted. Blackening and tattooing were also found. Injuries were caused by the firearm weapons that were sufficient to cause death in ordinary course of nature.

63. PW-11 Investigating Officer Yashveer Singh, is the Investigating Officer of this case. He recorded the statements of the informant and witnesses, prepared the site plan of the places of occurrence, (Ex.Ka.16 – Kunwar Singh), (Ex.Ka.17-Dinesh and Santosh) and (Ex. Ka.18 & 19-Zalim Singh).

64. During investigation, accused Keshav Giri @ Naga Baba, Jagan, Pyare and Ganga were taken on Police Custody Remand. On the basis of their disclosure statements, firearm weapons along with live and empty cartridges were recovered out of their pointing. Accused Veda @ Vedpal, Babloo @ Balua and Rakesh were arrested by him. Their statements were recorded. Firearm weapons along with cartridges were recovered out of their pointing. Recovery memos were prepared by him which are duly proved during trial. The recovered articles were sent for forensic examination with relevant documents.

65. He took the torches from witnesses Banty, Singhveer, Sukhveer Singh, Sheeshpal, Panji, Pappu, Omprakash and Vinod Kumar, which they were having with them at the time of incident. The witnesses told him that they witnessed the incident in the torch light. Recovery memo was prepared. The torches were returned to the witnesses with the direction that they will produce the torches before police/court as per direction.

66. After conclusion of the investigation, charge sheet (Ex.Ka-50) against accused Veda @ Vedpal, Nahariya, Ganga, Jagan, Pyare, Neetu, Vimlesh, Keshav Giri, Rakesh and Babloo was submitted. Charge sheet against Rajkumar @ Bolia @ Bolambar was given in his abscondence.

67. PW-12 SI Nahar Singh, is the witness of inquest proceedings of deceased Kunwar Singh. He proved the inquest report and the other documents executed. He is also a witness of inquest proceeding relating to the dead bodies of Dinesh and

Santosh. He proved the inquest report along with other documents.

68. PW-13 SI Rajan Lal Yadav, is the Investigating Officer of Crime No.261 of 2004 (State vs. Rakesh) under Section 25 Arms Act. He prepared site plan of the place of recovery, recorded the statements of the witnesses, obtained the prosecution sanction from the District Magistrate and submitted charge-sheet against appellant Rakesh. Related documents are proved by him.

69. PW-14 SI Ram Avtar Sharma, is the Investigating Officer of Crime Nos.253 and 254 of 2004 (State vs. Veda @ Vedpal & Another) under Section 25 Arms Act. He prepared site plan of the place of recovery, recorded the statements of the witnesses, obtained the prosecution sanction from the District Magistrate and submitted charge-sheet against appellant Rakesh. Related documents are proved by him.

70. PW-15 SI Anil Kumar, is the Investigating Officer of Crime No.207 of 2004 (State vs. Keshav Giri @ Naga Baba) under Section 25 Arms Act. He prepared site plan of the place of recovery, recorded the statements of the witnesses, obtained the prosecution sanction from the District Magistrate and submitted charge-sheet against appellant Rakesh. Related documents are proved by him.

**Analysis**

71. It is the case of the prosecution that during the intervening night of 24/25.5.2004, between 1:00-1:30 am, the appellants, armed with firearm weapons, committed the murder of Zalim Singh at his tube-well. After this, they reached at the tube-well of Santosh and Dinesh and shot them dead. Thereafter, they reached at the field of Kunwar Singh and shot him dead.

72. According to the prosecution version and testimony of the eyewitnesses, the night, when occurrences took place, was dark. Source of light at the time of occurrence is stated by the prosecution that witnesses, namely, PW-1, PW-2 and PW-3 and other persons such as Pappu, Punji, Sukhveer, Om Prakash, Singhveer and Sheeshpal, were having torches with them. Lanterns were also lighting there. They witnessed the incident and identified the appellants in the light of torch and lantern.

73. The informant averred in his written report that the incident was seen by him along with witnesses Pappu and Punji in the torch light. They were having torches with them. Similarly, when the appellants committed the murder of Zalim Singh, the incident was seen by witnesses Sheeshpal and Sukhbeer Singh in the torch light. Further, when the appellants committed the murder of Kunwar Singh, it was witnessed by his son Vinod and witnesses Singhveer Singh and Om Prakash in the light of torch and bulb. So far as the statement of PW-3, that he saw the incident and identified the assailants in the light of bulb is concerned, his statement does not inspire confidence for two reasons, one, that it is the admitted case of prosecution that it was dark night. During the entire night, no electric supply was available. Secondly, no bulb was recovered by the Investigating Officer and no recovery memo was prepared. No bulb shown in the site plan, either.

74. PW-1 Bunty, informant, is the son of deceased Dinesh as well as the eyewitness to the incident in which, his father Dinesh and uncle Santosh were shot

dead. During his deposition, he stated that a lantern was lighting at his engine (tube-well). He along with Pappu and Punji were irrigating the fields. They were having torches with them. When they noted that some persons armed with firearm weapons were approaching there, they lit their torches and identified them as appellants who shot Dinesh and Santosh dead.

75. During his cross-examination, he admitted that he had no electricity connection since he did not have electricity operated tube-well. He stated about the source of light at the place of occurrences that they were having torches with them and a lantern was lighting there. The relevant part of his cross-examination is quoted as under:

> "25. xxx घटना के समय (T.W.) इंजन पर लालटैन जलने वाली बात मैनें दरोगाजी को बता दी थी। अगर उन्होनें मेरे ब्यान में लालटैन जलने वाली बात नही लिखी है तो मै इसकी कोई वजह नही बता सकता। लालटैन आम के छोटे से पौधे पर टंगी थी। आम के पेड पर लालटैन टंगे होने की बात अगर दरोगाजी ने मेरे ब्यान में नही लिखी है तो मै इसकी कोई वजह नही बता सकता……...
>
> "26. ……जब मुल्जिमान ने मेरे पिता व चाचा को गोलियां मारी तब हमने नाली में बैठे हुये टोर्च जला कर देखा था। टोर्च मेरे, पप्पू व पन्जी के पास थी। हमने तब टोर्च **दो चार छः सेकेण्ड** जलाई थी। टोर्चों को चार छः सैकेण्ड जलाने के बाद देखकर पहचान कर हम वरहा में लेट गये।……...
>
> …मुल्जिमान घटना के दो तीन मिनट बाद गंगाई तरफ जाते देखा था। एक खेत दूरी करीब 10-15 कदम तक देखा था। लेटे हुये नाली के पार से उच्चक कर देख रहे थे।…
>
> X X X
>
> "29. मैनें लालटैन दरोगाजी को बतायी थी अपने हाथ से उन्हें लालटैन नही दी थी। दरोगाजी लालटैन लाये या नहीं मुझे पता नहीं। दरोगाजी मेरे सामने लालटैन को कब्जे में लेने की कोई लिखत पढत नही की थी। xxx दरोगाजी ने हम तीनों की मेरी पप्पू व पंजी की टार्चे अगले दिन गांव में हमसे मंगवा ली थी। **आज मेरे सामने उन टार्चों में से कोई टार्चे मौजूद नहीं है। मुल्जिमान ने हमारे टार्चे लगाने पर हम पर गोलियां नही चलाई थी क्योकि हम उन्हें देख नही रहे थे।** हमने जो टार्चे जलाई थी उसकी रोशनी मुल्जिमान ने देखी या नही वो ही बता सकते है।…
>
> X X X
>
> 35. ...हम T.W./ इंजन पर शाम के करीब सवा आठ बजे पहुंचे थे। जब हम **T.W./इंजन पर पहुँचे तब रात अन्धेरी थी। जिस वक्त घटना हुई तब भी अन्धेरी रात थी। ...**"

76. PW-1 Banty, deposed about the source of light at the time of incident at the place of occurrence. On one hand, he admitted that the intervening night of 24/25.5.2004 was a dark night and on the other hand, he stated about source of light in which, he along Pappu and Punji identified the appellants committing the murder of deceased Santosh and Dinesh.

77. PW-2 Sheeshpal, is the real brother of deceased Zalim Singh. He stated himself to be an eyewitness to the incident in which, his real brother Zalim Singh was done to death by the appellants. He stated that he along with Sukhbeer Singh were the eyewitnesses to the incident. A lantern was lighting on the engine (tube-well). He had seen the incident in the light of lantern and torch light. During his cross-examination, PW-2 stated about identification of the appellants in the light of torch and lantern lighting at the place of occurrence. The relevant part of his deposition is quoted as under:

> "13. ...***जालिम सिंह के T.W. पर लालटैन जल रही थी। ये बात मैनें किसी दरोगाजी को नही बतायी मैनें बदमाशों को टोर्च लगा कर देखा व पहचाना था, ये बात मैनें किसी दरोगा को***

***नही बतायी मुल्जिमान को जाते हुये मैनें नही पहचाना था। क्योंकि अन्धेरी रात में दूर से कैसे पहचानों।*** मैनें T.W. पर देखा व पहचाना था। …

X X X

20. ...जो T.W. बिजली के हैं वे अपने खेतों में पानी लगा रहे थे या नही मुझे जानकारी नही। क्योंकि उस वक्त बिजली नही थी। बिजली कब तक नहीं आयी इस बारे में मुझे पता नही। घटना वाली रात बिजली कितने बजे गयी मुझे जानकारी नही। मुझे इस बात की जानकारी नही कि घटना वाली रात 10-11 बजे के बीच में बिजली भाग गयी हो और 38 घन्टे तक ना आयी हो। …

X X X

23. ***...मैने दरोगाजी को यह बात बतायी थी कि इंजन पर लालटैन जल रही थी। xxx मैं दरोगाजी को यह भी बताया था कि मैनें लालटैन की रोशनी में मुल्जिमानों को देखा था। अगर दरोगाजी ने मेरे ब्यान में यह बात नही लिखी तो इसकी वजह दरोगाजी बता सकते है। ...”***

PW-2 also stated about existence of lantern at the time of incident at the place of occurrence.

78. PW-3 Vinod Kumar, is the son of deceased Kunwar Singh. He stated that at around 2:00 am, he heard the sound of firing from the tube-well of Bunty. After sometime, he saw that torch light was thrown towards his tube-well. A lantern was lighting outside the hut. He was having torch with him. He had seen the incident in the light of lantern and torch along with him, Singhveer and Om Prakash also witnessed the incident. He stated as under:

“21. ...घटना वाली रात को बिजली नही आयी थी। जब बिजली नही आयी थी इसलिये ट्यूबवेल नही चलाया हम बिजली आने के इन्तजार में थे इसलिये पानी नही लगा पाये।

22. दरोगाजी ने मेरे ब्यान लिया था। मैनें दरोगाजी यह बात बता दी थी कि बिजली नही आयी थी इसलिये पानी नही लगाया था इस समय मुझे ध्यान नही। जो ब्यान मैनें दरोगाजी को दिया होगा वही लिखा होगा।…..

X X X

27. ***… बदमाशों की टार्च की रोशनी 20 मीटर दूरी से दिखायी दी थी। मैं ईख के पास ही खड़ा था। बदमाशों ने ट्यूबवेल की ओर टार्च की रोशनी डाली थी। xxx जब बदमाश ट्यूबवेल के दरवाजे पर पहुँचे उस समय मैं ईख में जाकर खड़ा हो गया। बदमाशों के आने तक मैं खड़ा रहा था और मैनें टोर्च रोशनी आती हुयी दिखाई देने वाली बात दरोगाजी को अगर उन्होनें पूछी होगी तो बतायी होगी। मुझे ध्यान नही है कि बदमाशों की ओर से टार्च की रोशनी दिखाई देने वाली बात और बदमाशों के ट्यूबवेल के दरवाजे तक पहुँचने तक मेरे खडे रहने वाली बात दरोगाजी को अपनी ओर से बताई या नही मुझे ध्यान नही है। लालटैन दरवाजे के बाहर टंगी थी। लालटैन दरवाजे के बराबर में टंगी थी ये बात मैनें दरोगाजी को बतायी या नही ध्यान नही। लालटैन की रोशनी 1-1/2 - दो मीटर तक दिखायी देखी दरवाजा 5- 5-1/2 फुट का है उसी के बराबर में खूंटी लगी थी उसी पर लालटैन टंगी थी। xxx ट्यूबवैल के अन्दर तीन बदमाश घुसे थे। ट्यूबवैल के अन्दर कोई लालटैन नही जल रही थी। xxx टोर्च मैनें एक आद सैकिन्ड जलाई थी वो टोर्च जलाई थी जब तीन बदमाश कोठरी के भीतर बाकी बाहर थे। इसके बाद बदमाशों जाने तक टोर्च नही जलाई।…***

X X X

44. तीन बदमाश कोठरी में घुसे थे बाकी दरवाजे के सहारे खडे रहे। सब बदमाशों की पीठ मेरी ओर नही थी। तीन अन्दर घुसने वालों के अलावा बाकी बदमाश एक जगह खडे नही थे चहल कदमी कर रहे थे।

xxx xxx xxx

47. मैनें इससे पहले यह ब्यान दिया था कि टोर्च की रोशनी देखकर मैं ट्यूबवेल से हट गया था दरोगाजी को दिया होगा तो उन्होनें लिखा होगा और ब्यानों में नही लिखा है तो नही दिया होगा। इस समय मुझे याद नही है कि मैनें दरोगाजी को ये बयान दिया या नही। ***लालटैन टी. डब्लू. के दरवाजे के बराबर में लगी खुन्टी पर टंगी थी व मेरे पास टार्च थी यह ब्यान मैनें पहली बार अदालत में ही दिया है। ...***

**Source of Light: Lantern, Bulb and Torch**

79. On the basis of aforesaid testimony of the alleged eyewitnesses such as Bunty, Sheeshpal and Vinod, it is the case of the prosecution that at the time of incident at the place of occurrence, lantern was lighting. Besides this, the alleged eyewitnesses of the incident, such as Bunty, Pappu, Punjji, Sukhbeer Singh, Singhbeer Singh, and Om Prakash identified the appellants in torch light since they were having torches. They were lighting the torches when appellants were approaching from one place to another place. PW-1, PW-2 and PW-3, lit the torches for a while. It has also come during their testimony that there was no electricity supply at the place of occurrence. As mentioned earlier, it is the admitted case of prosecution that the intervening night of 24/25.5.2004 was a dark night.

**Lantern**

80. So far as the existence of lantern at the respective places of occurrence is concerned, the statements of eyewitness cannot be relied upon. No such lantern was recovered by the Investigating Officer from the place of occurrence during investigation. The eyewitnesses did not say that they handed over the lantern to the Investigating Officer. They stated that they informed the Investigating Officer about existence of lantern lighting there.

81. PW-11, Yashweer Singh, who is Investigating Officer of this case, was confronted with the statements of PW-1, PW-2 and PW-3, about the existence of lantern at the place of occurrence. He stated that:

*...मुझे गवाह बन्टी ने यह नही बताया कि मृतक दिनेश व सन्तोष के ट्यूबवेल पर घटना के समय लालटैन जल रही थी। मुझे उसने यह भी नही बताया कि लालटैन आम के पेड़ पर लटक रही थी। "*

82. The eyewitnesses, Bunty, Sheeshpal and Vinod Kumar stated that they informed the Investigating Officer about the existence of lantern at the place of occurrence at the time of incident. They also told the Investigating Officer that they identified the appellants in the light of the lantern which was lighting. When the Investigating Officer confronted with the information given by the witnesses to him with regard to the existence of lantern, he specifically denied this version that none of the eyewitnesses informed him about the existence of lantern at the place of occurrence during his statement. This amounts to material contradiction between the testimony of eyewitnesses and the Investigating Officer and raises a serious doubt about the existence of lantern lighting at the time of incident.

83. On the basis of appreciation of evidence adduced by PW-1, PW-2, PW-3 as well as PW-11, the identification of the appellants at the place of occurrence at the time of incident seems to be highly doubtful in the light of lantern. The factum that a lantern was lighting at all three places, where occurrences took place in a series of three murders, is not proved by the prosecution since there are material contradictions in the testimony of eyewitnesses and the Investigating Officer about existence and lighting of lantern at the respective place of occurrences. The Investigating Officer did not recover any lantern from the place of occurrence. No recovery memo is brought by prosecution on record which can demonstrate that such lanterns were recovered by the Investigating Officer.

In 161 statement, no version of lantern was introduced and, therefore, this part is an improvement.

**The Torches**

84. The torches which were taken by the Investigating Officer during investigation and recovery memos thereof were prepared, which were duly exhibited by PW-11, were returned to Banty, Shishpal and Vinod with a direction that they would produce these torches at the time of evidence before the trial Court. The eyewitnesses such as PW-1, PW-2 and PW-3 failed to produce the torches before the trial Court during their deposition. Therefore, the torches could not be exhibited as material exhibits. PW-11 stated during his deposition that:

> *"जिन गवाहान से मैने टार्च देखकर फर्द बनाकर इनकी सुपुर्दगी में दी गयी थी वह टार्च मेरे सामने नही है। टार्चों के बारें में जो फर्द बनाई थी उनका मार्का किस कम्पनी की थी तथा कितने सैल की थी उसका उल्लेख किया है।*

85. So far as the identification of the appellants in torch light is concerned, it also seems to be highly doubtful for two reasons; firstly, those torches were not produced at the time of evidence during trial although they were taken into possession by the Investigating Officer and the execution of recovery memos were proved. Had those torches been produced during the evidence before the trial Court, the appellants would have an opportunity to exercise their right to cross examine about those torches and secondly, it has also come in the statement of the witnesses that they lit a torch for a few second. As per their testimony, they threw the light of the torch towards the assailants for few seconds. Identifying a person in a dark night in a duration of 2 to 3 seconds in torch light cannot be believed. If it was so, there was a strong possibility that assailants could cause injury to the witnesses also.

86. The Hon'ble Apex Court in **Durbal vs. State of UP**, Criminal Appeal no.1398 of 2008, decided on 25.1.2022, observed about the non- production of seized and recovered articles during investigation, during the trial. The relevant paragraphs are extracted as hereunder:

> *"15. It is also required to note that all the eyewitnesses had stated in their evidence that lantern was burning in the verandah and Kaldhari (PW 1), Sheo Kumar (PW 2) and Sonai (PW 3) were having torch lights in their hands and only with the help of the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights though were alleged to have been seized, vide seizure mahazar Exts. Ka-2 and Ka-3 respectively, were not produced in the Court. The seizure memos Ext. Ka-2 and Ka-3 did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating Officer (PW 8) did not explain as to why the crime number was not noted on Ext. Ka-2 and Ka-3 and as to why the material objects if at all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of*

*identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. It is highly doubtful as to whether PWs 1, 2 and 3 had actually torch lights in their hands as stated by them, in the absence of their recovery details in the seizure memo and their not production before the Court. Moreover, Kaldhari (PW 1) refused to state as to whether the assailants were covering their faces with chadar. His evidence does not inspire any confidence."*

87. In an another judgment of the Hon'ble Apex Court in **Nallabothu Ramulu @ Seetharamaiah vs. State of Andhra Pradesh**, 2014 (12) SCC 261, it was observed as under:

*"16. The trial court rightly observed that assuming the prosecution witnesses had torches in their hands, they would not switch them on for fear of being spotted and subjected to attack. Besides, according to the prosecution, there were 50 accused. Some of them hurled bombs at the witnesses. Therefore, the attack must have resulted in smoke and dust rising in the air. In such a situation, it would not be possible for the prosecution witnesses to identify the assailants out of 50 persons, who, according to the prosecution, launched the attack. In any case, it would not be possible for the witnesses to note what role each accused played. The overt acts attributed by the witnesses to the accused must be, therefore, taken with a pinch of salt. All the accused were not known to the witnesses, because some witnesses stated that they would be able to identify them if they are shown to them.* ***But even assuming they knew the accused and there was some light at the scene of offence, it does not appear that it was sufficient to enable the witnesses to identify the accused and note the overt act of each of them. Possibility of wrong identification cannot be ruled out. The view taken by the trial court on this aspect is a reasonably possible view****. The High Court was wrong in disturbing it in an appeal against acquittal."*

*(emphasis supplied)*

88. We have also perused the impugned judgment of the trial Court. The trial Court did not consider this aspect that the torches which were taken into possession during investigation were not produced by the witnesses during their testimony before the trial Court. The trial Court concluded that since the witnesses were well known to the appellants, therefore, they identified them at the place of occurrence at the time of incident. The trial Court completely lost sight of the evidence given by the eyewitnesses such as, PW-1, PW-2 and PW-3 about existence of lantern, allegedly lighting at the time of incident at the place of occurrence, while the Investigating Officer has categorically denied that the eyewitnesses did not inform him about existence of lantern at the place of occurrence.

89. It is the case of the prosecution that informant-Banty, Sheeshpal, Vinod

along with other persons such as, Punji Singh, Pappu, Om Prakash, Sukhveer Singh and Singhveer were having torches with them at the time of incident. The existence of lantern and bulb was not averred either in the FIR or in the statements of Banti, Sheeshpal and Vinod Kumar recorded by the Investigating Officer. It appears that the source of light through lantern and bulb was narrated first time at the time of recording of testimony of these witnesses. In our view, it amounts to an improvement by the witnesses. On the perusal of the statements of PW-1, PW-2 and PW-3, it appears that existence of lantern and bulb is not substantiated by the evidence of these witnesses.

90. In view of above, we arrive at the conclusion that the prosecution has failed to establish that there was sufficient source of light for the identification of the appellants, committing murders of the deceased in the absence of any source of light at the time of occurrence. The existence of lanterns and the torches with the eyewitnesses as alleged by the prosecution, is not found to be proved on the basis of the evidence of eyewitnesses and Investigating Officer.

**Motive**

91. Learned counsel for appellants vehemently argued that the motive attributed to the appellants is not proved by the prosecution. The motive is not so strong for which appellants could commit four murders during a short span of two hours during a dark night.

92. In the First information Report motive is averred as appellant Veda was having illicit relation with Neetu, wife of Pramod. The said illicit relation was opposed by the informant and his family members. The appellant Veda and his family were prejudiced to him and were having enmity. They threatened to informant and his family that if they continue to oppose the relationship of Veda and Neetu, they would have to face its consequences. It is further alleged that on 24.5.2004, Vimlesh and Naga Baba (who were acquitted after trial) visited the house of appellant Veda in village Aukhand and threatened the informant and his family.

93. It emerges from the perusal of the first information report that following motive was mentioned, as the basis of committing the incident by the appellants. It reads thus:-

*''हमारे गाँव के प्रमोद की घरवाली नीतू गांव के वेदा पुत्र हरफूल से अवैध सम्बन्ध है जिसका हमने विरोध किया क्योंकि इनकी वेजा हरकतो से हमलोगों के परिवार पर गलत प्रभाव पड़ता था इस वेदा व उसके परिवार वालों ने हमसे रंजिश मानने लगे। और उन्होनें हमलोगों को व हमारे परिवार वालों को देख लेने की धमकी दी कल दिनांक 24.5.04 को विमलेश व नागा बाबा हमारे गांव में वेदा के यहा आए नाग बाबा करनवास में रहता है नागा बाबा व विमलेश ने हमलोगों को व हमारे परिवार वालों को धमकी देकर चले गये तथा कहा कि तुम नीतू को वेदा के पास जाने से क्यों रोकते हो जबकि नीतू वेदा के पास जाना चाहती है इस पर हम लोगों ने विमलेश व नागा बाबा से कहा कि तुम्हारा नीतू व वेदा से क्या मतलब है तब बाबा व विमलेश ने बताया कि नीतू व वेदा एक दूसरे से बहुत प्यार करते है व बहुत चाहते है नीतू व वेदा हमारे मित्र है तथा हम उनके मददगार है तथा नीतू व वेदा से हमारे अच्छे सम्बन्ध है और हम एक दूसरे के यहां आते जाते है नागा व विमलेश ने कहा कि हम लोग, नीतू व वेदा के बीच मत पढ़ो नहीं तुम्हें इसका परिणाम भोगना पड़ेगा यह धमकी देकर चले गये।''*

94. In order to prove the aforesaid motive, PW-1 Banty stated during his testimony that:

"7. दिनांक 24.5.2004 को दिन में दोपहर के बाद मुल्जिम श्रीमती विमलेश व नागा बाबा हमारे गांव में वेदा के यहां आये थे। उसके बाद हमारे यहां आये थे। वहाँ पर मेरे पिता व चाचा दिनेश व सन्तोष जालिम एंव कुंवर सिंह तथा अन्य व्यक्ति गांव वहां मौजूद थे उस समय वहाँ मुल्जिमा नीतू भी मौजूद थी। तब मेरे पिता व चाचा दिनेश व सन्तोष ने नीतू से कहा कि " तूने हमारी नाक काट दी " तभी वहाँ पर मौजूद मुल्जिमा विमलेश व नागा बाबा ने कहा कि " वेदा व नीतू एक दूसरे को प्यार करते है अगर तुम नीतू को वेदा के पास जाने से रोकोगे तो तुम्हें इसका गम्भीर परिणाम भुगतना होगा।

X X X

""17. वेदा व नीतू के अवैध सम्बन्ध घटना से करीब दो माह पहले से चल रहे थे। हमें दो महीने से ही ज्ञान था। नीतू के साथ-2 हमने उसके पति प्रमोद से भी कहा था। कि तेरी घर वाली नीतू के वेदा से गलत सम्बन्ध है। मुझे ये जानकारी नही है कि प्रमोद भी नीतू से विरोध कर रहा हो मैनें प्रमोद से ये नही पूछा कि उसने अपनी पत्नि को वेदा के पास जाने से रोका था या नही। "

x x x x x x x x x

36. जिस दिन नागा बाबा व विमलेश ने धमकी दी थी उस दिन मैं गावं में ही था। उस वक्त जब धमकी दी थी तब मैं स्वंय भी मौजूद था तथा परिवार वालों ने भी बताया था। तब मैं मेरे पापा, दिनेश चाचा सन्तोष, ठा० कुवर सिंह जालिम सिंह, और गांव के अन्य लोग भी मौजूद थे। धमकी दोपहर बाद की थी समय याद नही है। ये धमकी नागा बाबा व विमलेश दोनों ने ही दी थी। दोनों ने एक साथ ही धमकी दी थी। धमकी दोनो ने दी थी। धमकी देकर वे गांव से बाहर चले गये थे। धमकी वाले दिन मैं घर पर 12 बजे के करीब आया था। विमलेश हमारे घर पर दो दिन आयी थी पहली बार अकेली फिर नागा बाबा के साथ आयी थी। धमकी दोनों दिन दी थी। "

"37. इस धमकी की बाबत हमने पुलिस में कोई रिपोर्ट नही लिखाई।"

"38. शुरू में 23 तारीख को धमकी देने में नीतू व विमलेश थी। अवैध सम्बन्ध वेदा व नीतू के अवैध सम्बन्ध की बात मुझे मेरे घर वालों ने बतायी थी व गांव में भी हल्ला हो रहा था।"

PW-2 during his examination in chief stated that:

"6. घटना के एक दिन पहले नीतू और नागा बाबा आये थे। और धमकी दी थी कि तुम्हे देख लेंगे। नीतू ने कहा मेरा बहनोई राकेश डकैत है। फिर कहा कि विमलेश ने कहा कि बाहापुर का राकेश मेरा बहनोई राकेश डकैत है। तुम ठाकुरों को कटवा दूंगी। ये बात गांव में आकर कही थी ।

7. नीतू व वेदा के गलत सम्बन्ध थे।"

This witness during his cross examination stated that:-

***"18. मैनें नीतू व वेदा के गलत सम्बन्धों के बारे में कुछ देखा नहीं था। वेदा, प्रमोद व नीतू को एक साथ कही गये इस बारे में मुझे कुछ पता नहीं है। मैनें वेदा व नीतू के सम्बन्धों के बारे में किसी से शिकायत नहीं की।"***

PW 3-Vinod Kumar stated about the motive arose to appellants that:-

"5. 24 तारीख 24.5.04 को घटना से पहले विमलेश व नागा बाबा हमारे गांव में आये थे। और इन्होनें धमकी दी थी कि वेदा और नीतू सम्बन्धों में जो बाधा डालेगा तो बुरा परिणाम होगा।"

He further stated that:-

***"15. … मुझे बन्टी ने यह बात बताई थी कि दिनांक 24.5.04 को विमलेश व नागा बाबा गांव में आये थे और उन्होनें यह धमकी दी थी कि जो नीतू व वेदा के सम्बन्धों बाधा डालेगा उसका बुरा परिणाम होगा।***

***16. यह बात मैनें जालिम सिंह के घर के आगे चौराहे पर उस समय सुनी जब मै अपने टी.डब्लू. से सुबह गांव आया था। वहां उस समय चौराहे पर बन्टी, सुखवीर कन्चन सिंह और कई आदमी थे।"***

95. The aforesaid witnesses, about motive to commit the crime by the appellants, stated that appellant Veda was having illicit relations with Neetu. On the eve of fateful night, Keshav Giri @ Naga Baba along with Vimlesh (both acquitted after trial) had visited village Aukhand and extended threat to informant and his family members that if the relationship of appellant Veda and Neetu would be

opposed by them, they would face dire consequences. It is pertinent to note here that the case of prosecution is that the threat was extended by Keshav Giri @ Naga Baba and Vimlesh when they visited village Aukhand on the eve of the incident. It would have been Pramod, husband of Neetu, who got the reason to raise objections against illicit relation of his wife Neetu with appellant Veda. He never objected it even after the informant Banty informed him about illicit relations of his wife Neetu.

96. PW-1 has also stated that prior to this incident, appellant Veda and his family members had threatened him and his family members including appellants Jagan, Pyare, Ganga and Veda and others. If so happened, a report must have been lodged by him, but it seems that he did not take any action.

97. According to the informant, the threat was given by Keshav Giri @ Naga Baba and Vimlesh and not by any of the appellants on the eve of incident. It appears that PW-1 Banty and PW-3 Vinod Kumar deposed about the motive on the basis of hearsay evidence of this fact that appellant Veda and Neetu were having illicit relation. Informant Banty has also stated that his family members told him about illicit relations between Veda and Neetu, while PW-3 Vinod Kumar stated that Banty told him that on 24.5.2004 Vimlesh and Naga Baba visited their village and extended threat to them. The allegation of threatening on the eve of the occurrence was attributed to Keshav Giri @ Naga Baba and Vimlesh while they have been acquitted by the trial Court.

98. On perusal of the statement of PW-2 Sheeshpal about the motive to commit incident, it transpires that he did not state anything specific about any person who was threatened by Vimlesh and Naga Baba on the eve of incident.

99. We are conscious that in this case four persons are brutally murdered. On the basis of the testimony of PW-1, PW-2 and PW-3, the motive so asserted by the prosecution does not seem to be such a strong motive which can lead appellants to commit murder of four persons. Therefore, we are of the opinion that the prosecution has completely failed to establish and to prove the motive to commit the murder of four persons by the appellants. Merely opposing the illicit relations between appellant Veda and Neetu does not seem to be a cogent reason for the appellants to commit such a heinous crime.

**Informant's Conduct**

100. Another aspect, which we would like to consider, is about the conduct of the informant. He deposed that after his father Dinesh and uncle Santosh were shot dead, he continued to sit at the same place, hiding himself where he was sitting at the time of occurrence, till morning. He directly proceeded to the tube-well of Zalim Singh, where he came to know about his murder. The real brother of Zamil Singh, Sheeshpal (PW-2) and other persons were taking the dead body of Kunwar Singh to their village. Banty did not inform them about the murder of Dinesh and Santosh. The informant did not go to the place where the dead bodies of his father and uncle Santosh were lying, rather he opted to return to his village without attending them. This conduct of informant appears to be unnatural.

101. Learned counsel for the appellants vehemently argued that the

informant and the other witnesses stated, during their deposition, that they identified appellant Babloo @ Balua, who was involved in the incident. The informant did not mention appellant Babloo @ Balua as a person involved in the incident when he lodged the FIR of this case. It appears that the name of appellant Babloo @ Balua was disclosed first time at the time of his deposition. Therefore, the presence and identification of appellant Babloo @ Balua is also doubtful.

102. Appellant Balua @ Babloo was not named in the FIR. Informant Banty stated during his deposition that:

***"(11) मैं बलुआ उर्फ बबलू को घटना से पहले से ही नाम से अच्छी तरह से जानता था। ये बलुआ उर्फ बबलू हमारे गाँव के वेदा उर्फ वेद प्रकाश मुल्जिम के यहाँ आता-जाता था। इसलिए अच्छी तरह से पहचानता था। तथा ये जागन के यहाँ भी आता-जाता था। मैंने अपने पिता व चाचा के कत्ल के समय मुल्जिमानों में मुल्जिम बलुआ उर्फ बबलू को देखा व अच्छी तरह पहचाना था।*** मुझे जालिम सिंह व कुंवर सिंह के कत्ल के गवाहान ने यह नहीं बताया था कि उनके कत्ल में बलुआ उर्फ बबलू भी शामिल था। रिपोर्ट लिखते समय मैं परेशान था मुझे बलुआ उर्फ बबलू का नाम ध्यान नहीं आ रहा था क्योंकि मेरे घर में दो-दो मौत हो गयी थी। इस कारण रिपोर्ट में बलुआ उर्फ बबलू का नाम नहीं लिखा सका था। घटना से पूर्व मैं यह जानता था बलुआ उर्फ बबलू ग्राम भावापुर का रहने वाला है और जाति से गड़रिया है।

PW-2 Sheeshpal, stated that:

***"मैंने बंटी को तभी यह बता दिया था कि मैंने बबलू को जालिम सिंह के कत्ल के समय पहचान लिया था।....मैंने बंटी को यह बात सुबह पाँच बजे बतायी थी। ...मैंने बबलू को जालिम सिंह के कत्ल के समय पहचान लेने की बात बंटी के अलावा गाँव के किसी अन्य को नहीं बतायी... मेरे द्वारा बंटी सिंह को जालिम सिंह के कत्ल करते हुए बबलू को पहचानने वाली बात बताने के बाद बंटी ने रिपोर्ट कर दी थी।"***

103. On the basis of the aforesaid evidence, it is apparent that informant Banty was knowing appellant Babloo @ Balua prior to the incident, but he did not array him as an accused in the FIR. He stated that he identified Babloo @ Balua at the time of incident. PW-2 also informed him that he identified Babloo @ Balua at the time of occurrence. It is also pointed out by learned counsel for the appellants that even during his statement under Section 161 Cr PC, the informant did not disclose the name of appellant Babloo @ Balua, as one of the assailants. It raises a serious suspicion about the conduct of the informant that despite he was knowing the appellant Babloo @ Balua and identified him at the time of incident, he did not lodge named FIR against him.

104. The Hon'ble Apex Court in **Darshan Singh vs State of Punjab**, Criminal Appeal No. 163 of 2010 has held that:-

> *"26. If the PWs had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance.*

105. Considering the aforesaid oral evidence as well as legal pronouncements,

the involvement of appellant Babloo @ Balua seems to be doubtful since no FIR was lodged against him inspite of the fact that the informant and witnesses identified him during the incident.

**Recovery and Forensic Evidence**

106. Sri P.C. Srivastava, learned counsel for the appellants vehemently argued that the doctor who conducted the autopsy on the bodies of the deceased has stated that pallets were taken out from the dead body of deceased Dinesh, which does not appear to have been fired by the firearm of 315 bore and appears to have been fired by a firearm of 12 bore. A recovery of country made pistol of 315 bore along with one fired cartridge and seven live cartridges are shown out of the pointing of appellant Veda. Deceased Dinesh did not sustain any injury of country made pistol of 315 bore. PW-1 Banty specifically stated that fire blow on his father was given by appellant Veda. It reflects that he did not see the occurrence as alleged. The fired cartridge found inside the barrel of the weapon allegedly recovered out of the pointing of the appellant-Veda, was sent for forensic examination. It was concluded by the Laboratory that the fired cartridges, allegedly fired through a weapon by appellant Veda, were found to be mismatched. Besides this, the public witnesses of the said recovery were not produced during the trial.

107. PW-10 Dr. A.K. Bansal, who conducted autopsy of four deceased persons, stated that the pallets were recovered from the body of deceased Kuwar Singh, Santosh and Dinesh. The prosecution has alleged that during investigation, recovery of country made pistols and cartridges out of the pointing of appellants, Jagan, Pyare, Ganga, Balua @ Babloo and Veda @ Vedpal were made, while one SBBL gun of 12 bore was recovered out of the pointing of appellant Rakesh. It is to be noted that the alleged recovery is said to have been made in the presence of the eyewitnesses. The recovery of weapon, SBBL gun of 12 bore out of the pointing of the appellant Rakesh is said to have been made before the public witnesses. Recovery of country made pistol of 12 bore and cartridges from appellants Pyare and Ganga is alleged to be made in presence of witnesses, namely, Mohar Singh and Kamal Singh. Recovery of one country made pistol of 12 bore and live cartridges with fired cartridge is also shown in the presence of public witnesses. None of the public witnesses of such recovery has been produced during the trial. It is worth to be noted that according to the forensic laboratory report the recovery of firearm and cartridges made out of the pointing of appellant Veda, is found to be mismatched. Therefore, the statement of PW-1 that appellant Veda committed the murder of Dinesh with a firearm weapon becomes fallacious.

108. During the forensic examination, empty cartridges recovered with the country made pistols out of the pointing of appellants Jagan, Balua @ Babloo and Ganga are not found to be matched. Although empty cartridges were found to be matched from the firearms recovered out of the pointing of appellants, Rakesh and Pyare, but in view of our discussion over the identification of accused and insufficiency of source of light, as made herein-before, this evidence cannot be considered to be a conclusive evidence against appellants, Rakesh and Pyare.

109. We have perused the judgment of the learned trial Court. We find

that the learned trial Court has completely lost sight to the conclusion drawn by the forensic laboratory. The trial Court only referred that the FSL report was available on record as exhibit Ka-92.

110. The public witnesses who were present at the time of recovery of firearms and cartridges were not produced during the trial. Therefore, the alleged recovery of firearm weapons and cartridges out of the pointing of appellants appears to be doubtful.

111. The Hon'ble Apex Court in **Subramanya vs. State of Karnataka**, (2023) 11 SCC 255, observed that the disclosure statement of the accused must be recorded in the presence of public witness before making recovery. The relevant paragraph is extracted below:

> *"78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."*

112. In **Boby vs. State of Kerala**, 2023 SCC Online SC 50, the Hon'ble Apex Court observed as under:

> *27. As early as 1946, the Privy Council had considered the provisions of Section 27 of the*

*Evidence Act in the case of Pulukuri Kotayya v. King-Emperor. It will be relevant to refer to the following observations of the Privy Council in the said case:*

*"The second question, which involves the construction of s. 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms. [His Lordship read ss. 25, 26 and 27 of the Evidence Act and continued : ] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. On this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity, would all be admissible. If this be the effect of s.27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.* ***On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as***

***equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered***. *Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A.", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

*[Emphasis supplied]*

*28. It could thus be seen that Section 27 of the Evidence Act requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact. The information as to past user, or the past history, of the object produced is not related to its discovery. The said view has been consistently followed by this Court in a catena of cases.*

113. In view of the above legal proposition laid down by the Hon'ble Apex Court, it is pertinent to mention that in the present case, such disclosure statements were not recorded before whom the said recovery is said to have been made. Mohar Singh, Kamal Singh, Ravendra Singh and Vinod Kumar are the independent witnesses before whom such recovery is said to have been made. We have already observed that these witnesses were not produced before the trial Court to support the genuineness of the recovery made on the pointing out of the appellant concerned. Therefore, considering the evidence available on record, the recovery from the appellants becomes doubtful.

114. So far as the argument of Sri P.C. Srivastava, learned counsel for the appellants that the FIR of the case is ante time is concerned, it is the case of the prosecution that FIR was registered as 6.20 am on the basis of written report submitted by informant Banty. Merely, non mentioning of the names of the appellants on the inquest report does not conclusively indicate that the first information report came into existence after inquest proceedings. It is worthy to be noted that the crime number along with relevant sections are mentioned on the inquest report of the concerned deceased.

115. PW-9 HCP 178 Rameshwar Singh, stated that on the basis of the written report submitted by informant, he prepared chik No.110 against accused Veda and others, as Crime No.252 of 2004 under Sections 147, 148, 149, 302 & 120B IPC. It was duly entered in the general diary of the Police Station Debai at Rapat No.8 at 6.20 am. This witness has proved the chik FIR as well the entry made in general diary on

the basis of original endorsement before the trial Court.

116. It is also worth to be noted here that during investigation, statements of PW-6, Bunty S/o Om Pal, PW-7 Raghvendra and PW-8 Maharaj were recorded by the Investigating Officer. These witnesses were said to have the witnesses of fact and they saw Vimlesh, Naga Baba, appellant Rakesh and appellant Jagan, perpetrating conspiracy of murder of the deceased persons. PW-6, PW-7 and PW-8 were produced by the prosecution. All these witnesses denied such statements to the Investigating Officer. These witnesses were declared hostile. Therefore, the evidence of perpetrating conspiracy by appellants Rakesh and Jagan is not supported by any corroborative evidence.

117. We do not find any weight in the argument advanced by learned counsel for the appellants that the FIR of this case is ante time.

**Statements of Accused u/s 313 Cr PC**

118. Learned counsel for the appellants vehemently argued that the learned trial Court completely ignored the documents produced by the defense after recording their statements under Section 313 Cr PC. The prosecution has utterly failed to prove the motive behind the assassination of four persons alleged committed by the appellants. It is submitted that aunt (Bua) of informant Banty was done to dowry death by her husband. A case crime number Crime No.108/03, under Sections 498-A, 304, 201 of IPC and ¾ of Dowry Prohibition Act, P.S. Debai, District Bulandshahr was registered. After investigation, charge-sheet was filed. Deceased Santosh, Dinesh and Kunwar Singh were nominated as witnesses in the charge-sheet. Deceased Zalim Singh was doing pairvi of that case. The copy of FIR and charge-sheet was filed before the trial Court in defence evidence, being Paper no.129A, paper no.129A-3. It might be possible that on account of nomination as witnesses and doing pairvi in that case, deceased were killed by some unknown persons. The learned trial Court opined that if it is assumed that the deceased were nominated as witnesses and doing pairvi in that case, why the informant lodged FIR against the appellants.

119. Learned counsel for the appellants placed reliance upon the judgment rendered by the Hon'ble Apex Court in **Reena Hazarika vs. State of Assam**, 2019 (13) SCC 289. The relevant paragraph is extracted herein-below:

> *"19. Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) Cr PC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr PC the Court is duty-bound under Section 313(4) Cr PC*

*to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr PC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or reject the same for reasons specified in writing.*

120. We have perused the judgment of the trial Court. It did not express any conclusion about the nomination of deceased Dinesh and Santosh as witnesses in charge-sheet. Leaned trial Court although considered this aspect, but concluded that there was no evidence that deceased Zalim Singh was doing pairavi in the said case.

121. We have considered the argument raised by learned counsel for the appellants. A case, being Crime No.108 of 2003 under Sections 498-A, 304, 201 of IPC and Section ¾ of Dowry Prohibition Act came to be filed at Police Station Chatari, District Bulandshahr on the basis of information given by Banty Singh, who is informant of the present case. It was the case of the prosecution that the Aunt (Bua) of the informant was done to dowry death. After investigation, a charge-sheet came to be filed against Pawan Kumar and Sunil Kumar. Deceased Santosh and Dinesh were nominated as witnesses. This fact is not denied by the prosecution that the FIR was not lodged by the informant and witnesses Santosh and Dinesh were the same persons, who were done to death in the present case.

122. We have observed that the motive attributed to the appellants to commit the murder of four persons in one go was not so strong that could lead to the appellants to commit such offence. The motive that appellant Veda @ Vedpal was having illicit relation with acquitted co-accused Neetu, which was opposed by the informant and his family and, therefore, the appellants eliminated Santosh, Dinesh, Kunwar Singh and Zalim Singh, is not found to be substantiated with cogent evidence.

123. In view of the documentary evidence brought on behalf of the appellants, it can be said that since in the dowry death case of the aunt of informant-Banty Singh, deceased Santosh and Dinesh were witnesses in the charge-sheet and deceased Zalim Singh was a pairokar on behalf of the informant, therefore, possibility of committing murder of Santosh, Dinesh and Zalim Singh by some unknown persons, to ensure that they could not depose against the accused, prevent deceased Zalim Singh from doing pairavi and to ensure acquittal in that case, cannot be ruled out.

**CONCLUSION**

124. In view of the foregoing discussions and appreciation of

documentary as well as oral evidence available on record, we arrive at a conclusion that the prosecution has failed to establish that at the time of incident there was sufficient source of light in which the witnesses identified the appellants, committing the murder of four persons. The theory of prosecution that witnesses identified the appellants in the torch light is not proved on the basis of the appreciation of the evidence of these witnesses. The alleged torches were not produced before the trial Court at the time of evidence of the eyewitnesses by the witnesses and the Investigating Officer, either. The existence of lantern and bulb, as source of light, is not substantiated by any evidence. Therefore, the identification of the appellants by the witnesses, committing the murder of Santosh, Dinesh, Zalim Singh and Kunwar Singh is not proved beyond reasonable doubt. The recovery of firearm weapons and cartridges is also not substantiated with the forensic laboratory report and in view of the testimony of the witnesses. The independent witnesses of such recovery were not produced during trial. It would be imperative to mention here that other eyewitnesses, Punji, Pappu, Sukhveer, Om Prakash were Singhveer were not produced by the prosecution. The documentary evidence filed as defence evidence by the appellants appears to be a strong reason than the motive attributed to the appellants to commit the murder of the deceased. We find substance in the argument of the learned counsel for the appellants that the deceased were done to death by some unknown persons and not by the appellants.

125. For the reasons and discussions held above, these appeals succeed and are **allowed**. The impugned judgment and order dated 30.6.2007 passed by the then Additional Sessions Judge (Fast Track), Court No.20, Bulandshahr, in Sessions Trial No.625 of 2004 (State vs. Veda @ Vedpal and 8 others), arising out of Crime No.252 of 2004, under Sections 147, 148, 149, 302, 120-B IPC, Sessions Trial No.766 of 2004 (State vs. Rakesh) arising out of Crime No.261 of 2004, under Section 25 of the Arms Act, Sessions Trial No.1138 of 2004 (State vs. Veda @ Vedpal) arising out of Crime No.253 of 2004, under Section 25 Arms Act, Sessions Trial No.1139 of 2004 (State vs. Babloo @ Balua) arising out of Crime No.254 of 2004, under Section 25 Arms Act, Sessions Trial No.1141 of 2004 (State vs. Pyare) arising out of Crime No.266 of 2004, under Section 25 Arms Act and Sessions Trial No.1142 of 2004 (State vs. Ganga) arising out of Crime No.267 of 2004, under Section 25 Arms Act, Police Station Debai, District Bulandshahr, is set aside. The appellants are reported to be in prison. They shall be set at liberty, forthwith, unless they are wanted in any other case, subject to compliance of Section 437A Cr PC.

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**(2024) 10 ILRA 518**
**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 25.10.2024**

**BEFORE**

**THE HON'BLE SAURABH SRIVASTAVA, J.**

Criminal Revision No. 3981 of 2011

**Jawahar Lal Vats ...Revisionist**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Revisionist:**
Sunil Vasishta, Sushil Shukla

**Counsel for the Respondents:**

Arvind Srivastava, Brijesh Sahai (Sr. Adv.), C.P. Upadhyaya, Pranshu Gupta, Santosh Tripathi, Siddharth Singhal, Vinay Arora

**Criminal Law-Code of Criminal Procedure, 1973-Section 397-** Revision against the order passed by the learned Magistrate allowing the withdrawal application moved by the Assistant Prosecuting Officer thereby consenting withdrawal from the prosecution of accused-opposite party in a criminal case u/s 321 Cr.P.C. The jurisdiction under Section 397 Cr.P.C. is a very limited one, the illegality, propriety or correctness of the order passed by learned court below, is they very foundation of exercise of jurisdiction under Section 397 Cr.P.C. and the jurisdiction can be exercised where there is a palpable error, noncompliance with the provisions of law and the decision is completely erroneous or where is the judicial discretion is exercised arbitrarily. **(Para 68 & 71)**

**Revision dismissed**. (E-15)

**List of Cases cited:**

1. Sheonandan Paswan Vs St. of Bihar, 1987(1)SCC 288

2. M.N. Sankarayarayanan Nair Vs P.B. Balakrishnan 1972 (1) SCC 318

3. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460

4. Chandra Babu Vs State, (2015) 8 SCC 774

5. Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762

6. Ashish Chadha Vs Smt. Asha Kumari & anr., AIR 2012 SC 431

7. Hari Prakash Kasana Vs St. of U.P., 2009 (5) ALJ 750 (AII)

8. Nawal Kishor Gupta Vs St. of U.P., 2010 (5) ALJ 338 (AII)

9. Malti Vs St. of U.P., 2000 CrLJ 4170 (AII)

10. Iqram Vs St. of U.P. 1988(2) crimes 414 (AII)

11. Johar Vs Mangal Prasad, AIR 2008 SC 1165

12. St. farm Corpn. Of India Ltd. Vs Nijjer Agro Foods Ltd., (2005) 12 SCC 502

13. St. of Maharashtra Vs Jag Mohan Singh Kuldip Singh, 2004 (50) ACC 889 (SC)

14. Munna Devi Vs St. of Raj., AIR 2002 SC 107

15. Smt. Sheela Devi Vs Munnalal, 2000 (41) ACC 158 (Allahabad)

16. Ganga Prasad Vs St. of U.P., 2000 (40) ACC 761 (Allahabad)

17. Sachidanand Singh Vs St. of U.P., 1999(39) ACC 681 (AII)

18. Associated Cement Co. Ltd. Vs Keshvanand, 1998 (30) ACC 275 (SC)

19. Jamuna Vs St. of U.P., 1997 (2) AWC 959 (Allahabad)

20. Akhlak Ahmad Vs Vahid Ali Ansari, 1987 (24) ACC 544 (AII)

21. Dulichand Vs Delhi Administration, AIR 1975 SC 1960

22. St. of T.N. Vs Mariya Anton Vijay, (2015) 9 SCC 294

23. Shamima Farooqi Vs Shahid Khan, (2015) 5 SCC 705

24. Smt. Savitri Devi Vs St. of U.P., 2014 (84) ACC 81 (AII)

25. Sanjaysinh Ramrao Chavan Vs Dattatray Gulabrao Phalke & others, (2015) 3 SCC 123.

26. Susanta Dey Vs Babli Majumdar, AIR 2019 SC 1661

27. Ssangyong Engineering and Construction Co. Ltd.Vs National Highways Authority of India (NHA) IRONLINE 2019 SC 329

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

1. Heard Sri Sushil Shukla, learned counsel for revisionist, Sri Arvind Kumar Srivastava and Sri Rajarshi Gupta assisted by Sri Pranshu Gupta, learned counsels on behalf of opposite party no. 2 as well as learned AGA for the State.

**Prayer**

2. The instant revision has been preferred with a prayer to allow the revision and set aside the impugned order dated 6.9.2011 passed by Ld. ACJM IV th, Meerut in Case No. 3901 of 2010 u/s 307 IPC, PS Nauchandi, District Meerut (State Vs. Sanjai Bansal & other) whereby the learned Magistrate has allowed the withdrawal application dated 7.5.2010 moved by the Ld. Assistant Prosecuting Officer thereby consenting withdrawal from the prosecution of accused-opposite party nos. 2 &3 in aforesaid criminal case u/s 321 Cr.P.C.

It is also prayed to consequently direct the learned Magistrate to expeditiously proceed with the trial of the aforesaid case against the accused persons and conclude the same within a period of time as this Hon'ble Court may deem fit & proper to direct, otherwise the revisionists shall suffer irreparable loss.

And by way of interim measure, it is further prayed that this Hon'ble Court may be pleased to stay the operation & effect of impugned order dated 6.9.2011 passed by Ld. ACJM IV th, Meerut in Case No. 3901 of 2010 u/s 307 IPC, PS Nauchandi, District Meerut (State Vs. Sanjai Bansal & other), during the pendency of this criminal revision before this Court.

**Brief facts**

3. It is the case of the revisionist that on 30.3.2006 at about 10:00 AM, the accused-opposite party nos. 2 & 3 namely 'Sanjay & Ajay Bansal' along with one unidentified accused person had committed assault by firing upon the revisionist no. 2 as a result of which he received serious firearm injuries on his chest. He was immediately taken to nearby 'Lokpriya Hospital' where at he was admitted at around 10:30 AM and subsequently operated upon by the doctors. Revisionist no. 1 i.e. father of the injured-revisionist no. 2, since did not know them before as such he lodged FIR at 11:15 AM at PS Nauchandi in respect of aforesaid incident against 3 unknown accused persons. The said FIR was registered as Case Crime no. 147 of 2006 u/s 307 IPC and verbatim whereof is quoted here-under :-

*''नकल तहरीर हिन्दी वादी*

*सेवा में,*

*श्रीमान थानाध्यक्ष*

*थाना नौचन्दी, मेरठ।*

*महोदय,*

*निवेदन है कि प्रार्थी सुबह लगभग 10.00 बजे अपने घर के बाहर सड़क पर बाहर जाने के लिए खड़ा था तथा अपने बेटे धनन्जय जो मन्दिर से आने वाला था का इन्तजार कर रहा था। तभी गली के मोड़ पर मेरा पुत्र स्कूटर से आया तभी तीन अज्ञात हमलावरो ने यह कहते हुये कि साला बहुत मुकदमे बाजी करता है अपने हाथो मे लिए कट्टो से मेरे पुत्र को जान से मारने की नियत से गोलिया मार दी हमलावरो को मै सामने आने पर पहचान सकता हूं मेरे शोर मचाने पर वहाँ काफी लोग आ गये तथा बदमाशो को ललकारने पर हमलावर भाग गये। कृपया मेरी रिपोर्ट लिखकर कानूनी कार्यवाही करने की कृपा करे। प्रार्थी sd/- श्री जवाहर लाल वत्स s/o स्व० श्री दुर्गा प्रसाद r/o 18/14 , राजेन्द्र नगर, PS नौचंदी, मेरठ दिनांक 30.3.06*

*नोट- मै c/c 1506 रनधीर सिंह प्रमाणित करता हूँ कि नकल तहरीर हिन्दी वादी थाना हाजा की चिक पुश्त पर शब्द व शब्द अंकित की गई।''*

4. Subsequently, when on 10.04.2006 for the first time, the injured-revisionist no. 2 was examined by the Investigating Officer (in short 'the IO') of the said case, he revealed the name of 'Sanjay & Ajay Bansal (i.e. accused-opposite party nos. 2 & 3) as the assailants who along with one unidentified accused person had assaulted him on the day of incident by firing upon him. It is thereafter that both of them became accused in the Case Crime No. 147 of 2006.

5. Both the accused took the plea of alibi before the IO and finally the IO submitted the final report no. 32 of 2006 on 20.10.2006 in the said case thereby exonerating the aforesaid accused persons from the case. When the said final report reached in the court of learned JM IIIrd, Meerut on 12.12.2006, a Criminal Misc. Case no. 1331/11 of 2006 in his court was registered for judicial disposal of said FR and learned Magistrate directed for issuance of notice to the informant-revisionist no. 2 for making protest.

6. Meanwhile, an order came to be passed on 16.03.2007 by a Division bench of this Court in a pending Criminal Misc. Writ Petition No. 13182 of 2006 which had been filed by the informant-revisionist no. 2 before for seeking direction to the local police for proper & effective investigation of Case Crime no. 147 of 2006 under Section 307 IPC PS Nauchandi, District Meerut. In the said order, this Court had directed the informant-revisionist no. 1 to approach the court of learned Magistrate for making protest against the submission of FR in his case.

7. Informant-revisionist no. 2 appeared and filed his protest petition along with his affidavit on 04.04.2007 against the submission of the FR in the said case and through the petition, it was submitted by the informant-revisionist no. 2 that the conclusion drawn by the IO of the said case in the FR was illegal and patently absurd inasmuch as he could not have accepted the plea of alibi for exonerating the accused persons which was the domain of judicial appreciation only after receiving legal evidence in trial and when statement under Section 161 Cr.P.C of revisionist no. 2 was clearly revealing commission of offence under Section 307 IPC against those accused persons, therefore there was sufficient prosecution material to reject the FR and summon them to face prosecution before the court.

8. Thereafter, on 16.04.2007, learned Magistrate rejected the above said FR thereby summoning the accused persons to face prosecution before him. However, meanwhile, the accused persons had approached Hon'ble Supreme Court by filing a SLP No. 2364 of 2007 (which was later converted to regular 'Criminal Appeal No. 1453 of 2007') in challenge of the order dated 16.3.2007 passed by this Court on the writ petition of the informant-revisionist no. 1. The said SLP was admitted and later Hon'ble Supreme Court by its order & judgment dated 22.10.2007 set aside both the orders passed by this Court and and also the summoning order dated 16.4.2007 passed by the learned Magistrate. In fact, the operative portion of the order dated 16.03.2007 of this Court was taken to be objectionable by Hon'ble Supreme Court since in its view the same was likely to prevent the learned Magistrate to apply his independent judicial mind while deciding the Final Report submitted against the accused persons. Therefore, by upsetting the orders, the Hon'ble Supreme Court finally remanded the matter back to

the learned Magistrate for deciding the Final Report in accordance with applicable law as interpreted and guided for him in the body of the judgment by Hon'ble Supreme Court.

9. On 04.11.2007, the informant-revisionist no. 1 himself filed certified copy of the above said order dated 22.10.2007 passed by Hon'ble Supreme Court before the learned Magistrate. As the territorial jurisdiction of the concerned Magistrate had changed, hence the Criminal Misc. Case No. 1331/11 of 2006 registered previously in the court of Ld JM IIIrd was allotted fresh No. as 'Criminal Misc. Case No. 3309/9 of 2007' in the court of Ld JM Ist, Meerut for disposal of FR case and protest petition filed by the informant-revisionist no. 1.

10. Learned counsel for the appellant submitted that while the judicial proceedings in respect of disposal of FR and protest petition thereon were going on in the court of learned Magistrate, the informant-revisionist no. 1 discovered that on his previous complaint against the Investigating Officer of the case for helping the accused persons in fabricating & supporting their plea of alibi, a departmental enquiry had been ordered and on 19.11.2007, the enquiry officer i.e. SP City Meerut had already submitted his enquiry report finding these Investigating Officers guilty in not properly investigating the case and had recommended departmental punitive action against them and also that in an another enquiry conducted by the 'Deputy CMO, Rampur' against the Medical Staff & Doctors of CHC, Milak, Rampur who had helped accused 'Sanjay Bansal' in fabricating his admission into said CHC on 29.03.2006 i.e. a day prior to date of incident, the said staff & doctor have been found to be guilty of fabricating the medical record in order to show the admission of accused. Therefore, the informant-revisionist no. 1 through his letter dated 28.01.2008 prayed before 'DIG, Meerut Range, Meerut' for recommending further investigating into the instant case by drawing his attention to aforesaid enquiry reports, which had strengthen his case against accused persons.

11. The IO who undertook further investigation concluded with the previous observations made in the case by different Investigating Officers that the accused persons were not present at the place of occurrence as their alibi was established and that they have been falsely implicated by the injured-injured revisionist no. 1. Besides aforesaid conclusions, the IO also forwarded and submitted his complaint dated 28.04.2008, in the court of learned Magistrate dealing with FR case, against the informant 'Jawahar Lal Vats' and his injured son Dhananjay seeking their prosecution under Section 211 IPC for allegedly filing false criminal case against the innocent accused persons namely 'Sanjay & Ajay Bansal'.

12. On the other hand, the father of the accused-opposite party no. 2 & 3 namely 'R.K. Gupta' himself on 28.08.2008 approached 'Secretary Home, UP Govt Lucknow' and filed before him his written complaint narrating therein that his sons namely 'Sanjay & Ajay Bansal' were falsely implicated by the revisionists by lodging false FIR. However, since their acts also amount to an offence as defined under Sections 211, 195, 120-B IPC as such the local police be directed to lodge NCR in those sections against them and investigate

the same after seeking formal judicial permission under Section 155 Cr.P.C.

13. The said complaint of R.K. Gupta reached later before SHO, PS Nauchandi through proper channel and whereafter on his direction, surprisingly and quite illegally, an FIR under Section 154 Cr.P.C on 20.09.2008 was registered giving rise to 'Case Crime no. 467 of 2008 under Sections 211, 195, 120-B IPC, PS Nauchandi, Meerut against the revisionists.

14. The Investigating Officer who was entrusted with investigation of Case Crime no. 467 of 2008 noticed that the FIR of said case could not have been registered under Section 154 Cr.P.C as none of the aforesaid offence were cognizable resultantly the said IO on 24.09.2008 stopped the investigation by noticing the aforesaid discrepancy and observed that a formal judicial permission in terms of Section 155(2) Cr.P.C was needed to undertake any investigation in such cases.

15. Thereafter on 24.09.2008, R.K.Gupta, laid another application before SSP, Meerut praying therein that as his FIR has been wrongly registered for non-cognizable offences, which can only be investigated after seeking formal judicial permission in terms of Section 155(2) Cr.P.C and as such the local police be directed to approach the court of learned Magistrate for moving and seeking aforesaid permission so that his case can be investigated.

16. Learned counsel for revisionist submitted that on the above said application dated 24.09.2008, the SHO of PS Nauchandi directed the IO namely 'SI Kamal Singh' to do needful yet the said IO did not moved any such application in the court of learned Magistrate for seeking formal judicial permission in terms of Section 155(2) Cr.P.C which he was sure was not likely to be granted as the learned Magistrate was already in the process of deciding judicially the FR submitted by the police, therefore, it appears that the said R.K.Gupta acting under some tacit understanding with the IO of the case, moved yet another application on 18.11.2008 before the SSP, Meerut with the allegations that the IO was not investigating his case properly. On the said application, the SSP, Meerut without ascertaining true facts of the case passed an order on 18.11.2008 itself directing SHO, PS Nauchandi to take stern steps against the accused of the case instituted by Mr. R.K.Gupta.

17. The investigation of the above said FIR lodged against the revisionists continued and charge sheet no. 2 of 2009 dated 06.01.2009 was submitted in the court of learned ACJM Ist, Meerut for seeking their prosecution.

18. Learned counsel for the revisionist submitted that the learned Magistrate quite illegally and ignoring the statutory bar as provided under Section 195(1)(b)(i) Cr.P.C took cognizance of the offences on the basis of the police charge sheet under Sections 211, 195, 389, 120-B IPC submitted against the revisionists by his order dated 07.01.2009 thereby summoned them to face prosecution after registering against them formal proceeding of Criminal Case no. 677 of 2009 under Sections 211, 195, 389, 120-B IPC, PS Nauchandi, District Meerut (State Vs. Jawahar Lal Vats & other).

19. On the other hand, the proceedings regarding disposal of FR

submitted in case instituted by the revisionist no. 1 was still pending therefore, he approached this Court and filed 'Criminal Misc. 482-Application No. 648 of 2009' seeking direction for learned Magistrate to decide & dispose of the matter relating to protest petition filed against Final Report No. 32/06 dated 20.10.2006 pending before him expeditiously as the same was pending disposal even after the order of Hon'ble Supreme Court dated 22.10.2007 passed in the said case. Co-ordinate Bench of this Court vide order dated 23.01.2009, disposed of the said 482-Application of the revisionist no.1 by directing the learned Magistrate to decide within two weeks the protest petition in relation to FR case.

20. Subsequently, even though Mr.R.K.Gupta, did not have any locus in the case pertaining to protest petition against the above said FR yet they filed an Impleadment Application No. 28576 of 2009 in the above said 'Criminal Misc. 482-Application No. 648 of 2009 (which was already decided on 23.01.2009 before this Court seeking modification of said order dated 23.01.2009. On his Impleadment Application, this Court passed an order on 05.02.2009 disallowing impleadment however it also directed the concerned Magistrate to club both the cases i.e. the case of protest petition pertaining to challenge the FR filed by the informant-revisionist no.1 and also the case under Section 211, 195, 389, 120-B IPC which was also pending in the same court.

21. Finally, learned Magistrate (i.e. ACJM IV th, Meerut) summoned the record of 'Criminal Case No. 677 of 2009 under Sections, 211, 195, 389, 120-B IPC also before him while deciding the proceedings related to disposal of FR submitted in Case Crime No. 147 of 2006 and protest petition thereon (i.e. Criminal Misc. Case No. 701 of 2008, which were renumbered in his court) and thereafter, the learned Magistrate by his order dated 11.02.2009 disagreed with the conclusions drawn by the police while submitting FR No. 32 of 2006 dated 20.10.2006 in connection with Case Crime no. 147/06 under Section 307 IPC and took cognizance of offence against the accused persons namely 'Sanjay & Ajay Bansal' by summoning them to face prosecution of said case in his court.

22. Meanwhile both the accused persons namely 'Sanjay & Ajay Bansal' approached this Court in challenge of the summoning order dated 11.02.2009 passed against them by learned Magistrate by filing 'Criminal Misc. 482-Application Nos. 4983 & 6068 of 2009' in which, this Court issued notices to the revisionist no. 1 and as an interim measure provided that no coercive steps be taken against them.

23. On the other hand, the revisionists also approached this Court to challenge the criminal proceedings initiated against them by the learned Magistrate on the criminal case lodged by Mr. R.K.Gupta by filing 'Criminal Misc. 482-Application Nos. 8882 of 2009' in which this Court also directed for not taking any coercive steps against them as an interim measure and all the 482-applications i.e. filed by accused-opposite party nos. 2 & 3 and other filed by the revisionist were directed to be clubbed together for final hearing.

24. Learned counsel for the revisionist further submitted that opposite party nos. 2 and 3 some how managed to persuade the Government officials to withdraw the prosecution pending against

them and the State Government vide its letter No. 724/WC/7-Nyay-5-2009-202/WC/2009 dated 28.1.2010 communicated to the District Magistrate, Meerut their permission for withdrawal of prosecution against the accused-opposite party nos. 2 & 3 in the instant case. Where after, the District Magistrate communicated the aforesaid permission, through proper channel to the learned APO in charge of prosecution case against the accused-opposite party nos. 2 & 3 pending in the court of the then learned ACJM Ist, Meerut and finally, on 07.05.2010, learned APO moved his application seeking withdrawal of prosecution. Against the above said withdrawal application, the revisionists had filed their written objections on 04.06.2010. Whereafter the hearing of withdrawal application was taken up by the learned ACJM IV th, Meerut who was of clear opinion that the learned APO has not applied his independent mind over the facts and circumstances of the case and had moved withdrawal application by merely following dictate of State Government. The learned Magistrate was also of the opinion that the learned APO has not apprised him of any legal ground in support of withdrawal from prosecution. All these findings of learned Magistrate were clearly noted by him in his order dated 06.01.2011 passed during consideration of said withdrawal application. By the said order, learned Magistrate asked learned APO to apprise him of his clear stand over the matter. Again on 17.08.2011, learned Magistrate again passed a similar order as passed on dated 06.01.2011.

25. In response to the above said orders passed by the learned Magistrate, learned APO filed another application on 29.08.2011 purporting to be supplemental to his withdrawal application and the revisionists filed their supplementary objections on the same day.

26. Finally, learned Magistrate by his impugned order dated 06.09.2011 allowed the withdrawal application moved by learned APO and accorded his judicial consent to withdrawal from prosecution of the instant case pending against accused-opposite party nos. 2 & 3.

**Submissions on behalf of revisionists**

27. Main substratum of argument of learned counsel for revisionist is that on the strength of the interpretation of law governing Section 321 Cr.P.C as enunciated by Hon'ble Supreme Court and cited by the revisionist in support of his contention before this Court what transpires is that in judging validity of the impugned order passed by learned Magistrate permitting withdrawal of prosecution in the instant case, this Court has to examine objectively whether the learned Magistrate, on consideration of material placed before him and having regard to application for withdrawal of prosecution moved by learned APO has accorded its consent on judicial consideration and in that process of consideration whether of not, he has correctly examined following twin judicial conditions:-

***1. Whether while moving for withdrawal of prosecution, the learned APO has himself applied its independent mind or was influenced by the order of State Government?***

***2. Whether grounds put forth by the learned APO in his application seeking withdrawal of prosecution were serving any***

***public cause of justice or were germane to advancement of public justice?***

***3. Whether the learned Magistrate in granting his consent to withdrawal of prosecution has correctly deliberated and examined on legitimacy of those two grounds?***

28. Learned counsel for the revisionist submitted that there was no independent application of mind by learned APO while moving withdrawal application inasmuch as-

Firstly- he failed to objectively assess the material of the cases in arriving over his reason as to how withdrawal of prosecution in the instant case was going to advance the cause of public justice.

Secondly- despite observations made by the learned Magistrate himself on previous two occasions in the same case and over the same withdrawal application vide his orders dated 6.1.2011 & 17.8.2011 to effect that learned APO had not assigned any legal grounds on which the consent for withdrawal from prosecution in terms of Section 321 Cr.P.C could be granted, the learned APO further failed to assign any legal grounds or cause for withdrawal from prosecution through his supplementary withdrawal application dated 29.08.2011. Thus, the learned Magistrate in granting its consent to withdrawal has clearly committed error of law & fact both thereby improperly exercising his supervisory judicial function in terms of Sections 321 Cr.P.C.

Thirdly- at the time when learned APO had moved his very first application seeking withdrawal of prosecution (i.e. on 7.5.2010) the impugned criminal proceedings against the accused persons were already stayed by the interim order dated 16.4.2009 passed by this Court on their 482-Application and thus, he ought to have disclosed this fact having important bearing on the case in his said application. Non-discloser of said fact reveals that the learned APO was selective in laying facts before the learned Magistrate and thus there was no independent application of mind by him.

Fourthly- whereas the learned APO in his application for withdrawal of prosecution stated that final report in the criminal case was filed by the police even after further investigation and that police had filed a challan against the informant and injured of case seeking launch of prosecution against them under Section 211 IPC but what he mischievously and deliberately fails to inform the learned Magistrate though his application was the fact that the FR against the accused Bansal brothers has already been rejected by the very court of learned Magistrate vide his order dated 11.2.2009 who had found more than prima-facie case for trial against them and that they had been summoned to face prosecution in that court. Suppression of such a material and relevant fact having bearing on outcome of judicial consideration

over withdrawal of prosecution was pointer to non-application of independent mind by the learned APO in his application and ought to have been so noticed by learned Magistrate while considering granted of his informed consent in terms of Section 321 Cr.P.C in the instant case.

Fifthly- Had there been independent assessment of relevant material made by the learned APO he sure, as being himself possessed with the judicial trained mind, would have noticed that the very foundation of the FIR (dated 20.9.2008 in Re: Case Crime No. 467 of 2008 under Section 211, 195, 120-B IPC) based upon which the withdrawal of prosecution of case of Section 307 IPC against the accused Bansal brothers was being sought was in fact, lodged against them on the written complaint of father of the accused persons (i.e. Bansal brother) and the same was clearly motivated and lodged by the police illegally that too for non-cognizable offences as defined under Sections 211, 195, 120-B IPC, which was clearly designed to pressurize & intimidate them. Thus, by suppressing the relevant facts, the learned APO was clearly not acting in good faith or in public interest while seeking consent of the court in withdrawal prosecution against accused persons involved in case of Section 307 IPC and the learned Magistrate also failed to take note of those relevant facts in according his judicial consent to withdrawal.

Sixthly- No objective assessment or consideration of prosecution of material of case relating to the FIR bearing Case Crime No. 467 of 2008 under Sections 211, 195, 120-B IPC was made by the Ld APO and set out in his application seeking withdrawal of prosecution against the accused Bansal brothers. No reason were stated as to how, on the basis of his consideration of that material, he is able to state that the case against the accused Bansal brothers relating to offence of Section 307 IPC can be legitimately said to be false even before any judicial verdict by any criminal court is given after appreciating the evidence thereon. More so, he also failed to take note of the fact that collection of electronic evidence/video recording in form of sting operation allegedly conducted by some tainted media person wherein the injured Dhananjay was claimed to have confessed before said media person that accused Bansal brothers were not involved, was completely tainted and suspicious and was procured, in all likelihood, by these accused themselves after designing the episode with the help of such media person. The noticeable discrepancies in illegally seizing the CD and Camera and sending those to forensic laboratory after fabricating the judicial order of concerned Magistrate have all been revealed to the learned APO had he carefully perused the material of aforesaid FIR of Case Crime no. 467 of 2008. Apart from all, a careful perusal of typed transcript of the alleged conversation recorded between the injured and

the so called unverified media person will go to reveal that at no point of time in entire conversation that the injured had stated for himself that the accused Bansal brothers were not his assailants.

29. The instant was an ordinary criminal case involving commission of offence under Section 307 IPC wherein duo accused persons are accused of firing shots upon injured by fire arms thereby causing on his chest and the grievous fire arms injuries and therefore, withdrawal of prosecution of this case involving conflict of interest between two individuals was in no possible way going to advance cause of public justice. Withdrawal was therefore clearly with oblique motive and unconnected with the vindication of cause of any public justice. The learned Magistrate thus failed to notice that there was no legitimacy urged in support of withdrawal of prosecution and it was designed merely as tool of thwarting or shifting the course of law or cause manifest injustice. He, in passing the impugned order, ignored the fact that the learned APO was improperly exercising his executive function in seeking withdrawal from the prosecution in a case involving serious offence of Section 307 IPC, which was clearly an attempt to interfere with the normal course of justice with object to favour accused persons who were wealthy, rich and influential enjoying political patronage. The judicial consent granted by the learned Magistrate is therefore completely fallacious in law. The impugned order is likely to be revised and interfered by this Court on this sole ground of law itself.

30. Learned counsel for the revisionist for substantiating his arguments relied upon certain judgments which are as under:

*1. MN Sankarayaranan Nair Vs. PV Balakrishnan & ors. (1972) 1 SCC 318*

*2. Bansi Lal Vs. Chandan Lal & Ors. (1976) 1 SCC 421*

*3. State of Orissa Vs. Chandrika Mohapatra & Ors. (1976) 4 SCC 250*

*4. Balwant Singh & ors. Vs. State of Bihar (1977) 4 SCC 448*

*5. Abdul Karim & ors. Vs. State of Karnataka & ors. (2000) 8 SCC 710*

*6. Rahul Agarwal Vs. Rakesh Jain & Anr. (2005) 2 SCC 377*

*7. Bairam Muralidhar Vs. State of Andhra Pradesh (2014) 10 SCC 380*

*8. Hardeep Singh Vs. State of Punjab (2014) 3 SCC 92*

*9. HS Bains Vs. State (Union Territory of Chandigarh) (1980) 4 SCC 631*

*10. Rajendra Singh Vs. State of Punjab (2007) 7 SCC 378*

*11. Abdul Rehman & Ors. Vs. KM Anees-ul-Haq (2011) 10 SCC 696*

*12. Issac Isanga Musumba & Ors. Vs. State of Maharashtra & Ors. (2014) 15 SCC 357*

*13. Dhananjay @ Dhananjay Kumar Singh Vs. State of Bihar & Anr. (2007) 14 SCC 768*

*14. Ramjee Singh Vs. State of Bihar (1987) CrLJ 137*

*15. Sudha Tripathi Vs. State of MP & Anr. (2019) CrLJ 3993.*

**Submission on behalf of State**

31. Learned AGA rebutted the stand taken up by learned counsel for revisionist and argued that after registration of FIR of Crime no. 147 of 2006, the matter was investigated properly and thoroughly and after conducting investigation the Investigating Officer found that the involvement of Sanjay Bansal and Ajay Bansal is false whose name was figured by the injured Dhananjay Vats in his statement recorded under Section 161 of Cr.P.C and after completion of investigation the final report was submitted. It is also important to mention here that during the course of investigation, investigation was transferred to various Investigating Officer by the Senior Superintendent of Police on basis of complaint made by the complainant but none of the Investigating Officer has found any evidence against Sanjay Bansal and Ajay Bansal.

32. It is also submitted that it is totally wrong to say that the Investigating Officer has wrongly made the accused to Dhananjay Vats and Jawahar Lal Vats. In fact, the matter was investigated and after collecting the material evidence charge sheet was submitted in Court and the learned Magistrate has taken cognizance on the said charge sheet against the accused persons.

33. It is submitted that impugned order dated 06.09.2011 is fully justified and requires no interference.

**Submission on behalf of opposite party nos. 2 and 3.**

34. Learned counsels for the opposite party nos. 2 and 3 put forward his arguments as under:

35. The conspectus of the matter is that it relates to false implication of Sanjay Bansal and Ajay Bansal (both sons of R.K. Gupta, Chairman of IAMR College affiliated to CCS University, Meerut) by the Revisionists in this matter (namely, Jawahar Lal Vats, Lecturer in NAS College, Meerut affiliated to CCS University, Meerut and his son Dhananjay Vats, who was terminated by the opposite parties from his service as Lecturer from their IAMR College in 2005, as his appointment required approval by Vice Chancellor).

36. Unfortunately, the revisionist no. 2 was attacked by some unknown persons and accordingly a blind FIR was lodged by the revisionist no. 1 on 30.03.2006 which was registered as Case Crime No. 147/2006 under Section 307 IPC at Police Station- Nauchandi, District-Meerut. According to the evidence collected in this matter, the revisionist no. 2 was admitted in hospital and not unconscious and he did not know about the assailants. The statement of the revisionist no. 1 was recorded on the same day supporting his blind FIR. On 10.04.2006, i.e. on the twelfth day of the incident, the revisionist no. 2 named the opposite parties as assailants. On 14.04.2006, the revisionist no. 1 also made a supplementary statement to support the false charge and thus conspired with revisionist no. 2.

37. The Investigation Officer in Case Crime No. 147/2006 under Section 307 IPC submitted final report finding the name of opposite parties false and being named falsely with the intent to spoil the reputation of the Institution and for illegal gains. The cognizance was taken on the protest petition filed by the revisionists. The applicants approached this Court in Criminal Misc. Application Nos. 4983/2009 and 6068/2009 and they were duly protected by the interim order dated

26.03.2009. In this situation, the Public Prosecutor made an application for withdrawal from this false prosecution, which was allowed by the competent court and the subject matter of challenge before this Court.

38. The State also instituted separate proceedings against the revisionists which ultimately culminated into a charge sheet dated 06.01.2009 under Sections 195, 211, 120B and 389 of IPC on which cognizance was taken by the competent court, before the cognizance taken in Case Crime no. 147/2006, for false implication of Sanjay Bansal and Ajay Bansal (which is subject matter of Criminal Misc. Application no. 8882 of 2009 connected to the instant revision).

39. The Court took cognizance in Case Crime No. 147/2006 under Section 307 IPC, only on the basis that normally the injured only could tell about the real assailants (kindly see at page 118, ninth line from the top of the instant criminal revision), which is contrary to evidence collected in separate proceedings arising out of Case Crime No. 467/2008 under Sections 195, 211, 389, 120-B IPC, thereby ignoring the order/direction of the Court dated 05.02.2009 in Crl. Misc. Application No. 28576-79/2009 in Crl. Misc. Application No. 648/2009. In this matter the State had definite evidence before them that opposite parties in this case were falsely implicated and accordingly they filed a charge sheet in separate proceedings by virtue of Case Crime No. 467/2008 under Sections 195, 211, 120B and 389 of IPC on which cognizance was taken by the competent court against the revisionists.

40. The investigating agency in the present case had definite evidence before them that the injured revisionist no. 2 had brought false charge against opposite parties inter alia, a VCD (Talks between the revisionist no. 2 and one Kuldeep Panwar, reported of Hindustan News Paper, with whom the revisionist no. 2 was trying to flare up the issue in the media, admitting therein, that due to 'Kanooni Daon Pench', he had named the opposite parties as assailants and in fact they were not the real assailants etc. The aforesaid VCD was sent for Forensic Examination and it was found to be genuine one and in this situation, the public prosecutor in-charge of the case, exercised his executive function to withdraw the prosecution of the Opposite Parties and submitted appropriate application dated 07.05.2010 under Section 321 Cr.P.C and sought the consent of the Court after receiving the requisite permission of the State Government dated 28.01.2010 to file the application under Section 321 Cr.P.C, which was duly allowed by the Magistrate by a detailed judgment which is subject matter of challenge before this Court.

41. Learned counsels for opposite party nos. 2 & 3 also highlighted the scope of instant revision by way of submitting that the scope of the instant revision is very narrow. In revision of an order under Section 321 Cr.P.C, the duty of this Court is to see that the consideration by the competent court of the application under Section 321 Cr.P.C was not misdirected and the grounds of withdrawal were legally valid.

42. For substantiating his arguments, learned counsels for opposite party nos. 2 & 3 relied upon the judgment rendered by Hon'ble Apex Court in **Sheonandan Paswan Vs. State of Bihar, 1987(1)SCC 288** wherein, it has been held

that Section 321 Cr.P.C gives no indication as to the grounds on which the Public Prosecutor may make the application or the considerations on which the Court is to grant its consent. The initiative is of the Public Prosecutor and what the court is to do is only to give its consent and not to determine any matter judicially.

In para 79 of the judgment, the Constitution Bench held that, if on reading of the order giving consent, a higher court is satisfied that such consent was given on an overall consideration of the materials available, the order giving consent has to be upheld.

43. The Hon'ble Apex Court has also laid down that Section 397 gives the High Court jurisdiction to consider the correctness, legality or propriety of any finding, sentence or order and as to the regularity of the inferior court and while doing so, it cannot substitute its own conclusion on an elaborate consideration of evidence and converts into an Appellate Court. The order according consent under Sections 321 Cr.P.C, is discretionary in nature, while exercising supervisory jurisidiction by the competent court.

44. Learned counsel next submitted that in the instant matter, the State Government after seeking reports etc. and proper application of mind granted the public prosecutor, incharge of the case, to file appropriate application in the court.

45. Section 3 of Uttar Pradesh Act No. 18 of 1991 (w.e.f. 16.02.1991), mandates the written permission of State Government to withdraw from the prosecution by the public prosecutor. The public prosecutor being not an absolute independent officer, as he is appointed by the Government for conducting in Court any prosecution and therefore, a written permission is a sine qua non to an application under Section 321 Cr.P.C. It is submitted that the requisite permission was duly given by the State Government dated 28.01.2010 vide No. 724/WC/7-Justice-5-2009-202WC-2009.

46. The public prosecutor in the instant matter after proper application of mind and perusal of case diaries and all other materials pertaining to the matter, in view of complete facts, evidence and circumstances of the matter, sought informed consent from the competent court to withdraw the prosecution of the opposite parties. As the prosecution qua the opposite parties were not well founded and also indicated the definite clinching evidence collected by the investigating agency pertaining of Case Crime No. 467/2008 under Sections 211/195/389/120-B IPC against the revisionists, on which cognizance had already been taken, in the application itself.

47. It is submitted that, if this Court compares the application dated 07.05.2010 under Sections 321 Cr.P.C and the Government permission, it clearly reflects the independent application of mind by the public prosecutor and he had not acted blindly or on any extraneous consideration.

48. It is submitted that the scope of judicial function implicit in the exercise of judicial discretion for granting the consent would normally mean that the executive function of the public prosecutor has not been improperly exercised and not to determine the matter judicially.

49. It is settled law that the essential consideration which is implicit in the power of public prosecutor withdrawing from the prosecution is that it should be in

the interest of administration of justice, which depends entirely on the facts and circumstances (referring to case of M.N. Sankarayarayanan Nair Vs. P.B. Balakrishnan 1972 (1) SCC 318) Reliance is also placed over the case of **State of Orissa Vs. Chandrika Mohapatra 1976 (4) SCC 250**.

50. In the instant matter, revisionist no. 1 had initially raised the issue of jurisdiction of competent court, which was decided by the learned Magistrate on 06.09.2010 and that order had attained finality. Secondly, the revisionist also made false allegations of forgery etc. regarding the written permission dated 28.01.2010, accorded by the State Government in the instant matter. The learned court got all the proceedings verified and then only could proceeded further in this matter. It is humbly submitted that the revisionist is habitual of making false complaints and has not even spared the judicial officers in this regard. In the instant matter, learned Magistrate due to the conduct of revisionists very cautiously exercised its supervisory jurisdiction and wanted himself to be clarified and satisfied about the independent opinion of the public prosecutor.

51. In the instant matter, the public prosecutor in support of his application submitted that it is the duty of the State that the real culprits to be prosecuted and it would be against the interest of advancement of criminal justice system to prosecute any innocent person . The learned Magistrate duly applied its mind on the entire record, case diaries, the permission of the State Government and ultimately came to the conclusion that the reasoning and the grounds of the application made by the public prosecutor under Section 321 Cr.P.C are correct and valid and returned its categorical finding that the application made by public prosecutor is bonafide and would serve public cause and advancement of justice.

52. Thus, the learned competent court had complied with its duty to see that the grounds of withdrawal were legally valid and application made by the public prosecutor was bona fide and not collusive. In this matter, the revisionist did not put forward his case that application made by the public prosecutor was either mala fide or not in good faith, the only submission is on non-application of mind, which is contrary to record. Moreover, the opinion of the APO has never been challenged even in the instant criminal revision. The opinion of the APO cannot be reviewed in the instant revision. There is no allegation of bias against the judge who consented for withdrawal. The public prosecutor perused the record and the Magistrate also perused the complete record, this fact is mentioned in the impugned judgment/order, and the same is also not challenged. The reliance is placed on **para 70, 71 and 72** of the **Sheonandan Paswan (supra)**. It is also settled that decision of public prosecutor cannot be lightly intefered unless the court comes to conclusion that it is not bona fide.

53. The false prosecution is a valid reason for withdrawal. Prosecuting agency had brough sufficient material to show that the prosecution in Case Crime No. 147/2006 is based on false evidence of revisionists and a charge-sheet was preferred separately in Case Crime No. 467/2008 under Sections 195, 211, 389, 120-B IPC on which cognizance had been already taken by the competent court. The supervisory function of court had been properly exercised.

54. The impugned judgment and order dated 06.09.2011 is perfectly in accordance with law and the instant revision deserves to be dismissed.

**Issue, Discussion and Conclusion**

55. After hearing the rival submissions extended by learned counsels for the parties and perusing the records, certain scope of revision available before this Court has been discussed in catena of judgments rendered by Hon'ble Apex Court as well as Benches of other High Courts and this Court also. The gist of ratio laid down in several judgments are as under which are material to be discussed while adjudicating the controversy as raised by the revisionist through the instant revision.

56. The object of the provisions of revision is to set right a patent defect or error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders which upon the fact of with law. Revisional Jurisdiction can be invoked where the decisions under challenge are grossly erroneous there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes but merely indicative. Each case would have to be determined on its own merits. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restricts is that it should not be exercised against an interim or interlocutory order. **Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (paras 12 & 13).**

57. The object of the provisions of revision is to set right a patent defect or an error of jurisdiction or law. There has to be a well founded error and it may not be appropriate for the court to scrutinize the orders which upon the face of them bear a token of careful consideration and appear to be in accordance with law. Revisional Jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. There are not exhaustive classes but are merely indicative. Each case would have to be determined on its own merits. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that is should not be exercised against an interm or interlocutory order. The revisional jurisdiction of the Court u/s 397 Cr.P.C can be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. The revisional jurisdiction of the court u/s 397 of the Cr.P.C is very limited one.

58. Relying upon its earlier decision in the case of Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (para 18), the Hon'ble Supreme Court, in the case noted below, has ruled thus: *"Normally, revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an*

*apprehension or suspicion of the same would not be a sufficient ground for interference in such cases."*

**(I) Chandra Babu Vs. State, (2015) 8 SCC 774.**

**(ii) Vinay Tyagi Vs. Irshad Ali, (2013) 5 SCC 762 (para 18)**

**(iii) Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (para 18).**

59. The revisional jurisdiction of the Court u/s 397 Cr.P.C can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though Section 397 Cr.P.C does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction u/s 397 Cr.P.C is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction u/s 397 Cr.P.C but ultimately it also requires justice to be done. The jurisdiction can be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where is the judicial discretion is exercised arbitrarily. **Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (paras 12, 13 & 20).**

60. Where the Himachal Pradesh High Court had allowed the Criminal Revision by entering into merits (assuming original powers of the trial court) by reappreciating entire evidence and forming opinion that there was no prima facie case against the accused for framing charge, it has been held by the Hon'ble Supreme Court that the order of the High Court was improper in as much as the High Court in its revisional jurisdiction cannot appraise the evidence. It is the trial court which has to decide whether evidence on record is sufficient to make out a prima facie case against the accused so as to frame charge against him. Pertinenetly, even the trial court cannot conduct roving and fishing inquiry into evidence. It has only to consider whether evidence collected by the prosecution discloses prima facie case against the accused or not. **Ashish Chadha Vs. Smt. Asha Kumari & another, AIR 2012 SC 431.**

61. Where in a revision filed before Sessions Judge against rejection of application by Magistrate u/s 156(3) Cr.P.C, the Sessions Judge (by exercising original powers of the Magistrate) himself had directed the police for registration of FIR, it has been held that the Sessions Judge could not have directed the police to register FIR u/s 156(3) Cr.P.C.

**1. Hari Prakash Kasana Vs. State of U.P., 2009 (5) ALJ 750 (AII)**

**2. Nawal Kishor Gupta vs. State of U.P., 2010 (5) ALJ 338 (AII)**

62. Sections 397 to 403 Cr.P.C do not confer a right on a litigant to file revision but the revisional power is only discretionary with the court to see that justice is done in accordance with the recognized principles of criminal jurisprudence.

**(I) Malti Vs. State of U.P., 2000 CrLJ 4170 (AII)**

**(ii) Iqram Vs. State of U.P. 1988(2) crimes 414 (AII).**

63. While the appellate jurisdiction is co-extensive with the original court's jurisdiction as appreciation and re-

appreciation of evidence is concerned, the revisional court has simply to confine to the legality and propriety of the findings and as to whether the subordinate court acted within it's jurisdiction. A revisional court has no jurisdiction to set aside the findings of facts recorded by the Magistrate and impose and substitute its own findings. Sections 397 to 401 Cr.P.C confer only limited power on revisional court to extent of satisfying the legality, propriety or regularity of the proceedings or orders of the lower court and not to act like appellate court for other purposes including the recording of new findings of fact on fresh appraisal of evidence.

**1. Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (para 12 & 18).**

**2. Johar Vs. Mangal Prasad, AIR 2008 SC 1165**

**3. State farm Corpn. Of India Ltd. vs. Nijjer Agro Foods Ltd., (2005) 12 SCC 502**

**4. State of Maharashtra vs. Jag Mohan Singh Kuldip Singh, 2004 (50) ACC 889 (SC)**

**5. Munna Devi vs. State of Rajasthan, AIR 2002 SC 107**

**6. Smt. Sheela Devi vs. Munnalal, 2000 (41) ACC 158 (Allahabad)**

**7. Ganga Prasad vs. State of U.P., 2000 (40) ACC 761 (Allahabad)**

**8. Sachidanand Singh vs. State of U.P., 1999(39) ACC 681 (AII)**

**9. Associated Cement Co. Ltd. vs. Keshvanand, 1998 (30) ACC 275 (SC)**

**10. Jamuna vs. State of U.P., 1997 (2) AWC 959 (Allahabad)**

**11. Akhlak Ahmad vs. Vahid Ali Ansari, 1987 (24) ACC 544 (AII)**

**12. Dulichand vs. Delhi Administration, AIR 1975 SC 1960**

64. Where in a case of maintenance filed by wife u/s 125 Cr.P.C, the High Court had altered the findings of facts recorded by the Magistrate in its revisional powers u/s 401 Cr.P.C even when the said findings of facts recorded by the Magistrate were neither perverse nor erroneous but based on proper appreciation of evidence on record, setting aside the order of the High Court, the Hon'ble Supreme Court has ruled that the High Court in its revisional powers could not have interfered with the findings of facts recorded by the lower court only because the High Court could have arrived at a different or another conclusion.

(I) State of T.N. vs. Mariya Anton Vijay, (2015) 9 SCC 294 (paras 65 & 66)

(ii) Shamima Farooqi Vs. Shahid Khan, (2015) 5 SCC 705.

65. Normally, revisional jurisdiction u/s 397 Cr.P.C should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the Court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

**(I) Chandra Babu Vs. State, (2015) 8 SCC 774**

**(ii) Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (para 18).**

**(iii) Smt. Savitri Devi vs. State of U.P., 2014 (84) ACC 81 (AII)**

66. Revisional court can interfere with the findings of fact of the lower court only when the same is perverse and not merely when another view is also possible. **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke & others, (2015) 3 SCC 123.**

67. When the findings recorded by the lower court are based on no evidence, material evidence has been ignored or judicial discretion ha sbeen exercised arbitrarily or perversely, the revisional court can interfere in exercise of it's powers u/s 397 Cr.P.C. **Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460 (para 12).**

68. From the decisions of the Hon'ble Supreme Court discussed at various sub-heads noted above, the scope for interference by the revisional court with the findings of fact recorded by the lower Court may be summarized as under:

(I) findings of fact recorded by lower court on an evidence not available on record.

(ii) material evidence, which could have reflected on the the merits and the decision of the case, has been ignored by the lower court

(iii) finding of fact recorded on an evidence not admissible

(iv) material evidence discarded by treating it as inadmissible

(v) finding of fact being perverse in terms of law

(vi) but while disturbing the findings of fact recorded by the lower court, the revisional court would not proceed to appreciate or re-appreciate the evidence itself. The revisional court would only make its observations on the illegality committed by the lower court in appreciating the mistakes of law committed by the lower court, would set aside the findings and the order of the lower court by directing it to re-appreciate the evidence, record fresh findings of fact as per law by keeping in view the observations made by the revisional court and pass fresh orders.

69. In the case noted below, the Magistrate had convicted the revisionist for the offence u/s 138 of Negotiable Instruments Act, 1881 and had sentenced him to undergo simple imprisonment for two months along with a fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for one month and also awarded a compensation of Rs. Three lakhs payable to the respondent/complainant. While deciding the criminal revision u/s 401 Cr.P.C, the High Court remanded the matter to the Magistrate for fresh decision. The Supreme Court set aside the order of the High Court by observing that when sufficient material was there before the High Court, it ought to by observing that when sufficient material was there before the High Court, it ought to have finally decided the matter itself and remanding it to the Magistrate for fresh have finally decided the matter itself and remanding it to the Magistrate for fresh decision was not proper for the High Court.

Susanta Dey vs. Babli Majumdar, AIR 2019 SC 1661.

70. The facts alongwith the finding recorded by learned ACJM, Court No.4, Meerut while passing order dated 06.09.2011, have to be judicially scrutinized in the parameters of the judgments rendered by Hon'ble the Apex Court as discussed above regarding competency and jurisdiction, related case crime number arising out of inter-se criminal dispute pending between the parties have been given credence by this Court and the same has been elaborately discussed while passing the order which impugned the present criminal revision. The sole question which is materially to be adjudicated that whether the power vest with learned court of Magistrate under Section 321 Cr.P.C., has been rightly passed and is there any legal infirmity available which warrants interference of this Court?

71. Applying the litmus over the order dated 06.09.2011 which impugned the present criminal revision by the judgments rendered by Hon'ble the Apex Court in the cases of Amit Kapoor (supra), Chandra Babu (supra) and Vinay Tyagi (supra), the jurisdiction under Section 397 Cr.P.C. is a very limited one, the illegality, propriety or correctness of the order passed by learned court of ACJM, Court No.4, Meerut, is they very foundation of exercise of jurisdiction under Section 397 Cr.P.C. and the jurisdiction can be exercised where there is a palpable error, non-compliance with the provisions of law and the decision is completely erroneous or where is the judicial discretion is exercised arbitrarily.

72. While examining the order dated 06.09.2011, detailed discussion has been made with regard to facts which cannot be interfered by this Court, moreover, the entire fact has not been disputed at all by the revisionist. In sofar as illegality of the order is concerned, no specific illegality found in shape of procedure or finding recorded by learned court concerned.

73. Application preferred at the behest of State under Section 321 Cr.P.C. by the Prosecution Officer on dated 07.05.2010, is also on the footings of fact which has been broadly discussed by learned court concerned and as such, in the absence of any perversity or illegality involved in the order dated 06.09.2011, no interference required by this Court, therefore, order dated 06.09.2011 is hereby upheld.

74. In sofar as terminology of illegality and perversity is concerned, the same has been settled in the judgment in case of Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India (NHA) IRONLINE 2019 SC 329 rendered by Hon'ble the Apex Court, wherein it has been held that if material facts assailed by the concerned party in re, has not been appreciated and discussed but later on determined thereupon, the order may be termed as perverse, in the same manner, if the order which impugned the consideration of any court of law, is not in consonance with the provisions and procedures and contrary to the same, shall be termed as illegal, by bare perusal of the orders impugned there is hardly any illegality or perversity reflected either through the pleadings or from the facts of the matter.

75. In view of the aforesaid discussions, the instant revision is hereby dismissed.

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**(2024) 10 ILRA 538**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024`**

**BEFORE**

**THE HON'BLE SIDDHARTHA VARMA, J.**
**THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.**

Criminal Misc. Writ Petition No. 6236 of 2024
along with other connected cases

**Anil Tuteja ...Petitioner**
**Versus**
**S.H.O. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Saksham Srivastava, Vinayak Mithal

**Counsel for the Respondents:**
G.A., Jitendra Prasad Mishra, Pawan Kumar Srivastava

**Criminal Law - Constitution of India, 1950-Article 226-Quashing of FIR-**Whether when the prosecution complaint filed by the Enforcement Directorate had been quashed by the Supreme Court, would the St.ments made under Section 50 of the PML Act, 2002 of various witnesses continue to form the basis of F.I.R. which was to be lodged on the basis of the communication passed on to the St. under Section 66(2) of the PML Act? Answer-St.ments which are in the knowledge of an investigating agency can always be used for initiating or for furthering of any pending investigation. It of course need not be used for the purposes of a trial and definitely they could not be categorized as confessions or admissions. **(Para 29)**

**Petition dismissed**. (E-15)

**List of Cases cited:**

1. Prem Prakash Vs U.O.I.through the Directorate of Enforcement 2024 SCC OnLine 2270

2. St. of Punjab Vs Davinder Pal Singh Bhullar (2011) 14 SCC 770

3. St. of Haryana & ors.Vs Bhajan Lal & ors. AIR 1992 SC 604

4. Lovely Salhotra & anr.Vs St. (NCT) of Delhi & anr. (2018) 12 SCC 391

5. St. of Punjab Vs Davinder Pal Singh Bhullar (2011) 14 SCC 770

6. Vijay Madanlal Choudhary & ors.Vs U.O.I.& ors. reported in 2022 SCC OnLine 929 [AIR 2022 SL (Supp) 1283

7. M/s IREO Private Limited Vs U.O.I.& anr.

8. Angad Singh Makkar Vs U.O.I.& ors. CRMM-5228-2024

9. Central Bureau of Investigation Vs V.C. Shukla & anr.(1998) 3 SCC 410

10. Kanda Padayachi @ Kandaswamy Vs St. of Tamil Nadu 1971 (2) SCC 641

11. Nandani Satpathy Vs P.L. Dani & anr. (1978) 2 Supreme Court Cases

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

1. Criminal Misc. Writ Petition No.6236 of 2024 (Anil Tuteja vs. Station House Officer & Ors.) has been filed with the following prayers:

> "A. Issue appropriate writ, order or direction to quash the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.1 and all consequential proceedings emanating therefrom;
>
> B. Issue appropriate writ, order or direction to stay the operation and effect of the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s

420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.1 and all investigations and proceedings emanating therefrom;

C. Issue appropriate writ, order or direction to quash the Impugned Letter dated 28.07.2023 along with all consequential actions and proceedings emanating therefrom as being illegal and in contempt of the Orders of the Hon'ble Supreme Court."

2. Criminal Misc. Writ Petition No.6194 of 2024 (Anwar Dhebar vs. State of U.P. & Ors.) has been filed with the following prayers :-

"I. Issue appropriate writ, order or direction to quash the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.3 and all consequential actions/proceedings/ investigations emanating therefrom;

II. Issue appropriate writ, order or direction to stay the operation and effect of the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.3 and all actions/ investigations and proceedings emanating therefrom;

III. Issue appropriate writ, order or direction to quash the Impugned Letter dated 28.07.2023 along with all consequential actions/proceedings/investigations emanating therefrom as being illegal and in violation of the Orders of the Hon'ble Supreme Court."

3. Similarly, Criminal Misc. Writ Petition No.6195 of 2024 (Arun Pati Tripathi vs. State of U.P. & Ors.) has been filed with the following prayers :

"I. Issue appropriate writ, order or direction to quash the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.3 and all consequential actions/proceedings/ investigations emanating therefrom;

II. Issue appropriate writ, order or direction to stay the operation and effect of the FIR dated 30.7.2023 bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC PS Kasna, District Greater Noida, Uttar Pradesh ("Impugned FIR") registered by the Respondent No.3 and all actions/ investigations and proceedings emanating therefrom;

III. Issue appropriate writ, order or direction to quash the Impugned Letter dated 28.07.2023 along with all consequential actions/proceedings/investigations emanating therefrom as being illegal and in violation of the Orders of the Hon'ble Supreme Court."

4. Niranjan Das, another accused in the First Information Report which has

been impugned in the above writ petitions, has filed Criminal Misc. Writ Petition No.7389 of 2024 and the prayers made in the writ petition are as follows :-

> "A. Issue appropriate writ, order or direction to quash the FIR bearing Case Crime No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC registered by PS Kasna, Greater Noida, Gautam Budh Nagar, Uttar Pradesh with Sec. 467 IPC and Sec. 7 of the Prevention of Corruption Act having been added subsequently ("Impugned FIR") and all the consequential proceedings emanating there from;
>
> B. Issue appropriate writ, order or direction to stay the operation and effect of the FIR bearing FIR No.196/2023 dated 30.7.2023 u/s 420, 468, 471, 473, 484, 120-B IPC registered by PS Kasna, Greater Noida, Gautam Budh Nagar, Uttar Pradesh with Sec. 467 IPC and Sec. 7 of the Prevention of Corruption Act having been added subsequently ("Impugned FIR") registered by the Respondent No.1 and all investigations and proceedings emanating there from;
>
> C. Issue appropriate writ, order or direction to quash the Impugned Letter dated 28.07.2023 along with all consequential actions and proceedings emanating therefrom as being illegal and in contempt of the Orders of the Hon'ble Supreme Court."

5. The question which requires to be answered in the above writ petitions would be – Whether when the prosecution complaint filed by the Enforcement Directorate had been quashed by the Supreme Court, would the statements made under Section 50 of the PML Act, 2002 of various witnesses continue to form the basis of F.I.R. which was to be lodged on the basis of the communication passed on to the State under Section 66(2) of the PML Act.

6. On 26.2.2020, the Income Tax Department carried out certain search and seizure operation on the premises owned by the petitioner Anil Tuteja. On 1.3.2020 statements were recorded by the Income Tax Department of various individuals. Thereafter on 11.5.2020, Case No.1183 of 2022 was filed by the Department before the Court of Additional Chief Metropolitan Magistrate, Tees Hajari, New Delhi under sections 276(C), 277, 278, 278E of the Income Tax Act read with sections 120-B, 191, 199, 200 and 204 of Indian Penal Code for the Assessment Year 2020-21. Based on this Income Tax Complaint, the Enforcement Directorate (henceforth called the "ED") which finds its existence because of a notification issued under section 49(3) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the "PML Act, 2002") registered an Enforcement Case Information Report (henceforth called the "ECIR") on 18.11.2022 alleging that a liquor scam in the State of Chhatisgarh had come to light. This was numbered as ECIR/RPZO/11/2022 (hereinafter referred to as "ECIR-11"). In the meantime, on 6.4.2023, the Additional Chief Metropolitan Magistrate returned the income tax complaint for the lack of territorial jurisdiction. This was done by the order dated 6.4.2023 and this was also appealed against by the Income Tax Department. There was since now an

ECIR-11 registered against Anil Tuteja, Yash Tuteja, Smt. Saumya Chaurasia, Anwar Dhebar, Nitesh Purohit, Vikas Aggarwal alias Sabu, Vikas Aggarwal, CA, Mandeep Chawla, Siddharth Singhania and M/s. Lingraj Suppliers Pvt. Ltd., certain accused persons filed various writ petitions before the Supreme Court. Yash Tuteja and Anil Tuteja filed a writ petition under Article 32 of the Constitution of India being Writ Petition No.153 of 2023. Siddharth Singhania filed Writ Petition No.217 of 2023; Anwar Dhebar filed Writ Petition No.208 of 2023 and similarly Arun Pati Tripathi filed Writ Petition No.216 of 2023. When these writ petitions were filed they were connected to each other. When Yash Tuteja and Anil Tuteja had filed their writ petition being Writ Petition No.153 of 2023, the Supreme Court on 28.4.2023 protected them from any coercive action being taken by the ED. This writ petition was directed to be listed on 18.7.2023. The order dated 28.4.2023 passed by the Supreme Court is reproduced here as under :-

> "Issue notice.
>
> Learned ASG appearing for the respondent accept notice.
>
> Counter affidavit be filed within four weeks.
>
> Rejoinder be filed within two weeks, thereafter.
>
> Learned senior counsel for the petitioner(s) submits that the allegation is about offences under the Income Tax Act so far as the predicated offence is concerned and the cognizance has not been taken by the competent Court. At this stage, he only seeks protection so far as any coercive step is concerned and submits that he has already joined the investigation.
>
> No coercive steps be taken against the petitioner(s) till the next date.
>
> List on 18th July, 2023."

7. Thereafter on 18.7.2023, when the writ petition of Yash Tuteja was taken up, by that time all the other writ petitions were connected to the writ petition of Yash Tuteja and on that date the Supreme Court further extended the interim order and had also directed that the respondent-Authorities were to stay their hands off in all manner. The order dated 18.7.2023 is being reproduced here as under :

> "On hearing learned counsel for the parties it transpires that the complaints having been returned, the income tax authorities having taken that to a further Court in appeal and there being any absence of stay, apart from the order already passed of no coercive action, the concerned respondent authorities must stay their hands in all manner. Ordered accordingly.
>
> On our query of learned ASG, we clarify that if the stay is obtained qua that order, it is open to the respondents to move this Court for obtaining appropriate order."

8. Thereafter while the interim orders were pending, on 28.7.2023 the ED purportedly under section 66(2) of the PML Act, 2002 wrote to the Additional Director General of Police, Special Task Force, UP Police, Lucknow, Uttar Pradesh and shared certain information in respect of a company called M/s. Prizm Holography & Security Films Pvt. Ltd., Noida. This communication purportedly sent under section 66(2) of the PML Act, 2002 was

taken cognizance of by the Police and an FIR was lodged by the U.P. Police on 30.7.2023 which gave rise to Case Crime No.196/2023. The FIR was specifically lodged against Arunpati Tripathi, ITS, Special Secretary, Excise; Niranjan Das, IAS, Excise Commissioner; Anil Tuteja, IAS, Vidhu Gupta and Anwar Dhebar. While the FIR was pending on 7.8.2023 the Supreme Court, upon being informed that with regard to the issuing of duplicate holograms an FIR had been lodged which had given rise to Case Crime No.196/2023, had directed the U.P. Police not to take any coercive steps till the next date of listing of the writ petitions. The Supreme Court had, however, not interfered with the investigation. The order dated 7.8.2023 passed by the Supreme Court is being reproduced here as under :-

> "Learned senior counsel for the petitioner contends that the liquor scam is being investigated in file No.ECIR/RPZO/11/2022. He submits that the issue of duplicate holograms which is sought to be raised in the FIR No.0196 dated 30.7.2023 is something which came to the notice of the ED much earlier and it forms a part of the counter affidavit.
>
> It is further submitted that the endeavour is to circumvent the order of this Court dated 18.7.2023.
>
> Learned ASG submits that this is a different offence not connected with the issue of income tax and thus under Section 66(2) PMLA, 2002, the ED was duty bound to bring to the notice of the concerned agency, which is what was done.
>
> On our query as to when these aspects came to the notice of the ED, learned ASG seeks a short accommodation to obtain instructions.
>
> List on 21.8.2023.
>
> The Uttar Pradesh Police may not take any coercive steps till the next date though we are not impeding the investigation."

9. Thereafter on 21.8.2023 when the case was taken up before the Supreme Court then it had only continued the order dated 7.8.2023 till the next date of listing.

10. In the meantime, the ED on 4.7.2023 had already filed its prosecution complaint against 7 persons namely Anwar Dhebar, Arun Pati Tripathi, Trilok Singh Dhillol, Nitesh Purohit, Arvind Singh and M/s. Petrosun Bio Refinery Pvt. Ltd. One more legal entity was roped in and it was known by the name of M/s. Dhillon City Mall Pvt. Ltd. When thereafter the writ petitions of Yash Tuteja, Siddharth Singhania, Anwar Dhebar and Arun Pati Tripathi were finally heard by the Supreme Court, the latter by its judgment and order dated 8.4.2024 disposed of Writ Petition No.153 of 2023 and Writ Petition No.217 of 2023 with no specific order or direction as in both the writ petitions no prosecution complaint had been filed by the ED. So far as the ECIR-11 was concerned viz.-a-viz. Anwar Dhebar and Arun Pati Tripathi, the prosecution complaint pursuant to the ECIR-11 stood quashed. The ground taken by the Supreme Court was that since there was no scheduled offence on the basis of which the ECIR-11 had been filed, the same had to be quashed. For ready reference, paragraph nos.9 and 10 of the judgment and order of the Supreme Court dated 8.4.2024 are being reproduced here as under :-

> "9. Hence, we passed the following order :

(i) Writ Petition (Crl.) Nos.153/2023 and 217/2023 are disposed of;

(ii) The complaint based on ECIR/RPZO/11/2022, as far as the second petitioner (Anwar Dhebar) in Writ Petition (Crl.) No.208/2023 is concerned, is hereby quashed. The writ petition is, accordingly, partly allowed;

(iii) The complaint based on ECIR/RPZO/11/2022, as far as the petitioner (Arun Pati Tripathi) in Writ Petition (Crl.) No.216/2023 is concerned, is hereby quashed. The writ petition is, accordingly, allowed.

(iv) There will be no order as to costs; and

(v) Pending applications, including those seeking impleadment, are disposed of accordingly.

10. We may note that the petitioners in Writ Petition (Crl.) No.153/2023 and the petitioner in Writ Petition (Crl.) No.217/2023 have not been shown as accused in the complaint. Only the second petition in Writ Petition (Crl.) No.208/2023 and the petitioner in Writ Petition No.216/2023 have been shown as accused in the complaint. In the case of those petitioners who are not shown as accused in the complaint, it is unnecessary to entertain the Writ Petitions since the complaint itself is being quashed."

11. The paragraph 12 of the aforesaid judgment dated 8.4.2024 had, however, left it open to the petitioners therein to challenge the FIR dated 30.7.2023 lodged by the State of Uttar Pradesh on the basis of the communication of the ED dated 28.7.2023 and for the petitioners in the writ petitions the benefit of the interim order which was granted to them on 7.8.2023 was continued for a period of three weeks. Resultantly, the Criminal Misc. Writ Petition No.6236 of 2024 (Anil Tuteja vs. Station House Officer & Ors.); Criminal Misc. Writ Petition No.6194 of 2024 (Anwar Dhebar vs. State of U.P. & Ors.); Criminal Misc. Writ Petition No.6195 of 2024 (Arun Pati Tripathi vs. State of U.P. & Ors.) and Criminal Misc. Writ Petition No.7389 of 2024 (Niranjan Das vs. State of U.P. & Ors.) were filed.

12. To make the record straight, we may mention that while the ECIR-11 was pending, an FIR was also lodged in the State of Chhattisgarh on 17.1.2024 and that had given rise to Case Crime No.04/2024 at Chhatisgarh. This FIR was also lodged on the basis of an information of the ED sent on 11.7.2023. A writ petition had been filed, it has been informed by means of the Supplementary Affidavit, which was dismissed on 20.8.2024 by the Chhatisgarh High Court. It has also been informed that against the order dated 20.8.2024 passed by the Chhattisgarh High Court, a Special Leave Petition being SLP No.11790 of 2024 has been filed before the Supreme Court. This SLP is still pending.

13. Sri Siddharth Dave, learned Senior Counsel assisted by Sri Saksham Srivastava and Sri Vinayak Mithal, learned counsel appearing for the petitioners has made the following submissions while challenging the FIR dated 30.7.2023 and the communication of the ED dated 28.7.2023 :-

(i) The ECIR-11 when was initiated, certain statements were recorded under Section 50 of the

PML Act, 2002. When the communication dated 28.07.2023 was sent by the ED for State of Uttar Pradesh on the basis of which the FIR No. 196 of 2023 on 30.07.2023 was lodged, the statements were in existence but thereafter when the prosecution complaint dated 04.07.2023 as was filed by the ED was quashed by the Supreme Court on 08.04.2024 then all the statements made under Section 50 of the PML Act, 2002 got washed away and no reliance thereafter could be placed on those statements and, therefore, the FIR was without any basis.

(ii) Learned counsel for the petitioner thereafter submitted that the statements recorded under Section 50 of the PML Act, 2002 could be used only for the purposes of the proceedings under the PML Act, 2002 itself and that they could not have been used for the purposes of initiating criminal proceedings afresh by the State of Uttar Pradesh. Relying upon a judgment of the Supreme Court in **Prem Prakash vs. Union of India through the Directorate of Enforcement** reported in **2024 SCC OnLine 2270**, learned counsel has submitted that not only the statements recorded under Section 50 of the PML Act, 2002 could not be used for the purposes of the lodging of a separate FIR under the IPC it also could not be used for the purposes of initiating a subsequent ECIR by the ED itself. In this regard, learned counsel for the petitioner relied upon paragraphs 24, 25, 26 and 32 of that judgement. The paragraphs mentioned above are being reproduced here as under :-

"24. Vijay Madanlal Choudhary (supra) though held that the authorities under the PMLA are not police officers, did anticipate a scenario where in a given case, the protection of Section 25 of the Evidence Act may have to be made available to the accused. The Court observed that such situations will have to be examined on a case-to-case basis. We deem it appropriate to extract Para 172 of Vijay Madanlal Choudhary (supra).

"172. In other words, there is stark distinction between the scheme of the NDPS Act dealt with by this court in Tofan Singh (supra) and that in the provisions of the 2002 Act under consideration. Thus, it must follow that the authorities under the 2002 Act are not police officers. Ex-consequenti, the statements recorded by the authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of article 20(3) of the Constitution or for that matter, article 21 being procedure established by law. **In a given case, whether the protection given to the accused who is being prosecuted for the offence of money-laundering, of section 25 of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence."** (Emphasis supplied)

25. This Court in Vijay Madanlal Choudhary (supra) anticipated the myriad situations

that may arise in the recording of the Section 50 statement and discussed the parameters for dealing with them. In Rajaram Jaiswal vs. State of Bihar, AIR 1964 SC 828, a judgment quoted in extenso in Vijay Madanlal Choudhary (supra), this Court observed that the expression "police officer" in Section 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. Further, setting out the test for determining whether an officer is a "police officer" for the purpose of Section 25 of the Evidence Act, this Court in Rajaram Jaiswal (supra) held (quoted from para 165 of Vijay Madanlal Choudhary (supra)

"165(ii) It may well be that a statute confers powers and imposes duties on a public servant, some of which are analogous to those of a police officer. But by the reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed. The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by S. 25 of the Evidence Act. In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a 'police officer' for the purpose of this provision is not the **totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise**. The test for determining whether such a person is a "police officer" for the purpose of S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession. **In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."** (Emphasis supplied)

26. Four decades ago, V.R. Krishna Iyer, J. in his inimitable style, speaking for this Court in Nandini Satpathy Vs P.L. Dani and Another, (1978) 2 SCC 424 observed as under:-

"50. We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. **Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing or prosecutions pending on the amplitude of the immunity. "To be witness against oneself" is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from "tendency to be exposed to a criminal charge". "A criminal charge" covers any criminal charge then under** investigation or trial or which imminently threatens the accused." (Emphasis supplied)

"57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation- not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. **The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion tiring interrogative prolixity, overbearing and intimidatory methods and the like** – not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. **On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3)."** (Emphasis supplied)

32. We have no hesitation in holding that when an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under Section 50 PMLA to the same Investigating Agency **is inadmissible against the maker**. The reason being that the person in custody pursuant to the proceeding

investigated by the same Investigating Agency is not a person who can be considered as one operating with a free mind. **It will be extremely unsafe to render such statements admissible against the maker**, as such a course of action would be contrary to all canons of fair play and justice."

(iii) Learned counsel for the petitioner stated that the statements recorded under Section 50 of the PML Act, 2002 were akin to the admissions made before the Police and, therefore, as per Section 25 of the Evidence Act they could not be used against the petitioners i.e. the persons who had made those statements.

(iv) Learned counsel for the petitioner has submitted that if the FIR is perused, it becomes evident that it was a verbatim reproduction of the communication dated 28.07.2023 and, therefore, it could conveniently be said that it was so registered without any application of mind.

(v) Still further learned counsel for the petitioner submitted that every offence which finds mention in the FIR which was lodged on 30.07.2023 was originating in the State of Chhattisgarh and, therefore, there was no occasion for the State of Uttar Pradesh to have lodged the FIR.

(vi) Learned counsel for the petitioner further stated that during the pendency of the ECIR-11, ED had written to the State of Chhattisgarh on 11.07.2023 for the lodging of the FIR and thereafter information was also sent to the State of Uttar Pradesh on 28.7.2023. As per the learned counsel for the petitioners in all probability when under Section 66(2) of the PML Act, 2002, the State of Chhattisgarh had sat over the information sent by the ED then on 28.07.2023 another information was mala fidely sent with regard to the very same facts to State of Uttar Pradesh on 28.7.2023 and that gave rise to the Case Crime No. 196 of 2023 and this FIR was lodged malafidely on 30.07.2023. Learned counsel for the petitioner, therefore, states that the lodging of the FIR was an absolute result of a malicious act of the ED and also of the State of Uttar Pradesh.

(vii) Learned Senior Counsel Sri Siddharth Dave further submitted that when the entire ECIR and the subsequent prosecution complaint of the ED were set aside, it did not stand to reason that the statements which were taken of the various witnesses under section 50 of the PML Act, 2002 could be used for the lodging of the F.I.R. No. 169/2023. When the foundation itself had been removed, the whole edifice of the building would fall. He, therefore, submitted that such material which was in the possession of the Director of ED was actually of no consequence as the Supreme Court on 8.4.2024 had set aside the prosecution complaint itself. He submitted that when disclosure of information which was now no information at all because of the order of the Supreme Court dated 08.04.2024 then the lodging of the

F.I.R. on that information was an exercise in futility performed by the State of U.P. In this regard, learned Senior Counsel relied upon paragraph nos.107, 111 and 116 of the jugment of the Supreme Court in State of Punjab vs. Davinder Pal Singh Bhullar reported in (2011) 14 SCC 770 which are being reproduced here as under :-

"107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact situation, the legal maxim sublato fundamento cadit opusmeaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

.....

111. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/orders/FIR/investigation stand automatically vitiated and are liable to be declared non est.

.....

116. In view of the above, the appeals succeed and are accordingly allowed. The impugned orders challenged herein are declared to be a nullity and as a consequence, the FIR registered by CBI is also quashed."

(viii) Learned counsel Sri Imran Ullah appearing for the petitioner Niranjan Das in Criminal Misc. Writ Petition No. 7389 of 2024 has adopted the arguments made by the learned counsel for the petitioner in Criminal Misc. Writ Petition No. 6236 of 2024.

(ix) Sri Rajiv Lochan Shukla, learned counsel for the petitioner in Criminal Misc. Writ Petition No.6194 of 2024 (Anwar Debhar vs State of U.P. & Ors.) however, while adopting the arguments of Sri Siddharth Dave, learned Senior Counsel has submitted that a perusal of the FIR would go to show that there was not an iota of allegation against the accused, Anwar Debhar in the entire FIR. Learned counsel for the petitioner further relying upon the judgments of the Supreme Court in **State of Haryana & Ors. vs. Bhajan Lal & Ors**. reported in **AIR 1992 SC 604** submitted that if the FIR did not disclose any cause of action against any particular accused then the FIR could be quashed. He also relied upon the judgment of the Supreme Court in **Lovely Salhotra and Anr. vs. State (NCT) of Delhi & Anr**. reported in **(2018) 12 SCC 391** and submitted that if there were more than one accused persons in a particular FIR and if against any one particular accused, no definite allegation was there from the reading of the FIR then the FIR could be quashed against that particular person.

(x) Sri Shishir Prakash, learned counsel appearing for the petitioner in Criminal Misc. Writ Petition No.6195 of 2024 has submitted that it was wrong on the part of the Police to have said that work was given to the M/s. Prizm Holography and Security Private

Limited illegally as the tender which was allotted to the Prizm Holography was challenged before the Chhattisgarh High Court by another firm M/s UFLEX Ltd. but that writ petition came to be dismissed on 12.9.2019 by the High Court of Chhattisgarh. He also relied upon the judgment of the Supreme Court in **State of Punjab vs. Davinder Pal Singh Bhullar** reported in (2011) 14 SCC 770 and has also specifically relied upon paragraphs 107, 111 and 116 of that judgment which have already been quoted above.

14. Sri P.K. Giri, learned Additional Advocate General assisted by Sri Pankaj Kumar, learned AGA has, however, submitted that a bare perusal of the FIR dated 30.07.2023 discloses a cognizable offence. Relying upon the judgments of the Supreme Court in **Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others, AIR 2021 SC 1918; State of Telangana Vs. Habib Abdullah Jellani, (2017) 2 SCC 779 and Lalita Kumar vs. State of U.P., (2014) 2 SCC 1**, he has submitted that this Court may not interfere with the FIR as definitely a perusal of the FIR showed that a cognizable offence was made out and it was a subject of investigation as to whether the accused persons were to be charge-sheeted or whether no criminal proceedings were to be undergone against them. He submits that the investigation was going on and everything would be subject to it. Learned Additional Advocate General has further relied upon the judgment of Supreme Court in **Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors. reported in 2022 SCC OnLine 929 [AIR 2022 SL (Supp) 1283]** and has submitted that definitely under Section 66(2) of the PML Act, 2002 as and when a cognizable offence was noticed by the ED, it could have always referred the matter to the State of Uttar Pradesh for taking cognizance of it and for the lodging of the FIR under Section 154 of Cr.P.C. Learned Additional Advocate General in fact states that if the State of Uttar Pradesh did not lodge the FIR then it would be failing in its duty as a State. Learned Additional Advocate General further submits that the entire statement which was there on record of the ECIR-11 was definitely on the record of the case and it could always be referred to. He submits that the prosecution complaint which arose out of ECIR-11 was in fact quashed by the Supreme Court on account of the fact that no predicate offence was disclosed and, therefore, he submits that the offences which were to be taken cognizance of by the State and which were definitely found on the record of the case in the form of statements of so many other witnesses then those statements could always be utilized for the purposes of lodging of the FIR. Learned Additional Advocate General further relying upon the case in **Vijay Madanlal Choudhary (Supra)** submitted that the officials under Section 50 of the PML Act, 2002 were not police

officers and, therefore, any statement made on oath in their presence were not such admissions which could not be relied upon during trial as per Section 25 of the Evidence Act. Learned Additional Advocate General still further submits that as per Section 66(2) of PML Act, 2002 if the officials of the ED were of the opinion that on the basis of "**any**" information or on the basis of material in their possession, if the Director or any other official of ED came to know that any law for the time being in force was being contravened then it was the duty of the Director of ED to share that information with the concerned agency for necessary action. Relying upon paragraph 290 of the judgment of Vijay Madanlal Choudhary (Supra), learned Additional Advocate General states that if any incriminating information is there in the possession of the Director of ED then that information should compulsorily be shared with the appropriate authority under Section 66(2) of the PML Act, 2002. The relevant portion of paragraph 290 is being reproduced here as under :

> "290. As a matter of fact, prior to amendment of 2015, the first proviso acted as an impediment for taking such urgent measure even by the authorised officer, who is no less than the rank of Deputy Director. We must hasten to add that the nuanced distinction must be kept in mind that to initiate "prosecution" for offence under Section 3 of the Act registration of scheduled offence is a prerequisite, but for initiating action of "provisional attachment" under Section 5 there need not be a pre-registered criminal case in connection with scheduled offence. This is because the machinery provisions cannot be construed in a manner which would eventually frustrate the proceedings under the 2002 Act. Such dispensation alone can secure the proceeds of crime including prevent and regulate the commission of offence of money-laundering. The authorised officer would, thus, be expected to and, also in a given case, justified in acting with utmost speed to ensure that the proceeds of crime/property is available for being proceeded with appropriately under the 2002 Act so as not to frustrate any proceedings envisaged by the 2002 Act. **In case the scheduled offence is not already registered by the jurisdictional police or complaint filed before the Magistrate, it is open to the authorised officer to still proceed under Section 5 of the 2002 Act whilst contemporaneously sending information to**

**the jurisdictional police under Section 66(2) of the 2002 Act for registering FIR in respect of cognizable offence or report regarding non-cognizable offence and if the jurisdictional police fails to respond appropriately to such information, the authorised officer under the 2002 Act can take recourse to appropriate remedy, as may be permissible in law to ensure that the culprits do not go unpunished and the proceeds of crime are secured and dealt with as per the dispensation provided for in the 2002 Act.** Suffice it to observe that the amendment effected in 2015 in the second proviso has reasonable nexus with the object sought to be achieved by the 2002 Act."

(Emphasis supplied)

15. Learned Additional Advocate General further submitted that under section 66(2) of the PML Act, even if the main ECIR and the prosecution complaint were not in existence, the material which was in possession of the Director and the other officials of the ED and which did not form a scheduled offence, then even that material could have been transmitted to such authority which could take action in pursuance of the material which would be provided by the officials of the ED to such authority. Learned Additional Advocate General submitted that criminal law can be put into motion by just any person and in this regard he refers specifically to paragraph no.6 of the judgment of the Supreme Court in **A.R. Antulay vs. R.S. Nayak reported in (1988) 2 SCC 602**. Still further, learned Additional Advocate General submitted that even if any evidence is obtained improperly, it would not affect its admissibility if it is otherwise relevant. In this regard, he relied upon the judgments of the Supreme Court in **R.M. Malkani vs. State of Maharashtra reported in (1973) 1 SCC 471 and in Magraj Patodia vs. R.K. Birla & Ors. reported in AIR 1971 SC 1295**. He further submitted that identical issues were involved in the controversy before the Chhattisgarh High Court wherein the Chhattisgarh High Court dismissed the writ petitions filed for the quashing of the FIR on 20.8.2024 in the case of Anil Tuteja & Ors. vs. Union of India & Ors. in CRMP No.721 of 2024 (2024-CGHS-31310-DB).

16. Sri Zoheb Hossain, learned counsel assisted by Sri Sikandar Bharat Kochar who appeared for the ED while making his submissions states that it was in the fitness of things that the ED had under section 66(2) of the PML Act, 2002 shared with the State of Uttar Pradesh information which it had on 28.7.2023 for the lodging of the FIR. Learned counsel for the ED has stated that the disclosure of information which was made under section 66(2) was made much before the prosecution complaint by the ED was set aside on 8.4.2024 by the Supreme Court. He further submits that even otherwise if there was an information and the ED felt that it was to be shared with the concerned agency for necessary action then it was essential that the information ought to be shared and that the concerned agency had to take action.

Learned counsel for the ED relied upon paragraph nos.282 and 290 of the judgment of the Supreme Court in Vijay Madanlal Choudhary (supra) which are being reproduced here as under :-

> "282. Be it noted that the authority of the Authorised Officer under the 2002 Act to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process or activity. Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence. It is possible that in a given case after the discovery of huge volume of undisclosed property, **the authorised officer may be advised to send information to the jurisdictional police (under Section 66(2) of the 2002 Act) for registration of a scheduled offence contemporaneously, including for further investigation in a pending case, if any. On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR if it is a cognizable offence or as a non-cognizable offence (NC case), as the case may be**. If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.
>
> 290. As a matter of fact, prior to amendment of 2015, the first proviso acted as an impediment for taking such urgent measure even by the authorised officer, who is no less than the rank of Deputy Director. We must hasten to add that the nuanced distinction must be kept in mind that to initiate "prosecution" for offence under Section 3 of the Act registration of scheduled offence is a prerequisite, but for initiating action of "provisional attachment" under Section 5 there need not be a pre-registered criminal case in connection with scheduled offence. This is because the machinery provisions cannot be construed in a manner which would eventually frustrate the proceedings under the 2002 Act. Such dispensation alone can secure the proceeds of crime including prevent and regulate the commission of offence of money-laundering. The authorised officer would, thus, be expected to and, also in a given case, justified in acting with utmost speed to ensure that the proceeds of crime/property is available for being proceeded with appropriately under the 2002 Act so as not to frustrate any proceedings envisaged by the 2002 Act. **In case the scheduled offence is not already registered by the jurisdictional police or complaint filed before the Magistrate, it is open to the authorised officer to still proceed under Section 5 of**

> **the 2002 Act whilst contemporaneously sending information to the jurisdictional police under Section 66(2) of the 2002 Act for registering FIR in respect of cognizable offence or report regarding non-cognizable offence and if the jurisdictional police fails to respond appropriately to such information, the authorised officer under the 2002 Act can take recourse to appropriate remedy, as may be permissible in law to ensure that the culprits do not go unpunished and the proceeds of crime are secured and dealt with as per the dispensation provided for in the 2002 Act.** Suffice it to observe that the amendment effected in 2015 in the second proviso has reasonable nexus with the object sought to be achieved by the 2002 Act."

17. Learned counsel for the ED, therefore, states that for the ED to disclose the information which it had in its possession was the proper thing to do. To share the information was not just a power that the ED possessed but it was also its duty to do so.

18. Sri Zoheb Hossain, learned counsel for the ED further submitted that the ECIR-11 was never quashed. The Supreme Court by its order dated 8.4.2024 had only quashed the prosecution complaint which was filed by the ED pursuant to the ECIR-11. Learned counsel for the ED relying upon the judgment dated 20.8.2024 passed by the Chhattisgarh High Court submitted that even the counsel for the petitioners at Chhattisgarh had conceded to this fact that the Supreme Court had only quashed the prosecution complaint. Learned counsel for the ED further submitted that the statements recorded under section 50 of the PML Act, 2002 would always continue to remain alive since the ECIR-11 was never quashed. Learned counsel for the ED also adopted the argument of the learned Additional Advocate General that any information anywhere whether it is legally admissible or not under law, could be utilized by the State for the purposes of lodging of the FIR and that was in fact the duty of the State to do so.

19. Sri Zoheb Hossain, learned counsel appearing for the E.D. further submitted that an ECIR is merely an internal document which cannot be quashed and in this regard, he relied upon three judgments of three High Courts namely **Jitendra Nath Patnaik vs. Enforcement Directorate, Bhubaneswar** reported in **CRLMC No. 2891 of 2023 passed by the Orissa High Court at Cuttack dated 02.09.2023, N. Dhanraj Kochar and Ors. vs. Director Directorate of Enforcement and Ors. Reported in 2022 SCC Online Mad 8794 : (2022) 1 LW (Cri) 251 passed by the Madras High Court and Pawan Insaa vs. Directorate of Enforcement, Government of India, Chandigarh Zonal Office, Chandigarh** reported in **CRM-M No. 6378 of 2023** passed by the High Court of Punjab & Haryana at Chandigarh vide order dated 10.04.2024.

20. Learned counsel for the E.D. further relied upon a judgment dated 04.09.2024 passed by the High Court of Punjab and Hariyana at Chadigarh in **M/s IREO Private Limited vs. Union of India and Anr.** which had held in paragraph 3.28 that though the ECIR is not an F.I.R., however, the E.D. which is an Investigating

Agency constituted to investigate the offences of money laundering, can always continue to investigate and in the process as and when it got information and material can inform the jurisdictional Police which, can, in its turn lodge the F.I.R. The Paragraph 3.28 of that judgment is being reproduced here as under :-

> "3.28 Though, the ECIR is not an FIR, however, the ED is an Investigating Agency that has been constituted to investigate the various offences including the offence of money laundering. In these circumstances, after the filing of ECIR in the year 2022, the ED continued to investigate. In that process, it collected information and material by various methods including written communication (Annexure P16). After the collection of the information, the jurisdictional police was informed resulting in the registration of FIR No. 14 dated 12.03.2024. Hence, there is no occasion to either quash or declare that the communication (Annexure P16) is beyond the ED's jurisdiction, as it is not violative of law and the Investigating Agency has acted within the precincts of law, ensuring that all procedures and actions taken during the course of investigation adhered to law."

21. Learned counsel for the E.D. for the similar proposition of law has also relied upon a judgment dated 01.02.2024 passed by the High Court of Punjab and Haryana at Chandigarh in **Angad Singh Makkar vs. Union of India and Ors.** reported in **CRM-M-5228-2024**. The High Court had observed that the E.D. was free to communicate to the Police any information which it had in it's possession. The paragraph 23 of that judgment is being reproduced hereas under :-

> "23. Based on the crimes mentioned in para No. 3 (supra), the Enforcement Directorate was also prosecuting him for proceeds of crime. During such enquiry, the Joint Director of Enforcement Directorate, got to know about commission of other offences and thus he rightly exercised his statutory obligations in accordance with Section 66(2) of PMLA and informed the concerned Superintendent of Police, Gobindpur, Yamuna Nagar at Jagadhri. Neither, such communication sent by the Joint Director of Enforcement Directorate to Superintendent of Police, Yamuna Nagar is a direction nor the said Joint Director had any authority to direct for registration of FIR. Thus, the petitioner's contention that the said communication amounts to direction is misreading of the said communication, which has been reproduced in para 16. The communication is only information and it is the power of concerned investigator/SHO to register FIR if they are satisfied and found offence cognizable, as such, the present petition deserves dismissal even on this prayer and related prayers."

22. Similarly, the learned counsel for the ED has relied upon a judgment dated 28.08.2024 passed by the High Court of Punjab and Haryana at Chandigarh in **Pritpal Singh vs. State of Punjab** reported in **CRM-M-32979-2024**. He also relied

upon a judgment dated 24.11.2023 passed by the High Court of Delhi at New Delhi in **Rajinder Singh Chadha vs. Union of India Ministry of Home Affairs through its Chief Secretary & Anr**. For a similar proposition he has again relied upon a judgment dated 26.02.2024 passed by the High Court of Punjab and Haryana at Chandigarh in Sikandar Singh vs. Directorate of Enforcement and Anr. reported in CRM-M-51250-2023 **(O&M)**. Learned counsel for the ED has also submitted that such admissions which do not amount to confession, can always be used as evidence. He has relied upon a judgment of Supreme Court in **Central Bureau of Investigation vs. V.C. Shukla and Anr.** reported in **(1998) 3 SCC 410.** Since the learned counsel for the ED specifically relied upon paragraph 45 of that judgment, the same is being reproduced hereas under :-

> "45. It is thus seen that only voluntary and direct acknowledgement of guilt is a confession but when a confession falls short of actual admission of guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an "admission" under Section 21. The law in this regard has been clearly and in our considered view correctly explained in Monir's Law of Evidence (New Edn. at pp. 205 and 206), on which Mr Jethmalani relied to bring home his contention that even if the entries are treated as "admission" of the Jains still they cannot be used against Shri Advani. The relevant passage reads as under:
>
> "The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to a Police Officer, or was made at a time when the accused was in custody of a Police Officer. If a statement was made by the accused in the circumstances just mentioned its admissibility will depend upon the determination of the question whether it does not amount to a a confession. If it amounts to a confession, it will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused b person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him. Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance.""

(Emphasis supplied)

23. Learned counsel for the ED has also relied upon two further judgments of the Supreme Court dated 24.01.1964 in **Faddi vs. State of M.P.** reported in **AIR 1964 SC 1850** and a judgment dated 27.08.1971 in **Kanda Padayachi alias Kandaswamy vs. State of Tamil Nadu** reported in **1971 (2) SCC 641**. To bolster his arguments, he relied upon paragraphs 11 and 13 of that judgment and the same are being reproduced hereas under :-

> "11. As held by the Privy Council, a confession has to be a direct acknowledgment of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgment of guilt it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tends to prove his guilt. Such a statement is admission but not confession. Such a definition was brought out by Chandawarkar, J., in R v. Santya Bandhu (supra) by distinguishing a statement giving rise to an inference of guilt and a statement directly admitting the crime in question.
>
> 13. It is true that in Queen-Empress v. Nana, the Bombay High Court, following Stephen's definition of confession, held that a statement suggesting the inference that the prisoner had committed the crime would amount to confession. Such a definition would no longer be accepted in the light of Pakala Narayana Swami's case (supra) and the approval of that decision by this Court in Palvinder Kaur's case (supra). In U. P. v. Deoman Upadhyaya, Shah, J., (as he then was) referred to a confession as a statement made by a person "stating or suggesting the inference that he had committed a crime". From that isolated observation, it is difficult to say whether he widened the definition than the one given by the Privy Council. But he did not include in the expression 'confession' an admission of a fact, however incriminating, which by itself would not be enough to prove the guilt of the crime in question, although it might, together with the other evidence on record, lead to the conclusion of the guilt of the accused person. In a later case of A. Nagesia v. Bihar, Bachawat, J., after referring to Lord Atkin's observations in Pakala Narayana Swami's case (supra) and their approval in Palvinder Kaur's case (supra) defined a confession as "an admission of the offence by a person charged with the offence". It is thus clear that an admission of a fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act."

24. Having heard Sri Siddharth Dave, learned Senior Advocate assisted by Sri Saksham Srivastava and Vinayak Mithal, learned counsel appearing in Criminal Misc. Writ Petition No.6236 of 2024; Sri Rajiv Lochan Shukla learned counsel for the petitioner appearing in Criminal Misc. Writ Petition No.6194 of 2024; Sri Imran Ullah, learned counsel

appearing for the petitioner in Criminal Misc. Writ Petition No.7389 of 2024 and Sri Shishir Prakash, learned counsel appearing in Criminal Misc. Writ Petition No.6195 of 2024, the Court finds that the question which is required to be answered in the instant case is as to whether when a prosecution complaint filed by the ED, which was already quashed, and was no longer in existence, would the information disclosed by the officials of the ED to the authority concerned for taking necessary action continue to form basis of an F.I.R. We are of the view that when on the date when the ED had communicated to the State of Uttar Pradesh on 28.7.2023 (purportedly under section 66(2) of the PML Act, 2002) then on that date the prosecution complaint was very much surviving and, therefore, there was nothing wrong in the communication being sent on 28.7.2023 and in the lodging of the FIR on 30.7.2023. Also if the prosecution complaint had been set aside, there was information available with the ED which had compulsorily to be disclosed to the relevant authority for taking necessary action. In the instant case, if the FIR is perused, then it becomes clear that the Directorate of Enforcement while investigating in a money laundering case under the provisions of PML Act, 2002 had discovered that a company known by the name of M/s. Prizm Holography and Security Films Pvt. Ltd. which was based in Noida was illegally granted a tender to supply holograms to the Excise Department of Chhattisgarh. FIR therefore was registered under sections 420, 468, 471 473, 484 and 120-B IPC. The FIR was lodged by the ED and it had definite information from the statements made by various witnesses under section 50 of the PML Act, 2002 that there was connivance between the company known by the name of M/s. Prizm Holography and Security Films Pvt. Ltd. and senior officials of the State of Chhattisgarh namely Arunpati Tripathi, ITS, Special Secretary, Excise; Niranjan Das, IAS, Excise Commissioner; Anil Tuteja, IAS and a few other individuals and they had modified the tender conditions in such a manner that they were allotted to M/s. Prizm Holography and Security Films Pvt. Ltd., Noida and for doing so they had charged a commission of eight paise per hologram. They had also, as per the FIR, taken a commitment to supply unaccounted duplicate holograms for the sale of illegal country liquor bottles from State run shops in Chhattisgarh and the manufacturing of duplicate holograms at Noida had allowed the sale of spurious liquor in the State. As per the FIR, the sale of unaccounted liquor due to supply of duplicate holograms had resulted in a massive loss of Rs.1200 crores to the State exchequer. On record were also statements of one Sri Deepak Duary which had corroborated the case of the prosecution. The complaints against illegal allotment of hologram tender to M/s. Prizm Holography and Security Films Pvt. Ltd. had all fallen on deaf ears of the accused persons. We are thus of the view that, therefore, the accused government officials and the owner of the firm M/s. Prizm Holography and Security Films Pvt. Ltd. along with Anwar Dhebar were prima facie involved in the case in question. A bare perusal of the FIR does not evidently disclose the complicity in the case of Anwar Dhebar with the crime in question but the counter affidavits of the State definitely reveal such incriminating evidence which confirms the involvement of Anwar Dhebar. The whatsapp chat between Anwar Dhebar and company officials of the firm definitely go to indicate

that there were dubious activities going on in between the accused persons.

25. It is a clear law as has been held by the Supreme Court in **Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra** and Others, AIR 2021 SC 1918; State of Telangana Vs. Habib Abdullah Jellani, (2017) 2 SCC 779 and Lalita Kumar vs. State of U.P., (2014) 2 SCC 1 that if there is a cognizable offence disclosed in the FIR, then no interference is to be made by the Court. In the instant case, so far as the petitioners Anil Tuteja, Arun Pati Tripathi and Niranjan Das are concerned we do find that against them a definite allegation is there in the FIR and they disclose cognizable offences under sections 420, 468, 471 473, 484 and 120-B IPC.

26. The arguments of Sri Rajiv Lochan Shukla were required to be referred to wherein he had stated that no definite role had been assigned to Anwar Dhebar, the petitioner in Criminal Misc. Writ Petition No.6194 of 2024. The argument to begin with impressed us but when we looked into the various investigations which had been undergone after the FIR was lodged on 30.7.2023 and which formed a part of the counter affidavit of the State of Uttar Pradesh, we found that there was a definite complicity of the accused Anwar Dhebar in the crime in question and we cannot shut our eyes to the investigations which had been undergone. As per the judgment of the Supreme Court in State of Haryana & Ors. vs. Bhajan Lal & Ors. (AIR 1992 SC 604), an FIR could be quashed if there was nothing established from the reading of the FIR and from the evidence collected thereafter. In the instant case the evidence gathered after the lodging of the FIR definitely showed complicity of the petitioner Anwar Dhebar with the crime in question. The law with regard to criminal cases stands on a different footing from the law with regard to service law etc. wherein an order cannot be substituted with reasons etc. in the form of subsequent affidavits. In the case at hand, we find that Anwar Dhebar was named in the FIR and during the investigation his complicity in the crime which was a cognizable one cannot be prima facie ruled out, the evidence in regard to which was clearly to be found in the counter affidavit of the State and of the E.D.

27. The answer to the question that whether when the prosecution complaint itself had been done away with, could the FIR stand on the basis of the statements etc. which were recorded under section 50 of the PML Act, 2002, would be that definitely the information which was gathered under section 50 of the PML Act, 2002 was a material in the possession of the Director of ED which had to be transmitted to the concerned agency for necessary action. In the instant case, the State of Uttar Pradesh was the concerned agency which had to look into the fact as to whether the work of manufacturing holograms was given to M/s. Prizm Holography and Security Films Pvt. Ltd. illegally by the accused persons and whether the accused persons for their illegal acts had charged commission. Also, the State of Uttar Pradesh had to see that when duplicate holograms, in connivance of the accused persons were being made and for this purpose the ED had passed on information in its possession to it then it had to further investigate and bring the guilty to book.

28. While holding that the F.I.R. cannot be interfered with in the above

mentioned writ petitions, we would also like to meet the arguments made by the learned counsel for the petitioners when he stated that the statements made under Section 50 of the PML Act, 2002 would not enure to the benefits of the prosecution after the prosecution complaint of the ED was set aside by the Supreme Court by its order dated 08.04.2024. Learned counsel for the petitioners had relied upon the judgment of **Prem Prakash (Supra)** and had submitted that the Supreme Court had held that even though the authorities were not Police under the PML Act, 2002 before whom the witnesses had made their statements, the protection under Section 25 of the Evidence Act were to be given to those witnesses.

29. Having perused the judgment of **Prem Prakash (Supra)** and the judgment of **Vijay Madanlal Choudhary (Supra)**, we are definitely of the view that whether the protection which is to be extended to the accused who is being prosecuted for the offence of money laundering would have a protection of Section 25 of the Evidence Act, depends on a case to case basis. Even if the judgment of the Supreme Court in **Nandani Satpathy vs. P.L. Dani & Anr. (1978) 2 Supreme Court Cases** is seen, we are of the view that the protection under Section 25 of the Evidence Act to an accused is given at the stage when the cases are being tried after they are put to trial. We are of the considered view that when the trial takes place then of course the statements recorded at the time of investigation would not be admissible. When ever the investigating agency has a doubt as to whether the makers of the statement were bringing to light any crime then that information could always be used for initiating an investigation or for the purposes of further forwarding a particular investigation which was already engaging the attention of a particular investigating agency. Thus, it will be very unsafe to accept the arguments of the learned counsel for the petitioners that for all initiation of criminal cases, statements made before the authorities under Section 50 of the PML Act, 2002 could never be used. Such statements which are in the knowledge of an investigating agency can always be used for initiating or for furthering of any pending investigation. It of course need not be used for the purposes of a trial and definitely they could not be categorized as confessions or admissions. Also we are of the view that when the ED had by its communication dated 28.07.2023 informed the State of Uttar Pradesh and which information had resulted in the F.I.R. dated 30.07.2023 then that information was an information under Section 66(2) of the PML Act, 2002 and that information could be always used by the State of Uttar Pradesh. Still further we are of the view that even if the crimes had allegedly been discovered in the State of Chhatisgarh, when it was discovered by ED that duplicate holograms were being made in NOIDA a district of the State of Uttar Pradesh then it was in the fitness of things that the State of Uttar Pradesh was informed about the wrongs which were being done on its territory. Also we are of the view that there was nothing malicious in the fact that when the State of Chhatisgarh did not react to the communication dated 11.07.2023, then the ED had written to the State of Uttar Pradesh on 28.07.2023 about the activities which were being done in the State of Uttar Pradesh. The two communications dated 11.07.2023 and 28.07.2023 were sent in quick succession and, therefore, no mala fide could be attached to this act of the ED.

If the State of Chhatisgarh did not react to the communication dated 11.07.2023 and the State of Uttar Pradesh reacted to the communication dated 11.07.2023 then it could not be said that, because the State of Chhatisgarh did not react to the communication dated 11.07.2023, the communication dated 28.07.2023 was sent to the State of Uttar Pradesh. Also we refer to the argument of Sri Shishir Prakash who had stated that the allotment of tender to M/s. Prizm Holography and Security Private Limited was challenged before the Chhatisgarh High Court and the Chhatisgarh High Court had found that there was nothing illegal in the grant of tender to the M/s. Prizm Holography and Security Private Limited and, therefore, to say that M/s. Prizm Holography and Security Private Limited was wrongly granted the tender, was wrong on the part of the ED. Here, we may state, it was just possible that the High Court had looked into the technicalities of the grant of the tender and thereafter it had held that there was nothing wrong in the grant of the tender. Definitely the High Court of Chhatisgarh had not while looking into the grant of tender looked into the aspect of the fact as to whether bribe had been paid to the accused persons and that whether M/s. Prizm Holography and Security Private Limited was actually manufacturing duplicate holograms which was bringing loss to the exchequer of the State to the tune of Rs. 1,200 crores.

30. Since, we have found that the FIR challenged in Criminal Misc. Writ Petition No.6236 of 2024, Criminal Misc. Writ Petition No.6195 of 2024; Criminal Misc. Writ Petition No.6194 of 2024 and Criminal Misc. Writ Petition No.7389 of 2024 disclose the commission of cognizable offences, we consider it appropriate not to interfere in the writ petitions. However, the petitioners can always avail the remedy before the competent court of law for bail/anticipatory bail as is permissible under law.

31. For the reasons stated above, all the writ petitions accordingly stand dismissed.

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**(2024) 10 ILRA 560**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 63 of 2021

**Sushil Kumar Trivedi ...Appellant**
**Versus**
**Smt. Richa ...Respondent**

**Counsel for the Appellant:**
Manoj Kumar Gupta

**Counsel for the Respondent:**
Abhinav Singh, Lalit Kumar, Ram Vijay Yadav

**Civil Law- The Family Courts Act, 1984 - Section 19(1) - The Hindu Marriage Act, 1955-Section 13-**Appeal against dismissal of matrimonial case seeking dissolution of the marriage under Section 13 of the Hindu Marriage Act- It is true that the parties are living apart for a considerable period of time, but this is not the only test of irretrievable break down of marriage. Divorce is found on fault theory. Husband applied for divorce on the ground of cruelty and desertion. He has not been able to prove either of these grounds-The basic element of desertion is animus deserendi has not been proved in this case-The husband has not proved the instances of cruelty or desertion against his wife supported by consistent and coherent evidence of witnesses and has deposed that he can not live with the wife at any cost. The husband has not been able to substantiate his

allegations of cruelty against his wife. The wife is willing to live with him but it is he who does not want to live with her, therefore, in the facts of this case, plea of irretrievable break down of marriage cannot be accepted. **(Para38 & 39)**

**Appeal dismissed**. (E-15)

**List of Cases cited:**

1. N.G Dastane Vs S. Dastane, (1975) 2 SCC 326

2. Naveen Kohli Vs Neelu Kohli : (2006) 4 SCC 558

3. Samar Ghosh Vs Jaya Ghosh : (2007) SCC 511

4. Joydeep Majumdar Vs Bharti Jaiswal Majumdar : (2021) 3 SCC 742

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. **Prelude**

(1) This appeal under Section 19 (1) of the Family Courts Act, 1984 has been filed by the husband/appellant, assailing the judgment and order dated 03.04.2021 passed by the Additional Principal Judge, Family Court, Court No. 2, Unnao (hereinafter referred to as '***trial Court'***), whereby Matrimonial Case No. 433 of 2016 : *Sushil Kumar Trivedi vs. Smt. Raicha*, seeking to dissolve the marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as '**Act, 1955'**) was dismissed.

**B. Factual Matrix**

(2) The appellant/husband instituted a suit (Matrimonial Case No. 433 of 2016) against the respondent/wife under Section 13 of the Act, 1955 to obtain a decree of divorce mainly on the ground of cruelty, breakdown of their marriage due to mental torture suffered by the appellant and further, that cruelty was of a kind that the appellant could not be expected to live with the respondent.

(3) It was pleaded in the plaint that the appellant, Sushil Kumar Trivedi, got married to Smt Richa (respondent herein) in accordance with Hindu rites and rituals. After marriage, respondent came to matrimonial house and lived peacefully for two months and thereafter behaviour of the respondent towards the appellant and his parents was not good and she started quarreling over every issue. According to the appellant, although he took full care of the respondent as per her comfort and convenience but even then the behaviour of the respondent was always aggressive and cruel towards the appellant. It was also alleged in the plaint that appellant tried his best to convince the respondent, but the respondent used to quarrel and go away to her parents' house. It was also alleged that on 20.05.2012, at 06:00 p.m., the respondent came along with her step mother Usha, her aunt Sunita and Bitto and one woman to the house of the appellant in his absence and they forcefully snatched key of the box from the appellant's mother and took away the gold, silver jewellery worth about one lakh rupees and clothes and also insulted the appellant's mother by using abusive languages and also threatened that if any action was taken against them, they would kill the appellant and after the said incident, the respondent had no relation with the appellant and even she did not want to live with the appellant. On 23.05.2012, the appellant complained about the aforesaid incident to the Superintendent of Police as well as Station House Officer, Gangahat personally and through post.

(4) It was also pleaded that about a month after the aforesaid incident, father of the respondent along with his relative, who was also an Advocate, came to the house of the appellant and requested to forgive the mistake of the respondent/wife and other relatives, who had barged into the house of the appellant. According to the appellant, on account of dignity, he agreed to bring the respondent back to his home and as such brought the respondent to her matrimonial home. It was alleged in the plaint that till February, 2014, the respondent continued to come and go from the house of the appellant but during this period the responded refused to have any conjugal relationship with the appellant.

(5) It was further pleaded in the plaint that in March, 2014, father of the respondent came along with several people to the appellant's house and by insulting the appellant and his parents, took away the respondent along with jewellery worth about Rs.5,00,000/- and the respondent told the appellant that neither she wants to live with him nor she wants to have any kind of marital relationship with the appellant and she would ruin them and would not let him and his family members live happily.

(6) It was also pleaded that appellant filed a suit, bearing Matrimonial Case No. 721 of 2014, under Section 9 of the Act, 1955 for restitution of conjugal rights on 28.04.2014. On 05.07.2016, when the appellant was going to court in the said case, the respondent along with her father and several persons came, armed with illegal arms, accosted the appellant near G.I.C. Inter College at 09:45 a.m. and threatened him and asked him to withdraw the said case. It has been stated by the appellant that fearing for his life on account of this threat, he withdrew the said case on 05.07.2016 and in this backdrop, the appellant instituted Matrimonial Case No. 433 of 2016 on 12.07.2016 seeking divorce on the ground of cruelty and desertion.

(7) In her written statement, the respondent/wife has categorically denied the grounds pleaded by the appellant, and has specifically pleaded that the appellant and his family members were demanding dowry and also tortured and threatened to kill her, in case demand of dowry was not fulfilled. It was also pleaded by the respondent/wife that ever since she came to her matrimonial house, she maintained her marital relationship with the appellant. She kept pleading with folded hands to the appellant and his parents but the appellant and his family members always misbehaved with her and sometimes even locked her in the room and kept her hungry. It has been also stated by the respondent/wife that she did not go to parental home without informing the appellant. On 20.05.2012, her mother did not go to the house of appellant nor her father went to the house of the appellant in March, 2014. She also pleaded that her husband/appellant filed a suit under Section 9 of the Act, 1955, in which she appeared and has also filed an application under Section 24 of the Act, 1955 and thereafter, appellant himself withdrew the aforesaid suit. It was also pleaded that on 26.03.2024, the appellant and his family members assaulted her and by using abusive languages, the appellant threatened her for her life, upon which she informed her parents and then her father, uncle and other relatives came to the house of the appellant, but the appellant and his family members kept her jewellery and threw her out of the house and threatened to kill her if she took any action. She also pleaded that she is a student of L.LB and she is able to think

about her own well being and she does not want to end her married life under any circumstances.

(8) Based upon the pleadings led by the parties, the issues framed by the trial Court are as under:-

> "1- क्या पक्षकारन आपस में विधिक रूप से विवाहित है ?
>
> 2- क्या पक्षकारान के मध्य कथित विवाह विच्छेदन होना उचित है ?
>
> 3- क्या वादी प्रतिवादिनी द्वारा किये गये परित्याग के आधार पर विवाह विच्छेद की आज्ञप्ति पाने की अधिकारी है?"

(9) The parties led evidence before the Trial Court. The appellant examined himself as P.W.1 and his mother, namely, Smt. Shyma Trivedi as P.W.2. Apart from it, the appellant (P.W.1) had filed documentary evidence i.e. a copy of the application sent by the appellant to Station House Officer, Gangaghat, a copy of the application sent by the appellant to the Superintendent of Police, Unnao and a copy of the registry receipt (marked as list 16Ga). The respondent examined herself as D.W.1. From the side of the respondent (D.W.1), no documentary evidence was filed.

(10) By the impugned judgment and order dated 03.04.2021, the trial Court, after appraising both, oral as well as documentary evidence, decided the issues framed in the suits as under :-

| Issue No. | Issues | Findings of the trial Court |
|---|---|---|
| 1. | क्या पक्षकारन आपस में विधिक रूप से विवाहित है ? | Yes |
| 2. | क्या पक्षकारान के मध्य कथित विवाह विच्छेदन होना उचित है ? | Issue nos. 2 and 3 were decided together in the negative and in favour of the respondent/wife. |
| 3. | क्या वादी प्रतिवादिनी द्वारा किये गये परित्याग के आधार पर विवाह विच्छेद की आज्ञप्ति पाने की अधिकारी है? | |

(11) The trial Court thus dismissed the suit filed by the appellant under Section 13 of the Act vide judgment and decree dated 03.04.2021. It is this judgment and decree dated 03.04.2021, which has been assailed in the above-captioned appeal.

## C. Points of Determination

(12) Based upon the pleadings, evidence on record and the impugned judgment passed by the trial Court, the following point for determination arises before us in this appeal:-

> "Whether the findings of the Family Court regarding issues no. 2 and 3 especially regarding the plea of cruelty and desertion as allegations for divorce, are perverse and unsustainable thereby rendering the impugned judgment unsustainable ?"

## D. Discussion & Analysis

(13) We have heard Shri Manoj Kumar Gupta, learned Counsel representing the appellant and Ms. Lalit Kumari, learned Counsel representing the respondent and perused the pleadings of the parties, the evidence led by them and the impugned judgment.

(14) The main plank of learned Counsel for the appellant submission was :-

i. that matrimonial life lasted only for few months and the couple have been living separately since 28.04.2014 and had deserted him. After all these years, there is no chance whatsoever of their coming together;

ii. that the respondent/wife had caused cruelty by instituting a series of complaints against the appellant viz. (a) a complaint against the appellant, his father, mother and her sister on 29.07.2016, which is pending; (b) on 29.07.2016, Case No. 418 of 2016 under Section 125 Cr.P.C. before the Court of Chief Judicial Magistrate, Unnao which was decided on 03.04.2022, whereby the appellant was directed to pay Rs.2500/- per month as maintenance since the date of filing; (c) on 29.07.2016, a case under Section 20/21 of Domestic Violence Act against the appellant, his parents and his sister, which is pending.

iii. that by filing the aforesaid cases, mental peace and reputation of the appellant and his family members has been irreparably damaged;

iv. that respondent's cruel state of mind, had exhibited a behaviour of such a nature that it amounted to treating the appellant with cruelty, rendering the marriage open to grant of a decree of divorce in terms of the grounds specified under Section 13 of the Act;

v. that the findings of the trial Court that the behaviour of the respondent constituting grounds of cruelty, had not been proved, were perverse and contrary to the weight of the evidence on record.

(15) Placing reliance upon the judgment of the Apex Court in **Naveen Kohli Vs. Neelu Kohli** : (2006) 4 SCC 558, **Samar Ghosh Vs. Jaya Ghosh** : (2007) SCC 511 and **Joydeep Majumdar Vs. Bharti Jaiswal Majumdar** : (2021) 3 SCC 742, learned Counsel for the appellant submitted that findings recorded by the trial Court on the ground of cruelty while adjudicating issue nos. 2 and 3 are perverse and are liable to be set-aside. He further submitted that parties have been living apart since March 2014. During this period, they never met each other which indicates that their marriage has broken down irretrievably. Learned counsel, therefore, urges the Court to put their relationship to end by granting divorce.

(16) Replying to the contentions raised by the appellant/husband, learned Counsel for the respondent/wife has argued that the respondent wants to resume her matrimonial life with the appellant and the same was also pleaded in her written statement filed by her in the trial Court. According to the learned Counsel, the respondent had filed complaints only to get her legal rights as married wife of the appellant, therefore, these complaints filed by the wife/ respondent ought to be treated/understood as efforts being made by the wife to preserve her marital relationship and not as an act of cruelty. Moreso, mere filing of criminal cases against the appellant-husband would not constitute cruelty. According to the learned Counsel, P.W.1/appellant himself had stated before the trial Court as well as in the mediation proceedings between the parties in the trial Court that the appellant would never bring home the respondent, whereas in the

written statement, specific plea was taken by the respondent that she wants to live with the appellant, therefore, the findings recorded by the trial Court are just and proper and do not require any interference.

(17) Learned Counsel for the respondent/wife has further submitted that the appellant/husband compelled his wife/ respondent to leave her matrimonial home who is now trying to take advantage of his own wrong. It is submitted that if the respondent really intended to terminate the relationship, she would not have stated in her deposition that she wants to live with the appellant/husband. According to the learned counsel, the respondent is still willing to live with her husband. According to the learned Counsel, neither cruelty nor desertion has been proved against the respondent/wife and moreover, the theory of irretrievable break down of marriage does not apply to this case as from the facts and circumstances of the case it cannot be established that their marriage has become dead. Learned counsel, therefore, urges the court for dismissal of the appeal.

(18) To consider the rival arguments and in order to answer the points for determination, it will be apposite to quote relevant provisions of Section 13 of the Hindu Marriage Act, 1955, which set out grounds for divorce :-

> "**13. Divorce**.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—
>
> (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
>
> (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
>
> (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
>
> (ii) has ceased to be a Hindu by conversion to another religion; or
>
> (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> Explanation.—In this clause,—
>
> (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
>
> (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub—normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or
>
> (iv) * * * * *

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

(viii) ***

(ix) ***

Explanation.—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has

repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)."

(19) The plaint for dissolution of marriage in the present case is restricted to two grounds referable to Section 13(1)(i-a) and under Section 13(1) (i-b) of the Act i.e. cruelty and desertion.

(20) The specific pleadings alleging cruelty on the part of the wife are in paragraphs 3 to 9 of the plaint, but they have been specifically denied by the respondent in the written statement. Pleadings relevant to the ground of desertion are contended in paras 5, 6, 7 of the plaint.

(21) At this juncture, it would be apt to mention that Clause (i-a) of sub section (1) of section 13 of the Act, 1955 declares that a decree of divorce may be granted by a court on the ground that after solemnization of marriage, the opposite party has treated the petitioner with cruelty subject to the State amendments to Section 13 (1) (i-a) in this regard. Section 13(1)(ib) of the Act deals with desertion.

(22) To prove his case made in the plaint, the appellant has examined himself as P.W.1. He was also cross-examined. It has come in his deposition that the defendant/respondent is his wife and she wants to live with him, but he (appellant) himself did not want to keep her (respondent) and his wife is residing at the address mentioned in the plaint. P.W.1 has further stated that he did not want to take back his wife (respondent) at any cost. P.W.1 has stated on one hand that he went to the house of his wife (respondent) alone but he did not remember the date on which he went to the house of respondent and on the other hand, he has stated that he did not go to see off his wife (respondent). He has further stated that he did not reveal anything about him and his wife to any of his relatives. He denied that he has thrown his wife out of the house by beating her. He has reiterated the fact that in the case of Section 9 of the Act, 1955, his wife had threatened and forced him to withdraw the case, but he has admitted that he did not report it to police but had told it orally in the Court.

(23) In support of his case, appellant/P.W.1 has also examined his mother as P.W.2, who, in his examination-in-chief, also reiterated the version of the plaint. She was also extensively cross-examined and in her cross-examination, she has also deposed that she did not want to take back respondent at all nor did she want to keep her. P.W.2 has also stated that respondent did not want to get divorced.

(24) One fact is clear from the aforesaid testimony of appellant/P.W.1 and his mother/P.W.2 that the plaintiff/appellant (P.W.1) and his mother (P.W.2) themselves do not want to keep the respondent as both of them in their testimonies have clearly stated that they would not keep the defendant/respondent at any cost. Moreso, the record also reveals that matrimonial dispute between the appellant and respondent was not only referred to the mediation but even the trial Court attempted to bring about a settlement but the efforts could not succeed. The Mediator, after counseling the parties, has

submitted a report (marked as Paper No. 22-Ka) before the trial Court, wherein it was specifically mentioned that the appellant does not want to keep her wife in any way and further the appellant was not ready to listen or accept any opinion nor did he want to accept anything and as such, there does not seem to be any possibility of reconciliation between the parties.

(25) D.W.1/respondent, while reiterating the version of her written statement in her testimony, has deposed before the trial Court that her husband/appellant herein had filed a case for restitution of conjugal rights but he himself withdrew the same and out of the wedlock no issue was borne.

(26) The record reveals that immediately after two years of marriage, litigation between the parties started. On one hand, the appellant had filed a case under Section 9 of the Act, 1955 for restitution of conjugal rights, whereas on the other, the appellant had filed three cases, (i) under Section 125 of the Act, 1955, which was decided in her favour; and (ii) under the provisions of Domestic Violence Act and (iii) under the provisions of Dowry Prohibition Act against the appellant, which are pending before the Court. The appellant had also not brought on record before the trial Court the decision of the case filed by him under Section 9 of the Act, 1955.

(27) Thus, taking into consideration the aforesaid facts, particularly the testimonies of P.W.1, P.W.2 and D.W.2 as also the fact that the appellant did not bring on record before the trial Court the decision of the case filed by him under Section 9 of the Act, 1955, we are of the opinion that the ground pleaded by the appellant that his wife/respondent has deserted him, is not proved as P.W.1 and his mother P.W.2 have categorically deposed before the trial Court that they did not want to keep the respondent at any cost. We also find that the appellant has failed to prove the allegations pleaded by him in the plaint as regards reasons for withdrawal of the case filed by him under Section 9 of the Act, 1955 Thus, the ground of desertion pleaded by the appellant has no substance and we are in full agreement with the findings recorded by the trial Court on the ground of desertion.

(28) Now, the other issue pleaded by the appellant is that the respondent has treated the appellant with cruelty. In this regard, the appellant has pleaded in the plaint that the defendant/ respondent used to insult him and his parents before the marriage, however, he tried his best to convince her; a dispute arose just after two months of marriage; once due to the efforts of the relatives, a settlement was reached between them and he brought his wife/respondent to home; till February, 2014, his wife/ defendant lived reluctantly in his house and refused to have marital relationship; in March, 2014, the father-in-law took away the respondent-wife with jewellery worth Rs.5,00,000/- and threatened him that the defendant would not live a happy married life while living with him. The defendant/wife had refuted the aforesaid allegations made in the plaint.

(29) It is well-settled that the expression ‘cruelty’ includes both (i) physical cruelty; and (ii) mental cruelty. The onus was on the plaintiff/appellant to prove cruel treatment by the defendant/ respondent. Appellant/P.W.1 has stated that his wife/ respondent herein remained faithful for three months of marriage but

after that nature of his wife became aggressive. His statement shows that there was a dispute after two months of marriage. In para-5 of the affidavit filed by the appellant, he has stated that on 20.05.2012, at about 06:00 p.m., his wife along with step mother Usha, aunt Sunita and Bitto and another woman came to his house in his absence and snatched away the key of box from his mother, took gold, silver jewellery worth of Rs.1,00,000/- and clothes from almirah and also used abusive languages against his mother and threatened his mother that if report be made, then she and her son would be killed. It was also pleaded that his wife told his mother that she had no concern with her son nor she would live with him. It was stated by the appellant/P.W.1 that the aforesaid incident was reported by him to the Superintendent of Police and Station House Officer, Gangaghat personally and through post. The mother of the appellant was also examined as P.W.2, wherein she has reiterated aforesaid averments in para-5 of her affidavit.

(30) Both witnesses i.e. P.W.1 and P.W.2 have stated that the incident dated 20.05.2012 was reported to the police through post. In this regard, copy of receipt of registered post was filed by the appellant as list 16-Ga. The evidence of P.W.1 and P.W.2 do not show that the appellant himself went personally to report the incident to the police but it seems that the appellant had made a report of the incident to the police through post and only formally report the police about the incident. This shows that the appellant was not serious about the lodging the complaint of the incident as if the police did not take any action on his report, the appellant did nothing after that and kept silent as there is nothing on record to show that the Appellant has taken any further remedial steps regarding the said incident.

(31) The evidence of P.W.1 and P.W.2 shows that after some time, on the intervention of the relatives, a settlement between the appellant and respondent was arrived and the appellant took back the respondent to his home and thereafter respondent lived along with the appellant at his house till February, 2014, thus, apparently any cruelty extended by the respondent/wife to the appellant prior to it appears to have been condoned as it is the own admission of the appellant that after the said incident, the father and other relatives of the respondent/wife came to his house and sought forgiveness and admittedly, the appellant/ husband was magnanimous to forgive the respondent/wife and they both started living a happy matrimonial home after the said incident. At this stage, it would be apt to mention section 23 of the Hindu Marriage Act, wherein section 23 (b) inter alia states:

> "(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty,"
>
> From a plain reading of Section 23(b) of the Act, it is clear that if a party wants a decree of divorce on the ground of cruelty, he is not only required to prove the facts of cruelty, but is also required to show that he has not in any manner condoned the alleged

cruelty of the respondent. Further, even if the respondent/wife has not pleaded in her defence about the said condonation, as is not to be found in the pleading of the respondent/wife, this Court is reminded of an observation of a 3-Judges bench of the Hon'ble Supreme Court in **N.G Dastane Vs. S. Dastane**, (1975) 2 SCC 326, to quote;

> *"54*
>
> *……Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of Section 23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had cordoned the cruelty.*
>
> *55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of accrual act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and there by frustrate the benign purpose of marriage laws".*

(32) Thus, as far as the case of the appellant is concerned, although he had pleaded instances of cruelty before the incident of 20.05.2012, however, apparently as observed by this Court the same had been condoned in February, 2014 as is admitted by the appellant that he forgave the respondent/wife and both started living in the matrimonial home, thus, any incident of cruelty as alleged

prior to February, 2014 cannot be considered.

(33) Further, the record reveals that the appellant has not stated clearly as to how and in what manner the respondent behaved cruelly towards him till February, 2014 and his family. A conjoint reading of the testimonies of P.W.1 and P.W.2 reveals that the plaintiff/appellant has failed to prove the factum of cruelty during the period she returned back to her matrimonial home after the incident of 20.05.2012 till February, 2014, which had allegedly caused humiliation to the appellant and his family members, referable to section 13(1)(ia) of the Act, 1955 as applicable in the State of U.P. This, of course, is apart from the fact that he admitted to have condoned such acts in February, 2014. Thus, we are in agreement with the finding of the trial Court that the plaintiff/appellant has failed to prove the ground of cruelty, which alleged is said to be perpetrated by the respondent/wife upon him.

(34) As regards the case of **Naveen Kohli (Supra)** relied upon by the appellant to claim irretrievable break down of marriage, husband Naveen Kohli sought divorce against his wife Neelu Kohli, which was dismissed by the Family Court. Appeal of the wife was allowed by the High Court and divorce granted by the Family Court was dismissed. Appellant husband then came to the Supreme Court. In the said case, the husband alleged in his divorce petition that his wife was a bad tempered woman and she was of rude behaviour and after marriage she started quarrelling and misbehaving with her husband and parents. As a result, the husband and his parents left their ancestral house and started living in a rented house. In the said case, it was also alleged by the husband that he found his wife indulging in an indecent manner in a party and she was also found in a compromising position with another man. The wife also showed extreme cruelty against her husband by lodging series of criminal cases under various sections of IPC against her husband. It was proved by the husband that she lodged at least 10 criminal cases against him. Moreover, she also opposed the bail application moved by her husband and in one case in which final report was filed for lack of evidence, she even lodged a protest petition. The Apex Court observed that conduct of the wife clearly demonstrates her deep and intense feeling of revenge against her husband and the Apex Court held as under :-

> *"83...From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again."*

(35) In this factual context, the Apex Court granted divorce in favour of the husband Naveen Kohli by observing as under :-

> *"86.In view of the fact that the parties have been living separately for more than 10 years*

*and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond."*

(36) In the case of **Samar Ghosh (supra),** the appellant/husband Samar Ghosh and his wife Jaya Ghosh were both IAS officers. The factual context reveals that they were in marital tie for as long as 22 years. After solemnization of their marriage on 13.12.1984, they started living separately from 27.08.1990. The wife was a divorcee who had a daughter from her first marriage. The daughter lived with her because custody of the daughter was given to her while she obtained a decree of divorce against her first husband who was also an IAS officer. According to the appellant/husband right from the beginning of their marriage, his wife imposed rationing in emotions in the area of love, affection, future planning and normal human relation. According to the appellant, she also declared that she would not have any child from her marriage with the appellant and it was her firm decision. As a result of her stubborn attitude serious problems developed between the couple right from the beginning of their marriage which kept growing. The wife was contemplating divorce and her daughter also told the appellant that her mother had decided to divorce him. Ultimately, from 27.08.1990, she started living separately. In this factual backdrop, the appellant husband filed a suit for grant of divorce in which the wife pleaded that her husband was guided by his relatives who were interfering in their family affairs. Ultimately, Addl. District Judge, Alipur, granted divorce on the ground of cruelty. In the appeal filed by the wife, High Court reversed the judgment on the ground that the husband could not prove cruelty. The Apex Court on consideration of the cumulative facts and circumstances of the case, granted divorce in favour of the appellant husband observing as under :-

*"102. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.".*

(37) In the case of Joydeep Majumdar (supra), defamatory complaints had been made by wife to the superior officers and the complaint so made by the wife was held to have affected the career progress of the husband, the Hon'ble Supreme Court held that it amounted to 'mental cruelty' as the husband had suffered adverse consequences, in his life and

career, on account of allegations, made by wife. The Family Court, had granted divorce to the husband, on the ground of cruelty. However, the High Court had reversed the finding of the Family Court. The Hon'ble Supreme Court, while deciding the matter, referred to another judgment passed in Samar Ghosh vs. Jaya Ghosh (supra), wherein, it was observed that in order to make out a case of mental cruelty, no uniform standard can be laid down and each case will have to be decided, on its own facts. Further, in Joydeep Majumdar's case (supra), it was observed as herein given:-

> *"11. The materials in the present case reveal that the respondent had made several defamatory complaints to the appellant's superiors in the Army for which, a Court of inquiry was held by the Army authorities against the appellant. Primarily for those, the appellant's career progress got affected. The Respondent was also making complaints to other authorities, such as, the State Commission for Women and has posted defamatory materials on other platforms. The net outcome of above is that the appellant's career and reputation had suffered.*
>
> *12. When the appellant has suffered adverse consequences in his life and career on account of the allegations made by the respondent, the legal consequences must follow and those cannot be prevented only because, no Court has determined that the allegations were false. The High Court however felt that without any definite finding on the credibility of the wife's allegation, the wronged spouse would be disentitled to relief. This is not found to be the correct way to deal with the issue.*
>
> *13. Proceeding with the above understanding, the question which requires to be answered here is whether the conduct of the respondent would fall within the realm of mental cruelty. Here the allegations are levelled by a highly educated spouse and they do have the propensity to irreparably damage the character and reputation of the appellant. When the reputation of the spouse is sullied amongst his colleagues, his superiors and the society at large, it would be difficult to expect condonation of such conduct by the affected party."*

(38) The facts of the case before us are very different from the above mentioned laws and the observations their do not apply to this case. In the case of Naveen Kohli(supra), the Apex Court has held that except in the cases when the marriage is found totally dead, it would be appropriate for the Courts and all concerned to maintain the marriage status as far as, as long as possible and whenever possible. In the case of Samar Ghosh (supra), the Apex Court after analysis and scrutiny of its past judgments on the issue, laid down certain decisions on the basis of which the allegations of mental cruelty can be decided. In Joydeep Majumdar (supra), the Apex Court has observed that wronged party cannot be expected to continue with the matrimonial relationship and there is enough justification for him to seek separation. We are of the considered view that none of these tests is satisfied in the given case. It is true that the parties are

living apart for a considerable period of time, but this is not the only test of irretrievable break down of marriage. Divorce is found on fault theory. Husband applied for divorce on the ground of cruelty and desertion. He has not been able to prove either of these grounds. We have already discussed that the basic element of desertion is animus deserendi which has not been proved in this case. With regard to cruelty, it is seen that the respondent/wife has pointed out that she is willing to live with her husband, whereas the appellant/husband has not proved the instances of cruelty or desertion against his wife supported by consistent and coherent evidence of witnesses and has deposed that he can not live with the respondent at any cost. The husband has not been able to substantiate his allegations of cruelty against his wife. The wife is willing to live with him but it is he who does not want to live with her, therefore, in the facts of this case, plea of irretrievable break down of marriage cannot be accepted.

## E. Conclusion

(39) Looking to the evidence on record, the only conclusion that we can arrive at is, that there is no ground made out by the appellant in terms of Section 13 (1)(i-a) and Section 13(1)(i-b) for seeking a decree of dissolution of marriage. The judgment of the trial Court has considered all the evidence to which we have made a reference and has correctly arrived at its finding, rejecting both grounds for seeking divorce. We are in complete agreement with the findings of fact arrived at by the Trial Court, which are in consonance with the evidence on record. There is no perversity or illegality in any of the findings arrived at by the trial Court in passing the impugned judgment. The point for determination formulated by us is answered in the negative.

(40) For the reasons stated above, we hereby **dismiss** the present appeal with no order as to costs.

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**(2024) 10 ILRA 574**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.10.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 439 of 2009

**Rajvir Singh ...Appellant**
**Versus**
**Randhir Singh ...Respondent**

**Counsel for the Appellant:**
M.K. Gupta, M.K. Upadhyay, Pradeep K Bhardwaj, R.D. Tiwari, Satendra Kumar Singh, Shashwat Kishore Chaturve, Suresh Chandra Varma

**Counsel for the Respondent:**
A.K. Mehrotra, Nishant Mehrotra, Pranjal Mehrotra, Swetashwa Agarwal

**A. Civil Law - Registration Act, 1908 - Section 58 - Indian Evidence Act, 1872 - Sections 68, 91 & 92 – Sale deed - Registered Document - Registered document carries with it strong presumption about its execution and contents, however the presumption is rebuttable. In order to rebut such presumption, the parties seeking to dislodge the validity of the transaction covered by registered document has to lead a strong evidence. Initial burden to establish undue execution of the document is upon a person, who challenges the same and it is only after the said initial burden is discharged, onus would shift upon the other side, which would be seen during the course of evaluation of evidence (Para 31)**

**B. Transfer of Property Act,1882 - Section 54 - Suit for Cancellation of Sale Deed - Allegation of fraud - Burden of proof - Limitation - Limitation Act, 1963 - Section 17 - Registration Act, 1908 - Section 58 - Presumption under Registration Act. Suit for cancellation of sale deed filed after three years and four months of its execution held to be barred by limitation, as the plaintiff's plea of discovering the alleged fraud belatedly was unsubstantiated. Trial court rightly disbelieved the plaintiff's version that he lost consciousness after consuming cold drink. Comparison of signatures and the endorsement by the Sub-Registrar, confirming receipt of full sale consideration and due understanding by the executant, attracted a strong presumption u/s 58, 59, and 60 of the Registration Act, 1908, further corroborated by oral testimony and the recitals in the deed. Sale deed, recording advance payment of full consideration, amounted to a concluded sale u/s 54 of the Transfer of Property Act, 1882, leaving no infirmity in the transaction. In absence of credible proof of delayed knowledge of the sale, S. 17 of the Limitation Act, 1963 was held inapplicable (Para 32)**

**Dismissed.** (E-5)

**List of Cases cited:**

(1) Chacko & anr.Vs Mahadevan, 2008 ACJ 13

(2) Karan Singh (dead) Through LRs Vs Deputy Director of Consolidation, Aligarh & ors., 2003 (94) RD 382

(3) Devendra Singh & ors. Vs Deputy Director of Consolidation, Aligarh & anr., 2003 (94) RD 70

(4) Kewal Krishna Vs Rajesh Kumar & ors. etc., 2022 SCCR 154

(5) Ved Singh Vs Vinood Kumar, 1996 ALJ 1888

(6) Ishwar Dass Jain (Dead) Through Lrs Vs Sohan Lal (Dead) by LRs, 2000(1) SCC 434

(7) Iqbal Ahmad Vs Smt. Naimul, 2004 SCC OnLine All 117

(8) Jeet Kaur Vs Mishri Lal, 2023 SCC OnLine All 2704

(9) Dhiraj Singh Vs Sripal Singh & anr., 2009 SCC OnLine All 1208

(10) R.V.E. Venkatachala Gounder Vs Arulmigu Viswesaraswami & V.P. Temple & ors., 2003 (8) SCC 752

(11) M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) Vs Mahant Suresh Das & anr., 2020 (1) SCC 1

(Delivered by Hon'ble Kshitij Shailendra, J.)

## THE APPEAL

1. This is plaintiff's second appeal assailing concurrent judgments, whereby his suit for cancellation of registered sale deed dated 24.03.2004 has been dismissed and civil appeal arising therefrom has also failed.

## PLAINT CASE

2. The plaintiff and defendant, who are real brothers, were owners to the extent of 1/3rd share each in agricultural land covered by Gata No. 1231/1 measuring 0.6930 hectares situated at Village Sikandrabad Dehat, Pargana and Tehsil Sikandrabad, District Bulandshahr. Remaining 1/3rd share was that of third brother, namely, Jai Singh. When, on 01.08.2007, plaintiff felt need of Khatauni, on obtaining copy thereof, he came to know that his name was expunged from the records and in its place, the defendant's name was recorded. Certified copy of the sale deed was applied for and obtained on 01.08.2007 itself, on perusal whereof the

plaintiff came to know about execution of a sale deed dated 24.03.2004. As regards the date, it is stated that on 24.03.2004, the plaintiff, on account of some personal work, had gone to Sikandrabad where he met his elder brother (defendant) alongwith Jogendra Singh and Veeru. The defendant offered the plaintiff with Coca-cola and having drunken the same, the plaintiff fell in the state of inebriation and tipsiness and his brain stopped working. He gained consciousness on the next day and did not remember anything about 24.03.2004. The sale deed was alleged to have been executed as a result of deceit and alleging that the defendant did not pay sum of Rs. 2,00,000/- (rupees two lacs) as alleged sale consideration; sale deed was got executed in the state of plaintiff being under intoxication; it was not as per his free will; witness Veeru is related to the defendant and the other witness too being under influence of the defendant, all had colluded; plaintiff being an issueless person, had executed a registered Will dated 16.12.2003 in favour of defendant's sons and, therefore, there was no occasion for executing the sale deed.

DEFENSE IN WRITTEN STATEMENT

3. The written statement admitted the shares as described in the plaint, but the sale deed was defended as having been duly executed without any coercion and after making payment of Rs.2,00,000/- (rupees two lacs) as sale consideration. The incident of 24.03.2004 as described by the plaintiff, particularly the plea of intoxication etc., was denied, and it was alleged that the plaintiff had taken loan towards business of truck and he being in need of money, sold the property to the defendant, discharged his financial liability and also got him medically treated.

TRIAL PROCEEDINGS AND THE DECISION

4. The plaintiff appeared as PW-1 with no other witness, whereas Jogendra Singh and Veeru, witnesses to the disputed sale deed, appeared as DW-2 and DW-3 with the defendant as DW-1. The trial court, after discussing oral and documentary evidence, dismissed the suit with cost by judgment and order dated 30.05.2008. It discussed oral testimony of PW-1 that he was working in P.A.C. and left the job in 1969 and was also engaged in truck business. As regards plea of intoxication, the trial court observed that if the incident as alleged was correct, the plaintiff, under natural circumstances, would have asked his defendant-brother about the incident as, according to him, he gained his consciousness next day. The offer of Coca-Cola was shown to have been made at the shop of one Ghanshyam from whom also no enquiry was made and the plaint was silent about it. The trial court also recorded that the plaintiff had signed the sale deed on 24.03.2004 and, therefore, if, according to him, after intake of Coca-cola his condition had become so pity that he was not even able to move properly and that he was not in his senses in the office of Sub-Registrar, it was wholly unnatural that he could put his signatures on the sale deed. The trial court compared the signatures of the plaintiff on the order sheet, plaint as well as in the sale deed and found the same as normal. It also observed that initially the plaintiff executed a Will dated 05.08.1997 in favour of sons of his another brother Jai Singh and after a period of six years, he executed another Will dated 16.12.2003 in favour of sons of defendant-Randhir Singh and had admitted in his statement that some time ago he had executed a sale deed in favour of one Poonam Sharma and also instituted suit for its cancellation.

THE FIRST APPELLATE COURT'S JUDGMENT

5. Affirming the trial court's judgment, the first appellate court dismissed the Civil Appeal No. 173 of 2008 on 07.02.2009. It also analysed the truth in the plaintiff's version in relation to the incident dated 24.03.2004 i.e. intoxication through cold drink resulting into fraudulent execution of sale deed and recorded various findings inter-alia that Ghanshyam on whose shop cold drink was allegedly given to the plaintiff, being the most important witness, had not been produced.

LEARNED COUNSEL HEARD

6. Heard Mr. Shashi Nandan, learned Senior Advocate assisted by Ms. Shreya Gupta for the plaintiff-appellant and Mr. Ashish Kumar Singh, leaned Advocate holding brief of Mr. Swetashwa Agarwal assisted by Mr. Raghav Arora for the defendant respondent.

ADMISSION ORDER IN THE INSTANT APPEAL

7. This second appeal was admitted by order dated 22.05.2009 on two questions of law. Later on, by another order dated 17.07.2019, another question of law was framed and, consequently, the second appeal was heard on the following three questions of law:

> "(a) Whether, both the courts below have erred in applying the provisions of Section 54 of the Transfer of Property Act to the present case inasmuch as the sale deed itself clearly recorded that the entire sale consideration has been paid in advance and there was no question of any payment or part payment of sale consideration after registration of sale deed?
>
> (b) Whether, the sale deed dated 24.03.2004 is a result of fraud and undue influence and view of the courts below to the contrary is not sustainable in law?
>
> (c) Whether the trial court was justified in its finding that the suit is barred by limitation despite the fact that the suit was based on the allegation of fraud committed by the defendant and thus the provisions of Section 17 of the Limitation Act would apply?"

CONTENTION OF APPELLANT

8. Shri Shashi Nandan, learned Senior Advocate has vehemently argued that the plaintiff came to know about fraudulent execution of sale deed in August, 2007 and instituted the suit in question. According to him, there was sufficient evidence on record to establish the plaint case. He emphasised that though the payment of sale consideration of Rs.2,00,000/- (rupees two lac) was alleged in relation to the disputed sale deed, the defence witness namely, Jogendra Singh (DW-2) and Veeru (DW-3) themselves dislodged the transaction of sale. By referring to statement of DW-1 (defendant-respondent), he submits that transaction of sale was finalized by Jogendra Singh, DW-2 and Veeru, DW-3, whereas DW-2, Jogendra Singh, in his cross-examination, stated that when he alongwith defendant reached the chamber of Qatib, the sale deed had been written to some extent; sale consideration had not been paid in front of him nor was any reference of the same ever made; sale deed was not recited to the plaintiff by the Qatib before him nor did the

plaintiff read it; he never discussed about sale deed with the plaintiff; no amount was paid before him and he had not seen the sale deed. As regards DW-3, Veeru, he stated in his cross-examination that he had brought money with him on the information given by Sukhvir, i.e. son of the defendant, no sale consideration was paid before him and Sukhvir had told him that transaction of sale had been finalized for a sum of Rs.2,00,000/- (rupees two lacs). By referring to statement of DW-1 (defendant), it was emphasised that he himself being the purchaser expressed his ignorance as to for how much amount the sale had been finalised; the sale consideration was given by his son Sukhvir in his hand, thereafter he gave the amount to the Qatib and Qatib might have given the same to the plaintiff. Regarding the defendant's financial standing, that portion of his cross-examination was read out to the Court where he stated that he and his sons were not engaged in any business; agricultural activity was the only source for his livelihood; there was no bank account in the name of the defendant, his son or his wife; he had never served anywhere; he had frail legs and used to walk with mobility aid.

9. By referring to the averments contained in the plaint and written statement, it was submitted that the plaintiff-appellant had duly proved the factum of non-tendering of sale consideration and maintained consistency in his stand in his examination-in-chief as well as cross-examination, whereas the defendant-respondent remained completely aloof as regards the amount demanded by the plaintiff as sale consideration and also the date on which agreement regarding execution of sale deed had been reached and, further, about the exact amount handed over to the defendant by his son and, thereafter, by the defendant to the deed writer and whether or not the deed writer had actually handed over that money to the plaintiff. Further submission is that after denial of execution (in fit state of mind) and payment of sale consideration by the plaintiff-appellant, and its affirmance by the witnesses of the defendant-respondent, the presumption under Section 60 of the Registration Act, 1908 lost its force. The burden was squarely upon the defendant to prove the due execution (in fit state of mind) as well as payment of sale consideration. This burden the defendant not only failed to discharge, in fact, in attempting to do so, he and his own witnesses ended up admitting non-payment of sale consideration, thereby giving a fatal blow to the defence set up by the defendant. The courts below erred in discarding the aforementioned overwhelming evidence on record sufficiently proving that the sale deed in question was executed without payment of any sale consideration and is void. They misread the statement of the defence witnesses. They also erred in discarding the statement of the DW-2 on the ground of inconsistency in between his examination-in-chief and cross-examination, without appreciating that the very purpose of cross-examination is to cull out the true facts of the case. The courts below could not have treated the unequivocal testimony of DW-2 as unreliable and discarded it, despite the fact that the defendant himself had pleaded in his written statement that DW-2 is a reliable and uninfluenced witness. Further, the statement of DW-2 corroborated not just the plaint case but the admissions made by the defendant in his cross examination. It is a widely accepted doctrine that witnesses may lie, but the circumstances do not. In the case at hand, the fact that the

plaintiff-appellant had already executed a will in favour of his 3 nephews (all sons of the defendant herein) to the exclusion of the defendant, at the time when the sale deed in question was executed, is an important circumstance indicating the actual intention of the appellant. The plaintiff-appellant acquired knowledge about execution of the sale deed for the first time on 01.08.2007 when he obtained copy of Khatauni, which was also brought on record and, therefore, suit filed within three years from the date of knowledge was well within limitation. In support of his submission, the plaintiff-appellant has placed reliance upon the following authorities:

(1) **Chacko and another vs. Mahadevan**, 2008 ACJ 13

(2) **Karan Singh (dead) Through LRs vs. Deputy Director of Consolidation, Aligarh and others**, 2003 (94) RD 382

(3) **Devendra Singh and others vs. Deputy Director of Consolidation, Aligarh and another**, 2003 (94) RD 70

(4) **Kewal Krishna vs. Rajesh Kumar and others etc.**, 2022 SCCR 154

(5) **Ved Singh vs. Vinood Kumar**, 1996 ALJ 1888

CONTENTION OF RESPONDENT

10. Per contra, Shri Ashish Kumar Singh, learned for the respondents submits that the very foundation of the suit was alleged inebriation of the plaintiff and if record establishes that the said statement was wholly false and was made just for the purposes of creating grounds for cancellation of sale deed, the entire plaint case would fall to earth. He submits that the plaintiff did not specifically plead in the plaint as to for what purpose he required Khatauni on 01.08.2007, i.e. more than three years after execution of disputed sale deed; the plaintiff on the same day allegedly obtained Khatauni and same day went to the Registry office, applied for certified copy of the sale deed and got it on the same day, i.e. 01.08.2007 and also failed to establish as to for what purpose he had gone to Sikandrabad on 24.03.2004. Shri Singh emphasised upon paragraph 6 of the plaint where the plaintiff-appellant stated that he had fallen into drunken state after he was given Coca-Cola, his brain stopped working when the sale deed was got executed on 24.03.2004, the plaintiff gained consciousness on the next day when he had forgotten everything about 24.03.2004. He further submits that Ghanshyam on whose shop the incident of drinking Coca-Cola was alleged, was never produced by the plaintiff and, therefore, once he withheld the best evidence, adverse inference would be drawn against him. Further argument is that once the two courts have recorded the finding that the plaintiff signed the sale deed in the Registry office and there was no infirmity in the health of the plaintiff by the time he had signed the sale deed, but he expressed his ignorance taking a plea of drunkenness and void state of mind and got back to his senses on the next day, but did not inquire anything either from Ghanshyam or even from his real brother, the entire story was cooked up by him after more than three years just to create a cause of action for filing suit. Further submission is that the plaintiff was in habit of executing documents and initially he executed a Will dated 05.08.1997 in favour of sons of his another brother Jai Singh and six years

thereafter he executed another Will dated 16.12.2003 in favour of sons of the defendant and he also sold some of his property to one Poonam Sharma by executing a registered sale deed and, thereafter, challenged the same before the civil court, which shows that he was a person of dishonest intention.

11. As regards sale consideration, submission is that sale deed itself contains recital of payment of sale consideration of Rs. 2,00,000/- (rupees two lac) in advance and Sub-Registrar endorsed that the sale deed was read out to the plaintiff-Rajvir Singh, who had understood its execution and also accepted the receipt of entire sale consideration, the Sub-Registrar's endorsement on the sale deed would carry a strong presumption as per Sections 58, 59 and 60 of the Registration Act, 1908 and there is nothing on record that the said strong presumption was rebutted by any cogent evidence. He also submits that as per Section 91 of the Indian Evidence Act, 1972, the oral testimony of DW-2 Jogendra Singh and DW-3 Veeru would not be of much significance, inasmuch as, it pertains to a document, i.e., sale deed that would be read as it is and oral evidence would remain excluded. He also submits that suit was barred by limitation as it was filed after more than three years from the date of execution of sale deed about which the plaintiff had knowledge since beginning, but in order to bring the suit within the period of limitation, a false story of acquiring knowledge on 01.08.2007 was cooked up in the plaint, but the same could not be established and, therefore, the plaintiff has no case. Shri Singh further submits that as per Section 14 of the Indian Evidence Act, 1872 state of mind of a person has significant value and once in the present case, unconscious state of mind was not proved by the plaintiff, it would be a case where the sale deed would be presumed to have been executed under conscious state of mind with free will and without any other infirmity. Learned counsel for the respondent has placed reliance upon the following authorities:

(1) **Ishwar Dass Jain (Dead) Through Lrs vs. Sohan Lal (Dead) by LRs**, 2000(1) SCC 434

(2) **Iqbal Ahmad vs. Smt. Naimul**, 2004 SCC OnLine All 117

(3) **Jeet Kaur vs. Mishri Lal**, 2023 SCC OnLine All 2704

(4) **Dhiraj Singh vs. Sripal Singh and another,** 2009 SCC OnLine All 1208

CONTENTION OF APPELLANT IN REJOINDER

12. In rejoinder, Shri Shashi Nandan submits that provisions of Section 91 of the Indian Evidence Act, 1872 or those attaching presumption to a registered instrument as per Registration Act, 1908 would be applicable only when the executant of the instrument is under conscious state of mind. Contention is that once the plaintiff was not under normal condition on the date of execution of sale deed, no presumption would be attached to its validity and once the witnesses to the sale deed themselves could not establish the transaction of sale and even defendant (DW-1) did not specifically prove payment of sale consideration to the plaintiff, the sale deed was bound to be cancelled.

ANALYSIS OF RIVAL CONTENTIONS, FINDINGS AND CONCLUSION

13. Having heard the learned counsel for the parties, this Court finds that sale deed was executed on 24.03.2004 and the suit was filed in August, 2007, i.e. after a period of three years and four months. The plaintiff-appellant alleged acquisition of knowledge about sale deed on 01.08.2007. Then he came up with a plea that more than three years ago on 24.03.2004, he had gone to Sikandrabad at about 10.00 a.m. for some personal work where he found defendant along with Jogendra Singh and Veeru, where the defendant offered him with Coca-Cola and after drinking the same, his brain stopped working and sale deed was got executed. He further stated that he gained consciousness on the next day in the village but forgot everything about 24.03.2004. The courts below have analysed the plaintiff's case as regards his state of mind in the light of plaint version and oral testimony of the witnesses. They have recorded clear findings that once the plaintiff signed the sale deed, which signatures appeared to be normal when compared to his signatures on the plaint and order sheet, his contention that he went out of brain immediately after drinking cold drink was highly suspicious. Then it has come on record that the plaintiff alleged as if upto signing of the sale deed he was in all his senses, but immediately after putting his signatures in the Sub-Registrar office on the sale deed, he went out of brain. Non-production of Ghanshyam on whose shop the cold drink was alleged to have been offered, though it was not stated in the plaint, but came in evidence, was also held to be fatal to the plaintiff's case. The courts also discussed that the plaintiff was aware that he entered into Registry office and has not denied his signatures on the sale deed, but tried to explain the circumstances under which the deed was got executed.

14. It would be worthwhile to refer few significant portions of the cross examination of the PW-1. The same are extracted as under:-

"----------1&8&2007 को मुझे खतौनी की जरूरत पड़ी क्योंकि मुझे गारंटी देनी थी। गारंटी घनश्याम पंडित जी निग्रामपुर की देनी थी। यह गारंटी PNB सिकंदराबाद से पंडित को लोन लेना था, तब देनी थी। फिर मैंने गारंटी नहीं दी। ----------

--------आज घनश्याम दास मेरी गवाही के लिए नहीं आए.....

मैं अकेले आया था, घनश्याम दास की दुकान, जो रजिस्ट्री दफ्तर के पास है पर पहुँचा। घनश्याम दास की खाद की दुकान है। यह वही घनश्याम दास हैं जिनकी मैं गारंटी देना चाहता था। मैं घनश्यामदास की 6–7 वर्ष से जानता हूँ। ----------

------ 1-8-2007 से पहले मैं रणधीर अपने बड़े भाई के साथ ही रहता था। रणधीर भी मेरी खाने–पीने की व्यवस्था करने थे। रणधीर से कोई रंजिश किसी किस्म की मेरी नहीं है।.....

..... मुझे 24–3–04 को क्या हुआ मुझे मालूम नहीं है। इसलिए मैंने प्रतिवादीगण से कुछ नहीं पूछा। मैंने घनश्याम दास जी से भी कुछ नहीं पूछा जिनकी दुकान पर वाक्या हुआ था। 1–8–07 को ही मुझे इन सब बातों का पता, खतौनी की नकल लेने पर चला। 1–8–07 से पूर्व बैनामा की बात मुझे पता चली, coca-cola पिलाना याद है।.....

.....पीने के पांच चार मिनट बाद ही नशा हो गया था। मैं बेहोश नहीं हुआ था, केवल नशा हो गया था। मैं चलने फिरने की स्थिति में नहीं रहा, मुझे पकड़ कर ले गये। मुझे यह पता है कि मुझे यह लोग रजिस्ट्री दफ्तर ले गये। रजिस्ट्री दफ्तर में किसी बैनामा लिखने वाले के पास ले गये होंगे। मुझे नहीं मालूम कि बैनामा लिखने वाले के पास कितनी देर रहे। उसके बाद मुझे कोई होश नहीं रहा, मुझे अगले दिन गाँव में होश आया। ये लोग मुझे गाँव में जिस दिन कोका कोला पिलाया था उसी दिन ले गये।----------"

15. PW-1 in his cross-examination stated that he required Khatauni on 01.08.2007 for the purposes of giving

guarantee of Ghanshyam Pandit as he intended to take a loan from Punjab National Bank, Sikandrabad, however, guarantee was not given. He is the same Ghanshyam on whose shop the allegation of offering Coca Cola was made. Admittedly, Ghanshyam was not produced as a witness though he appears to be very familiar to the plaintiff and, therefore, there was some understanding of giving guarantee by the plaintiff in relation to transaction of loan in between Ghanshyam and Punjab National Bank. It has also come on record that plaintiff had executed a Will dated 16.12.2003 in favour of his nephew. The said Will was also brought on record and witnesses to the said Will are Raju, son of same Ghanshyam and Jogendra Singh (DW-2). Therefore, affinity of plaintiff with Ghanshyam and also Jogendra Singh is a fact established on record. It is not the case of the plaintiff that Will dated 16.12.2003 was also a fraudulent transaction. Therefore, the plaintiff appears to be in habit of executing registered documents in favour of his own family members and the same are witnessed by same persons and also those who always joined the scene and transaction qua execution of registered documents. As regards sale deed executed by the plaintiff in favour of one Poonam Sharma, it was dated 11.07.2002 and, immediately thereafter, he filed Original Suit No. 260 of 2002 against State of U.P., S.D.M., Police Inspector, vendee Poonam Sharma and also the respondent Randhir Singh claiming a decree for cancellation of the sale deed with the allegation that it had been executed under coercion. Later on, he entered into a compromise with the vendee and recognised the disputed sale deed as a valid one. Accordingly, the suit was disposed of in terms of compromise by order dated 19.03.2005 by the civil court. DW-1 stated in his cross-examination about institution of suit against Poonam Sharma and compromise entered with her. All these circumstances reflect that plaintiff was not a person unknown with execution of registered documents.

16. In the aforesaid light, if plaint of the suit giving rise to the instant appeal is again perused, in paragraph 7 (ट) he stated about exercise of undue influence by the defendant as regards execution of sale deed. The entire plaint as well as oral testimony of DW-1 reflect that he was not consistent in his stand as undue influence is separate from getting the sale deed executed under state of intoxication. There are different modes of proof of these parameters recognised by the Indian Contract Act, 1872 and, hence, the plaintiff's stand not being clear and, even otherwise, not proved by cogent oral and documentary evidence, this Court is not in a position to upset the findings of fact recorded by both the courts below dislodging the plaintiff's case and attaching validity to the sale deed.

17. As far as the statement of appellant that payment of sale consideration could not be proved, this Court is not in a position to accept the same. First reason is that payment of sale consideration is mentioned in the sale deed itself that it was paid in advance. It is not the case of the defendant that the amount either in part or full was paid before the Sub-Registrar. The endorsement of Sub-Registrar is also to the same effect that Rs.2,00,000/- (rupees two lac) was paid earlier. The said endorsement as regards due understanding of the plaintiff about execution of sale deed and acceptance of Rs. 2,00,000/- (rupees two lac) in advance, in itself, is sufficient to prove payment of sale consideration unless rebutted by

cogent evidence. As regards payment of sale consideration, DW-1, in his cross-examination, stated as under:-

"--------विक्रय धन मेरे बेटे सुखवीर ने मेरे हाथ में दिया था। फिर मैंने अपने हाथ से रुपये कातिब को दे दिये थे। कातिब ने वादी को दे दिये होंगे। लड़के सुखवीर ने मुझे दो लाख रुपये पकड़ाये थे, किन्तु मैंने गिने नहीं थे।.....

.....चूँकि वादी ने पहले पैसा माँगा था, इसलिए दे दिया गया था। कातिब को मैंने बैनामा लिखने के सम्बन्ध में सब बातें जुबानी ही बता दी थी, कोई इन्तखाब नहीं दिया था। कातिब ने बैनामा लिखने के बाद अन्य कोई कार्यवाही नहीं की थी। वह बैनामा लिखते ही सब–रजिस्ट्री कार्यालय मे बैनामे को ले गया था। बैनामा वहाँ जाकर बाबू को दे दिया था। रजिस्ट्रार ने पैसा मिलने की बाबत पूछा था।----------"

18. As regards plaintiff's version regarding coca-cola, DW-1, in his cross-examination, stated as under:-

"----------मैं वादी को कोका कोला नहीं पिलाया था बल्कि वादी ने स्वयं हम सबको बैनामे के बाद कोका कोला पिलाया था और बर्फी खिलाई थी। चूँकि मैंने बैनामा कराने के बाद भी कोका कोला पिलाने से मना कर दिया था तब वादी ने सबको कोका कोला पिलाया था। यह कहना गलत है कि मैंने वादी को कोका कोला में नशीला पदार्थ मिलाकर बैनामा लिखा लिया हो। यह कहना गलत है कि बैनामा नशे की हालत में कराया हो यह कहना भी गलत है कि वादी को कोई प्रतिफल अदा न किया गया हो।.....…"

19. Even if oral testimony of DWs is thoroughly analysed, it is found that DW-2 Jogendra Singh was never a witness to the payment of sale consideration and, therefore, if he stated ignorance about the same, it cannot go against the defendant. Similar is the position of DW-3, Veeru. Contrarily, from the statement of DW-3, it is found that on information received by him from Sukhvir, son of defendant, that sale deed was to be executed and he should bring Rs.10,000/- (rupees ten thousand), Veeru came to Registry office with Rs.10,000/- (rupees ten thousand), which was given by him to Sukhvir. Some relevant portion of cross examination of DW-3-Veeru is extracted as under:-

"----------विवादित बैनामे वाले दिन मैं खुद ही सुबह के समय आ गया था। मुझे बुलाया भी था और मैं पैसे भी लाया था।.....

.....मैंने सुखवीर से पूछा था कि मुझे किसलिए जाना है तो उसने बताया था कि हमारा राजवीर सिंह से जमीन का सौदा हो गया है। उसी के बताने पर मुझे बैनामे के सौदे की जानकारी gqbZ FkhA lq[kohj us eq>s crk;k fd esjh cSukes ij xokgh gksuh gSA----------

----------सुखवीर ने मुझे बताया था कि बैनामे का सौदा दो लाख रुपये में हो गया है। मुझसे भी दस हजार रुपये लाने के लिए सुखवीर ने कहा था।.....

.....मेरे सामने वादी को प्रतिफल की कोई अदायगी नहीं हुई थी। मुझे यह जानकारी है कि कातिब को बैनामा लिखने हेतु हिदायत वादी ने दी थी।----------"

20. Though DW-1 stated in his cross-examination that deal was done by Jogendra Singh and Veeru, but contrary statements were made by DW-2 and DW-3 as regards the transaction, however the statements of DW-1, DW-2 and DW-3, when read together and as a whole, the same would not lead to an inevitable conclusion that either the transaction of sale was not agreed upon or that it was not done at all. Once a registered sale deed is there and even payment of sale consideration of Rs.2,00,000/- (rupees two lacs) was alleged by DW-3 in the manner that Sukhvir had handed over the said

amount to the defendant which amount was given by the defendant to Qatib and Qatib might have given the same to the plaintiff, there is nothing unnatural in the said chain of events. It is not necessary that whenever a sale deed is executed, sale consideration is directly paid by the vendee to the vendor. It is a matter of common experience that when many persons join together to execute a sale deed, like, vendor, vendee, witnesses, other family members, middlemen, friends and deed writer etc., money can go through various hands from vendee to vendor and this is exactly what the DWs had stated. Therefore, nothing conclusive is found in the oral testimony of DWs that the amount was not paid. Payment is, therefore, established and stands corroborated by the endorsement of Sub-Registrar, recitals contained in the sale deed and oral testimony of witnesses.

21. In the instant case, significance of the provisions of Section 91 and 68 of the Indian Evidence Act, 1872 and Sections 58, 59 and 60 of the Registration Act, 1908 cannot be ignored. For a ready reference, these provisions are quoted herein below:

Indian Evidence Act, 1872

"**91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document-** When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

68. **Proof of execution of document required by law to be attested**.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Registration Act, 1908

**58. Particulars to be endorsed on documents admitted to registration**.—(1) On every document admitted to registration and true copy thereof, other than a copy of a decree or order, or a copy, sent to a Registering Officer under section 89, there shall be endorsed, from time to time, the following particulars, namely:—

(a) the signature and addition of every person admitting the execution of the document, and if such execution has been admitted by the representative, assign or agent of any person, the signature

and addition of such representative, assign or agent;

(b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(c) any payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the Registering Officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.

59. **Endorsements to be dated and signed by Registering Officer**.—The Registering Officer shall affix the date and his signature to all endorsements made under sections 52 and 58, relating to the same document and made in his presence on the same day.

60. **Certificate of registration**.—(1) After such of the provisions of sections 34, 35, 58 and 59 as apply to any document presented for registration have been complied with, the Registering Officer shall endorse thereon and on the true copies thereof, a certificate containing the word "registered", together with the number and page of the appropriate book in which the document or its true copy is to be scanned or kept.

(2) Such certificate shall be signed, sealed and dated by the Registering Officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59, have occurred as therein mentioned.

22. Section 58 of Registration Act, 1908 speaks about the procedure on admitting a document for registration which has a presumptive value. Section 58 of the Act, 1908 is to be read with Section 68 of the Indian Evidence Act, 1872 alongwith its proviso and Sections 91 and 92 of the Indian Evidence Act, 1872. A perusal of the Section 68 and its proviso goes to show that in order to prove the execution and registration of the sale deed which is not a will no further evidence is required and that relaxation by the statute has been given in view of Sections 91 and 92 of the Indian Evidence Act, 1872 which is an evidence of disposition as well. The said provisions prohibit that no evidence shall be given in proof of the terms of the such contract grant or disposition of the property.

23. Plea of intoxication as alleged by the plaintiff was thoroughly examined and the Trial Court recorded a finding that in case the said incident took place on 24.03.2004, the plaintiff could have asked about the incident from the defendant but the plaint is silent. The Trial Court further considered the statement of DW-1 and his relation with Ghanshyam on whose shop the said alleged incident took place. It further examined the oral testimony of DW-1 and reached to a conclusion that the plaintiff was conscious as he could not prove the plea of fraud and the reasons which could be proven or at least supported

the same, were not mentioned in the plaint or in the statement of DW-1. The Trial Court held that the plaintiff's case that he came back to his senses on the next day was of relevance as he did not bother for three years and four months to find out the reason either himself or through Ghanshyam who was material witness of plea of fraud but the plaintiff chose not to produce him. Perusal of statement of DW-1 would further show that according to his testimony he remained conscious for sometime till registry took place thereafter he lost his conscious.

CONCEPT OF PREPONDERANCE OF PROBABILITIES

24. In the entire facts and circumstances of the instant case, the Court deems it appropriate to mention that a civil trial applies the standard of proof governed by preponderance of probabilities. This principle has been elaborated by the Supreme Court in the case of ***R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and others, 2003 (8) SCC 752***. The Apex Court said that a fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. The probative effects of evidence in civil and criminal cases are not, however, always the same and a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. In a civil case a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, but in a criminal case, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt. Quoting Denning LJ (***Bater Vs. B, 1950, 2 All ER 458,459***) it was said that "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability." Agreeing with this statement of law, Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (***Hornal V. Neuberger P. Ltd., 1956 3 All ER 970, 977***)."

25. Further in ***M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) vs. Mahant Suresh Das & Another***, 2020 (1) SCC 1, it was held as under:

> "720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. Phipson on Evidence formulates the standard succinctly : If therefore, the evidence is such that the court can say "we think it more probable than

not", the burden is discharged, but if the probabilities are equal, it is not. [Phipson on Evidence.] In Miller v. Minister of Pensions [Miller v. Minister of Pensions, (1947) 2 All ER 372], Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms : (All ER p. 373 H)

"(1) … It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.

x x x x x

724. Analysing this, Y V Chandrachud J (as the learned Chief Justice then was) in N. G. Dastane vs. S. Dastane (1975) 2 SCC 326 held :

"The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: 'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue [Per Dixon, J] in Wright v. Wright, (1948) 77 CLR 191, 210]; or as said by Lord Denning, 'the degree of probability depends on the subject-matter'. In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, (1966) AC 643]. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."

(Emphasis supplied)

26. Now applying the abovesaid principle in the instant case, relationship between the plaintiff and the defendant as real brothers is not in dispute in the

instant case. It is also not the case of either of the parties that these two brothers were residing separately when the sale deed in question was executed. Rather there is a contrary evidence. Therefore, it cannot be believed that if the property is transferred by one brother in favour of other, the vendee would not know this fact for more than three years particularly when the land is agricultural and necessity to cultivate the land and doing other associated activities is a normal phenomenon. Therefore, on assessing the facts of this case, it is found that in the conflicting probabilities concerning the fact-situation, less weight is attached to the story set up in plaint based upon alleged brain-loss situation flowing from an unproved scene and it demolishes all the pleas to get the sale nullified.

27. Now coming to the authorities cited from the side of appellant, the Supreme Court in ***Chacko*** (supra) was dealing with a case where unsoundness of mind of vendor Chacko had been proved through medical evidence and he was also treated in Mental Hospital, Tirchur for about four days for Alcoholic Psychosis and such finding of fact had been recorded by the District Court, which was set aside by the High Court in Second Appeal. Under these circumstances, the Supreme Court set aside the High Court's judgment and upheld the finding of first Appellate Court that vendor was not of sound mind at the time of execution of sale deed. The case in hand involves a different factual position where the plaintiff came up with a case that just before execution of the sale deed, he had been offered Coca Cola and immediately thereafter he lost his senses and gained consciousness the next day i.e. on 25.03.2004. For a period of more than three years thereafter, there is nothing on record to establish as to what remedial measures the plaintiff took as regards his almost one day unconsciousness as he did not at all try to ascertain reason behind such state of his body and mind. Absolutely no medical evidence worth the name was brought on record nor even an FIR was lodged by him. Therefore, with due respect to the judgement of the Hon'ble Supreme Court, the appellant does not get any advantage from the same.

28. In ***Karan Singh*** *(supra)*, this Court held that once the vendor had appeared as a witness and denied execution of the sale deed and also receipt of sale consideration and no evidence was produced by the other side regarding execution of sale deed and payment of sale consideration, presumption under Section 60 of the Registration Act lost its force. It was also held that without payment of sale consideration, no sale deed could be executed. There is no dispute about the proposition laid down in the said authority, however, in the facts of the instant case, judgment would have no application, inasmuch as bare denial by the plaintiff about non-

receipt of sale consideration without there being any corroborative evidence or any other DW, the plea has been rightly turned down by both the courts below. The judgement in ***Devendra Singh*** (supra) is in fact the same judgement of ***Karan Singh*** (supra) passed in the same writ petition No. 14024 of 1985, reported twice in the same volume of revenue decision and by different names for whatever reason it may be.

29. The Hon'ble Supreme Court in ***Kewal Krishan*** (supra), after interpreting the provisions of Section 54 of Transfer of Property Act, 1882 held that a sale of an immovable property has to be for a price that may be payable in future and such payment is an essential part of sale and if a sale deed is executed without payment of price, it is no sale in the eyes of law. There is no quarrel with the proposition laid down by the Apex Court, however, it would not dislodge the sale deed disputed in the instant case for the reason that payment of sale consideration of Rs.2,00,000/- in advance was mentioned in the sale deed itself as well as in the endorsement made by the Sub-Registrar. In order to dislodge the presumption attached to the said recital and endorsement, the plaintiff-appellant must have come with strong evidence that no sale consideration was paid to him. Though, it is true that equal burden lay upon the defendant to prove sale consideration, DW-1 discharged the burden by his examination-in-chief as well as cross-examination as discussed above. He did not state that sale consideration was paid in front of DW-2, Jogendra Singh and, therefore, if DW-2, in his cross-examination stated that the payment was not made before him, the same cannot be read against the defence version. Therefore, mere statement of DW-1 in his examination-in-chief that amount was paid in front of witness would not mean that DW-2 was such witness and no such influence can be drawn from the complete reading of oral testimony of all the Dws.

30. ***Ved Singh*** (supra) lays down a proposition in terms of Section 17 of the Limitation Act and holds that period of limitation to institute a suit for cancellation of sale deed would start running from the date when fraud in relation to such execution stood revealed. It was also a case where some physical infirmity was alleged by the vendor, however, the facts were slightly different, inasmuch as in that case vendor's contention was that on account of such physical infirmity, he was not residing at the place where the land in dispute was situated in District Muzaffar Nagar, but was residing in District Saharanpur. In that background, contention of "no knowledge" about execution of the sale deed was raised. In the instant case, the facts are entirely different and in order to succeed in his plea of execution of the sale deed in unconscious state of mind, plaintiff-appellant had to complete

chain by joining every link together over a period of more than three years right from 24.03.2004 when the sale deed was executed till 03.08.2007 when the suit was instituted. Therefore, the said judgment is also of no assistance to the appellant.

31. The authorities cited from the respondent side are on the point that registered document carries with it strong presumption about its execution and contents, however the presumption is rebuttable. In order to rebut such presumption, the parties seeking to dislodge the validity of the transaction covered by registered document has to lead a strong evidence. The authorities further lay down that initial burden to establish undue execution of the document is upon a person, who challenges the same and it is only after the said initial burden is discharged, onus would shift upon the other side, which would be seen during the course of evaluation of evidence. Examining the ratio laid down therein and those referred to in the cited judgments, this Court is of the considered opinion that plaintiff-appellant failed to dislodge the presumption attached to the registered sale deed dated 24.03.2004 and the evidence to that effect was completely lacking. Taking aid of few lines from the oral testimony of DW-2 and DW-3 ignoring the plaint averments as well as oral and documentary evidence on record as a whole, would not be helpful to the plaintiff-appellant and it is thus, held that the courts below have rightly arrived at a conclusion that the plaintiff had failed to prove either undue execution of the sale deed or that it was executed when the plaintiff was not in his senses.

32. In view of above discussion, the Court finds that it was a concluded sale as per Section 54 of Transfer of Property Act, 1882 with no infirmity and payment of sale consideration is found to have reached to the vendor. Since it was not a case of part-paid or part-promised, first question is answered in favour of defendant-respondent attaching validity to the transaction of sale. Little finding recorded by the first Appellate Court in that direction, though not according to law, would not affect the ultimate decision of the Appellate Court. As regard second question, it is held that sale deed was a duly executed instrument and not only the plaint case, but also oral testimony of PW-1 makes his entire version as highly suspicious and unbelievable and, therefore, second question is answered in favour of respondent holding that the sale deed dated 24.03.2004 was not a result of fraud and undue influence and the view taken by the courts below is in accordance with law. As regards third question, once it is found that the plaintiff failed to establish acquisition of knowledge for the first time in August, 2007 i.e., three years and four months after execution of sale deed and the parties to the sale being real brothers, in absence of any concrete

proof as regards subsequent acquisition of knowledge, the period of limitation would not begin from 01.08.2007 and, therefore, Section 17 of the Limitation Act would have no application in the present case. The suit, therefore, was barred by limitation. Third question is answered accordingly.

33. For all the aforesaid reasons, the second appeal has no force and is, accordingly, **dismissed**.

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**(2024) 10 ILRA 591**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 25.10.2024**

**BEFORE**

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

First Appeal from Order Nos. 333 of 2023 & 18 of 2023

**The New India Insurance Co. Ltd. ...Appellant**
**Versus**
**Shallo Begum & Ors. ...Respondents**

**Counsel for the Appellant:**
Jitendra Narain Mishra

**Counsel for the Respondents:**
Nand Kishore Agarwal, Mayank Agarwal, R.K.S. Chauhan

**A. Civil Law - Motor Vehicles Act, 1988 - Sections 134(C), 149 & 168 - Claim petition has been filed - Claimants proved death of deceased in accident by offending vehicle i.e. Truck on account of rash and negligent driving of it's vehicle - Scooty was hit from back side without blowing horn - Insurance company submitted that scooty was damaged from front side, therefore, it can't be said that accident was from back side, negligence of deceased also in accident - Deceased was 58 years of age at time of accident and his daughter was given compassionate appointment, no future loss of income - Held, no evidence regarding allegation of contributory negligence - Once an enquiry held by tribunal after affording opportunity to appellant, plea of appellant that provisions of Section 134 (c) of Act, 1988 have not been complied, therefore, appellant was not liable to make payment of compensation was misconceived, it has no concern with claim of dependents and family members of deceased. (Para 3, 16, 18, 38)**

**B. Civil Law - Enhancement of compensation - Claimant proved that Tribunal has considered only salary of deceased and deducted amount of over time being earned by him monthly - Held, department admitted that income shown in Form-16 was arrears of salary, said income was not annual income - Perusal of Form-16 doesn't indicate any over time income separately - Only income has been shown - Not entitled for any enhancement. (Para 40, 41)**

**Appeal dismissed.** (E-13)

**List of Cases cited:**

1. Syed Basheer Ahmad & ors. Vs Mohammad Jameel & anr.; (2009) 2 SCC 225

2. Divisional Controller, KSRTC Vs Mahadev Shetty & anr.; (2003) 7 SCC 197, (Para 10 to 13)

3. St. of Har. & anr. Vs Jasbir Kaur & ors.; 2003 (3) T.A.C. 569 (S.C.)

4. St. of Guj. Vs Shantilal Mangaldas & ors.; 1969 (1) SCC 509

5. Gobald Motor Service Ltd. & anr.Vs R.M.K. Veluswami & ors.; (1962) 1 SCR 929

6. Reliance General Insurance Company Ltd. Vs Shashi Sharma & ors.; 2016 (4) T.A.C. 149 (S.C.)

7. Sebastiani Lakra & ors.Vs National Insurance company Ltd. & anr.; (2019) 17 SCC 465, 31, (Para 4 to 6)

8. Sanjay Ramdas Patil Vs Sanjay & ors.; (2021) 10 SCC 306

9. Khub Chand & ors.Vs St. of Rajasthan; (1967) 1 SCR 120

10. National Insurance company Ltd. Vs Pranay Shethi & ors.; (2017) 16 SCC 680, (Para 58)

11. Dinesh Kumar J. @ Dinesh J. Vs National Insurance Comp. Ltd. & ors.; (2018) 1 SCC 750

12. National Insurance Company Ltd. Vs Rekhaben & ors.; 2017 (3) ACCD 1372 (SC)/ (2017) 13 SCC 547, (Para 14 and 15)

13. The Oriental Insurance Comp. Ltd Vs Abhiraj Chetri & anr.; 2018 (2) ACCD 862 (All)/ 2017 SCC OnLine AII 2384

14. National Insurance Company Ltd. Vs Pushpa Rana & ors.; 2009 ACJ 287

15. Smt. Anjali & ors.Vs Lokendra Rathod & ors.; 2022 LiveLaw (SC) 1012

16. National Insurance Co. Ltd.Vs Mannat Johal & ors.; (2019) 15 SCC 260

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

1. Heard Shri Jitendra Narain Mishra, learned counsel for the appellant in F.A.F.O. No.333 of 2023 and learned counsel for the respondent no.3 in F.A.F.O. No.18 of 2023 (here-in-after referred as learned counsel for the insurance company) and Shri R.K.S. Chauhan, learned counsel for the claimant-respondents no.1 to 3 in F.A.F.O. No.333 of 2023 and learned counsel for the appellant in F.A.F.O. No.18 of 2023 (here-in-after referred as learned counsel for the claimants). None appeared on behalf of the respondent nos.4 and 5 in F.A.F.O. No.333 of 2023 and for respondent nos.1 and 2 in F.A.F.O. No. 18 of 2023 i.e. the owner and driver of the offending vehicle i.e. truck.

2. The F.A.F.O. No.333 of 2023 has been filed assailing the judgment and award dated 16.09.2022 passed in Claim Petition No.953 of 2014; Smt. Shallo Begum and Others Vs. Mahendra Singh and Others by Motor Accident Claims Tribunal (here-in-after referred as M.A.C.T.), South, Lucknow. The F.A.F.O. No.18 of 2023 has been filed for modification of the judgment and award dated 16.09.2022and enhancement of compensation. Hence both the appeals are being clubbed and decided together by this common judgment and order.

3. Learned counsel for the appellant i.e. insurance company in F.A.F.O. No.333 of 2023 submitted that contributory negligence of the deceased has not been considered, whereas as per the technical inspection report of scooty, on which the deceased was going, was damaged from the front side, therefore, the plea of the claimant-respondent that the truck insured with the appellant insurance company had dashed from the back side was not tenable and there was contributory negligence of the deceased also. He further submitted that the deceased was of 58 years of age at the time of accident and since the daughter of the deceased was given appointment on compassionate ground in his place after his death, therefore, there was no future loss of income, hence the future prospects could not have been allowed. He further submitted that the provision of Section 134(C) of the Motor Vehicles Act, 1988 (here-in-referred as Act of 1988) have not been complied and no information to the appellant insurance company was given after the accident by the driver or in-charge of vehicle, therefore,

the appellant insurance company can not be held liable to pay the amount of compensation in view of Section 168 of the Act of 1988.

4. On the basis of above, learned counsel for the appellant submitted that impugned judgment and award passed by the tribunal is not sustainable in the eyes of law and is liable to be set aside. He relied on **Syed Basheer Ahmad & Others Vs. Mohammad Jameel & Another; (2009) 2 SCC 225, Divisional Controller, KSRTC Vs. Mahadev Shetty & Another; (2003) 7 SCC 197, State of Haryana & Another Vs. Jasbir Kaur & Others; 2003 (3) T.A.C. 569 (S.C.), State of Gujarat Vs. Shantilal Mangaldas & Others; 1969 (1) SCC 509, Gobald Motor Service Ltd. & Another Vs. R.M.K. Veluswami & Others; (1962) 1 SCR 929, Reliance General Insurance Company Ltd. Vs. Shashi Sharma & Others; 2016 (4) T.A.C. 149 (S.C.), Sebastiani Lakra & Others Vs. National Insurance company Ltd. & another; (2019) 17 SCC 465, 31, Sanjay Ramdas Patil Vs. Sanjay & Others; (2021) 10 SCC 306, Khub Chand and Others Vs. State of Rajasthan; (1967) 1 SCR 120 and National Insurance company Ltd. Vs. Pranay Shethi & Others; (2017) 16 SCC 680.**

5. Per contra, learned counsel for the claimant-respondents no.1 to 3 in F.A.F.O. No.333 of 2023 submitted that the contentions of learned counsel for the insurance company are misconceived and not tenable. There was no contributory negligence of the deceased because the F.I.R. was lodged immediately after the accident alleging that the truck insured by the appellant insurance company had hit the scooty from the back side, therefore, the deceased fell down from the scooty and came under the truck. He further submitted that on hitting from back, the vehicle may fell from the front side, also and damaged, therefore, merely on the basis of damage from front side, it can not be said that there was any contributory negligence of the deceased. He further submitted that the violation of Section 134(C) of the Act of 1988, though has been pleaded in the written statement, but not proved by adducing any cogent evidence. Even otherwise the violation of Section 134 (c) can not be a ground for denying for payment of compensation to the claimants.

6. Learned counsel for the claimants further submitted that the age of deceased and appointment of daughter of the deceased on compassionate ground can not be a ground for denial of future prospects because the compassionate appointment or ex-gratia assistance can not be considered as a measure of future prospect on account of loss of life. Even otherwise, the daughter of the deceased has been appointed on very less emoluments in comparison to the salary of the deceased at the time of accident and prospective enhancement in his emoluments. He further submitted that it is settled proposition of law that just and fair compensation is to be awarded under the Act of 1988.

7. On the basis of above submission of learned counsel for the claimants is that the appeal filed by the insurance company is misconceived and the grounds taken are not tenable in the eyes of law, therefore, it is liable to be dismissed with cost.

8. Learned counsel for the claimants in regard to F.A.F.O. No.18 of 2023 filed by them for enhancement of compensation submitted that the learned

tribunal has considered only the salary of the deceased and deducted the amount of over time being earned by him monthly, which was proved by the wife of the deceased Smt. Sallo Begum. He further submitted that the learned tribunal failed to consider the annual income of the deceased shown in Form-16 i.e. Rs.6,93,043/-, which was issued and proved by the department by adducing evidence. Thus, the submission is that the F.A.F.O. No.18 of 2023 is liable to be allowed and the amount of compensation is liable to be enhanced accordingly.

9. Learned counsel for the claimants relied on **Dinesh Kumar J. @ Dinesh J. Vs. National Insurance Company Ltd. & Others; (2018) 1 SCC 750, National Insurance Company Ltd. Vs. Pranay Shethi & Others; (2017) 16 SCC 680, National Insurance Company Ltd. Vs. Rekhaben & Others; 2017 (3) ACCD 1372 (SC)/ (2017) 13 SCC 547, The Oriental Insurance Company Ltd. Vs. Abhiraj Chetri & One Another; 2018 (2) ACCD 862 (All)/ 2017 SCC OnLine AII 2384, National Insurance Company Ltd. Vs. Pushpa Rana & Others; 2009 ACJ 287, Smt. Anjali & Others Vs. Lokendra Rathod & Others; 2022 LiveLaw (SC) 1012 and National Insurance Company Limited Vs. Mannat Johal & Others; (2019) 15 SCC 260.**

10. Learned counsel for the insurance company vehemently opposed the submissions of learned counsel for the claimants in regard to F.A.F.O. No.18 of 2023. He submitted that the over time income can not be considered for assessment of the compensation because over time is given only for the days an employee works over time, which can not be said to be fixed each and every month and treated regular monthly income. He further submitted that the departmental witness has admitted the income shown in Form-16 as the arrears of salary, therefore, it can not be said that the said income was annual income of the deceased, thus the appellant is not entitled for any enhancement in compensation and the appeal for enhancement of compensation has been filed on misconceived and baseless ground, which is liable to dismissed.

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

12. The claim petition was filed alleging therein that the deceased was going on his scooty from ARTO office to his house on 08.05.2014. When he reached Barabirwa Crossing, Police Station-Krishna Nagar at 12:00 in the day, Truck No.U.P.-78-BT-3289, being driven rashly and negligently by its driver, hit the scooty from the backside without blowing horn, on account of which he fell down and came under the truck, in which he suffered serious injuries and died on the spot. The deceased was working on the post of driver in the Government service and getting Rs.34,351/- per month as salary and Rs.23,400/- as over time, thus total about Rs.57,753/- per month. Accordingly the compensation of Rs.100,00,000/- was claimed.

13. The written statement was filed by the respondent no.1 in the claim petition i.e. the owner of the vehicle denying most of the averments made in the claim petition and admitting that he is the owner of the vehicle and respondent no.2 Prahlad in the claim petition is the driver. It has also been admitted that the vehicle was insured with

the respondent no.3 i.e. the National Insurance Company Ltd. The vehicle was being driven with valid papers. It was also pleaded that no accident had occurred from his vehicle. The accident has occurred on account of negligence of the scooty, therefore, the liability of compensation is of the insurance company.

14. The National Insurance Company i.e. the respondent no.3 in the claim petition filed written statement denying most of the averments made in the claim petition and stating that the accident had occurred on account of negligence of the driver of the scooty. The relevant papers, such as first information report, charge sheet, postmortem report, R.C., insurance, etc. has not been produced, therefore, the claim petition is liable to be dismissed.

15. Considering the pleadings of the parties, nine issues were framed by the tribunal. Thereafter oral as well as documentary evidence was adduced by the parties. After considering the pleadings of the parties, the evidence and material on record, the tribunal held that the accident had occurred on account of rash and negligent driving of the Truck No.U.P.-78-BT-3289 and allowed the claim petition and awarded an amount of Rs.27,45,863.16 alongwith annual interest at the rate of 7% per annum from the date of filing of the claim petition and directed to the National Insurance Company Ltd. to make the payment of amount as the truck was validly insured and running in accordance with the terms and conditions of the insurance policy.

16. The claim petition has been filed under Section 166 of Motor Vehicles Act, 1988. The claimants have proved the death of the deceased in the accident by the offending vehicle i.e. the Truck No.U.P.-78-BT-3289 on account of rash and negligent driving of it's vehicle. The accident has not been disputed by the insurance company. The only dispute raised in regard to accident by learned counsel for the insurance company is that since the scooty, on which the deceased was going was damaged from the front side, therefore, it can not be said that the accident was from the back side, therefore, there was negligence of the deceased also in the accident. The claim petition was filed alleging that the truck was being driven rashly and negligently by its driver, who hit the scooty from the back side without blowing horn. The accident had occurred on 08.05.2014 at 12:00 in the day. The F.I.R. of the accident was lodged on the same date at 18:30 by the son of the deceased alleging therein that while his father was going back to his home from ARTO office, where he had gone for renewal of his license, the driver of the Truck No.U.P.-78-BT-3289, driving the truck rashly and negligently hit the scooty from the back side at Bara Birwa, crossing on account of which he fell down and came under the front wheel of the truck and suffered serious injuries. PW-3 Syed Sikandar Mehdi is an eye witness of the accident, who had seen the accident from the distance of 40-45 steps. He has stated in his cross examination that the scooty was going on his side. The driver of truck driving the truck rashly and negligently had changed its side and hit the scooty from the back side. It has also been stated by PW-3 that there was divider on the road at the place of accident.

17. The perusal of the site plan i.e. Paper No.C-12/8 indicates that the place of accident is on the left side of the road from

Kanpur towards Chargbagh Lucknow. There is divider at the place of accident and both the vehicles have been shown going towards the same direction. The site plan has not been disputed by the insurance company, therefore, the contention of learned counsel for the insurance company that the truck had not hit from the back side as the scooty was damaged from the front side is misconceived and not tenable.

18. The perusal of the Accident Inspection Report of Scooty Activa i.e. Paper No.C-12/17 indicates that the body of the scooty was damaged from the right side and front right indicator and stearing is also damaged, therefore, it can not be said that the scooty was damaged only from the front side. Even otherwise, if a truck, loaded with Morang, hit the scooty, it may fall on any side being a two wheeler. It is also not the case that the scooty was run over by the truck. The case, as pleaded, is that on being hit by the truck from the back side, the deceased had fallen and came under the front wheel of the truck, which is possible in an accident between a scooty which is a two wheeler and balanced on two wheels while driving and a four wheeler truck, therefore, the contention of the insurance company that there was contributory negligence of the deceased in the accident also has no legs to stand and it is liable to be repelled only and accordingly repelled. Even otherwise, no evidence has been produced in regard to allegation of contributory negligence.

19. The Hon'ble Supreme Court, in the case of **Dinesh Kumar J. @ Dinesh J. Vs. National Insurance Company Ltd. & Others (Supra)**, has held that the insurance company had not produced any evidence in regard to the contributory negligence.

20. A Division Bench of this Court, in the case of **Oriental Insurance Company Ltd. Vs. Abhiraj Chetri & One Another (Supra)**, has held that since the offending vehicle had hit the motor cycle from the back side, therefore, the principle of contributory negligence is not applicable.

21. The Delhi High Court, in the case of **National Insurance Company Limited Vs. Smt. Pushpa Rana and Others (Supra)**, has held that proceedings under Motor Vehicles Act are not akin to proceedings in a civil suit and hence strict rules of evidence are not required to be followed in this regard.

22. The next contention of learned counsel for the insurance company was that since the son of the deceased was given appointment on compassionate ground in his place, therefore, there was no future loss of income hence the future prospects could not have been allowed. The deceased Firoz @ Firoz Alam was a driver in Uttar Pradesh Rajya Setu Nigam Ltd. He died in harness in the aforesaid accident on 08.05.2014. He was getting Rs.34,351/- at the time of accident. The son of the deceased was appointed in his place on compassionate ground on a remuneration of about Rs.12000-13,000/- as per evidence of PW-1, therefore, firstly it can not be said that there was no loss of income to the family; secondly the compassionate appointment given on account of death during service can not be equated with the future prospect because the compassionate appointment is given on account of death of the bread earner of the family so that the family may come out from the distress and penury and their survival may not be in difficulty and it may be on account of death in any manner i.e. natural, illness etc.,

whereas the future prospects are allowed on account of loss of increase in income on account of accident and thus enhancement of living.

23. The Hon'ble Supreme Court, in the case of **National Insurance Company Ltd. Vs. Rekhaben & Others (Supra**) has held that financial benefit of the compassionate employment is not liable to be deducted at all from the compensation amount, which is liable to be paid either by the owner/ the driver of the offending vehicle or the insurer. The relevant paragraphs 14 and 15 are extracted here-in-below:-

> *"14. While awarding compensation, amongst other things, the Tribunal takes into account the income of the deceased and calculates the loss of such income after making permissible deductions to compensate the injured claimant for the loss of earning capacity in case of an injury, and to compensate the claimants dependent on him in case of death. Thus, the income of the deceased or the injured, which the claimants have lost due to the inability of the deceased or the injured to earn or to provide for them is a relevant factor which is always taken into consideration. The salary or the income of the claimant in case of death is generally not a relevant factor in determining compensation primarily because the law takes no cognizance of the claimant's situation. Though in case of an injury, the income of the claimant who is injured is relevant. In other words, compensation is awarded on the basis of the entire loss of income of the deceased or in a case of injury, for the loss of income due to the injury. What needs to be considered is whether compassionate appointment offered to the dependants of the deceased or the injured, by the employer of the deceased/injured, who is not the tortfeasor, can be deducted from the compensation receivable by him on account of the accident from the tortfeasor. Certainly, it cannot be that the one liable to compensate the claimants for the loss of income due to the accident, can have his liability reduced by the amount which the claimants earn as a result of compassionate appointment offered by another viz. the employer.*
>
> *15. The submission on behalf of the appellant in these cases is that the salary of the claimants receivable on account of compassionate appointment must be deducted from the compensation awarded to them. Reliance is placed in this regard on the judgment of this Court in Bhakra Beas Management Board v. Kanta Aggarwal [Bhakra Beas Management Board v. Kanta Aggarwal, (2008) 11 SCC 366 : (2009) 1 SCC (Cri) 154] in which compensation was claimed against the employer of the deceased who was also the owner of the offending vehicle i.e. the tortfeasor. The tortfeasor offered employment on compassionate grounds to the widow of the deceased i.e. the claimant. In the facts and circumstances of the case, this Court took the view that the salary*

*which flowed from the compassionate appointment offered by the tortfeasor, was liable to be deducted from the compensation which was payable by the same employer in his capacity as the owner of the offending vehicle. We find this decision as being of no assistance to the appellant in the cases before us. In the present cases, the owner of the offending vehicle is not the employer who offered the compassionate appointment. As observed earlier, it is difficult to see how the owner can contend that the compensation which he is liable to pay for causing the death or disability should be reduced because of compassionate employment offered by another. In any case, it is difficult to determine how much the person offered compassionate appointment would earn over the period of employment which is not certain, and deduct that amount from the compensation."*

24. The Hon'ble Supreme Court, in the case of **Smt. Anjali & Others Vs. Lokendra Rathod & Others (Supra)**, has held that the provisions of the Motor Vehicles Act, 1988 gives paramount importance to the concept of 'just and fair' compensation.

25. The Hon'ble Supreme Court, in the case of **Syed Basheer Ahmad & Others Vs. Mohammad Jameel & Another (Supra)**, has held that section 168 of the Act enjoins the Tribunal to make an award determining "the amount of compensation which appears to be just." However, the objective factors, which may constitute the basis of compensation appearing as just, have not been indicated in the Act. Thus, the expression "which appears to be just" vests a wide discretion in the Tribunal in the matter of determination of compensation. Nevertheless, the wide amplitude of such power does not empower the Tribunal to determine the compensation arbitrarily or to ignore settled principles relating to determination of compensation. Similarly, although the Act is a beneficial legislation, it can neither be allowed to be used as a source of profit, nor as a windfall to the persons affected nor should it be punitive to the person(s) liable to pay compensation. In nutshell, the amount of compensation determined to be payable to the claimant(s) has to be fair and reasonable by accepted legal standards. In the matter of computation of compensation, there is no uniform rule or formula for measuring the value of a human life. In a catena of decisions it has been observed that in a fatal accident action, the accepted measure of damages awarded to the dependents is the pecuniary loss suffered and likely to be suffered by them as a result of abrupt termination of life. The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependent by the death must be ascertained. In the present case there was loss as discussed above.

26. The Hon"ble Supreme Court, in the case of **Divisional Controller, KSRTC Vs. Mahadev Shetty & Another (Supra)**, considered the definition of compensation and held that the compensation awarded should not be

inadequate and should neither be unreasonable, excessive, nor deficient. It has also been held that it is to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. The relevant paragraphs 10 to 13 are extracted here-in-below:-

> *"10. The term "compensation" as stated in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. "Damages" on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term "compensation" etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. Pecuniary damages are to be valued on the basis of "full compensation". That concept was first stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. [(1880) 5 AC 25 : 42 LT 334 : 28 WR 357 (HL)]*
>
> *11. The "rule of law" requires that the wrongs should not remain unredressed. All the individuals or persons committing wrongs should be liable in an action for damages for breach of civil law or for criminal punishment. "Compensation" means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and the manner in which compensation is to be determined and given. Compensation is an act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss; or be made whole in respect of his injury; something given or obtained as an equivalent; rendering of equivalent in value or amount; an equivalent given for property taken or for an injury done to another; a recompense in value; a recompense given for a thing received; recompense for whole injury suffered; remuneration or satisfaction for injury or damage of every description. The expression "compensation" is not ordinarily used as an equivalent to "damages", although compensation may often have to be measured by the same rule as damages in an action for a breach. The term "compensation" as pointed out in the Oxford Dictionary signifies that which is given in recompense, an equivalent rendered; "damages" on the other hand constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained. "Compensation" is a return for the loss or damage sustained. Justice requires that it should be equal in value, although not alike in kind.*

*12. It is true that perfect compensation is hardly possible and money cannot renew a physique or frame that has been battered and shattered, as stated by Lord Morris in West v. Shephard [1964 AC 326 : (1963) 2 All ER 625 : (1963) 2 WLR 1359 (HL)] . Justice requires that it should be equal in value, although not alike in kind. The object of providing compensation is to place the claimant as far as possible in the same position financially as he was before the accident. Broadly speaking, in the case of death the basis of compensation is loss of pecuniary benefits to the dependants of the deceased which includes pecuniary loss, expenses etc. and loss to the estate. The object is to mitigate hardship that has been caused to the legal representatives due to the sudden demise of the deceased in the accident. Compensation awarded should not be inadequate and should neither be unreasonable, excessive, nor deficient. There can be no exact uniform rule for measuring the value of human life and the measure of damage cannot be arrived at by precise mathematical calculation; but amount recoverable depends on broad facts and circumstances of each case. It should neither be punitive against whom claim is decreed nor should it be a source of profit for the person in whose favour it is awarded. Upjohn, L.J. in Charterhouse Credit v. Tolly [(1963) 2 QB 683 : (1963) 2 All ER 432 : (1963) 2 WLR 1168 (CA)] remarked, "the assessment of damages has never been an exact science; it is essentially practical" (All ER p. 443 C).*

*13. The damages for vehicular accidents are in the nature of compensation in money for loss of any kind caused to any person. In case of personal injury the position is different from loss of property. In the latter case there is possibility of repair or restoration. But in the case of personal injury, the possibility of repair or restoration is practically non-existent. In Parry v. Cleaver [(1969) 1 All ER 555 : 1970 AC 1 : (1969) 2 WLR 821 (HL)] Lord Morris stated as follows : (All ER p. 564 I)*

"To compensate in money for pain and for physical consequences is invariably difficult but … no other process can be devised than that of making a monetary assessment."

27. The Hon'ble Supreme Court, in the case of ***State of Haryana & Another Vs. Jasbir Kaur & Others (Supra)***, has held that the statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance.

28. The Hon'ble Supreme Court, in the case of **State of Gujarat Vs. Shantilal Mangaldas & Others (Supra)**, has held that in ordinary parlance the expression "compensation" means any thing given to make things equivalent; a thing given to or to make amends for loss, recompense, remuneration or pay; it need not therefore, necessarily be in terms of money.

29. The Hon'ble Supreme Court, in the case of **Gobald Motor Service Ltd. & Another Vs. R.M.K. Veluswami &**

**Others (Supra)**, has held that the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependent by the death must be ascertained.

30. The Hon'ble Supreme Court, in the case of **Reliance General Insurance Company Ltd. Vs. Shashi Sharma & Others (Supra)**, has held that two cardinal principles run through the provisions of the Motor Vehicles Act of 1988 in the matter of determination of compensation. Firstly, the measure of compensation must be just and adequate and secondly, no double benefit should be passed on to the claimants in the matter of award of compensation. It has further been held that the claimants are legitimately entitled to claim for the loss of "pay and wages" of the deceased Government employee against the tortfeasor or Insurance Company, as the case may be, covered by the first part of Rule 5 under the Act of 1988. It has also been held that the Claims Tribunal should remain oblivious to the fact that the claim towards loss of pay and wages of the deceased has already been or will be compensated by the employer in the form of ex-gratia financial assistance on compassionate grounds under Rule 5 (1) because the Claims Tribunal has to adjudicate the claim and determine the amount of compensation which appears to it to be just.

31. The Hon'ble Supreme Court, in the case of **Sebastiani Lakra and Others Vs. National Insurance Company Limited and Another; (2019) 17 SCC 465**, considered section 168 of the Motor Vehicles Act, 1988, and held as under in paragraphs 4 to 6:

> *"4. Section 168 of the Motor Vehicles Act, 1988 (for short 'the Act') mandates that "just compensation" should be paid to the claimants. Any method of calculation of compensation which does not result in the award of 'just compensation' would not be in accordance with the Act. The word "just" is of (2016) 9 SCC 627 (1999) 1 SCC 90 (2002) 6 SCC 281 (2017) 16 SCC 680 a very wide amplitude. The Courts must interpret the word in a manner which meets the object of the Act, which is to give adequate and just compensation to the dependents of the deceased. One must also remember that compensation can be paid only once and not time and again.*
>
> *5. The traditional view was that while assessing compensation, the Court should assess the loss of income caused to the claimants by the death of the deceased and balance it with the benefits which may have accrued on account of the death of the deceased. However, even when this traditional view was being followed, it was a well settled position of law that the tortfeasor cannot not take benefit of the munificence or gratuity of others.*
>
> *6. In Helen C. Rebello case (supra), the issue was whether the amounts received by the deceased by way of provident fund, pension, life insurance policies and similarly, in cash, bank balance, shares, fixed deposits etc., are*

*'pecuniary advantages' received by the heirs on account of death of the deceased and liable to be deducted from the compensation. This Court held that these amounts have no co-relation with the compensation receivable by the dependents under the Motor Vehicle Act. The following observations were made by the Court:*

*"35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz., accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No corelation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no corelation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any corelation. The insured (deceased) contributes his own money for which he receives the amount which has no corelation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the*

*Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."*

32. The Hon'ble Supreme Court, in the case of **National Insurance Company Limited Vs. Mannat Johal and Others (Supra)**, considering the aforesaid judgment and issue of just compensation and as to when the deduction of ex-gratia payment would be warranted, has held that in a case relating to the death of the vehicular accident victim, any process of awarding "just" compensation involves assessment of such amount of pecuniary loss, which could be reasonably taken as the loss of dependency suffered by the claimants due to the demise of the victim. In regard to the deduction of ex-gratia payment the Hon'ble Supreme Court has taken a view that if any ex gratia amount received by the claimants has been under any Rules of Service and would be of continuous assistance, it may have been deducted.

33. One of the contention of learned counsel for the insurance companny was that the claimants are not entitled for the future prospects on the ground of his 58 years of age. The contention of learned counsel for the appellant is misconceived and not tenable because the death of bread earner of family is always loss to the family, who would have contributed to the family in future and his earnings may have increased in any manner.

34 The Hon'ble Supreme Court, in the case of **National Insurance company Ltd. Vs. Pranay Shethi & Others (Supra)**, has held that Judicial notice can be taken of the fact that salary does not remain the same and when a person is in a permanent job, there is always an enhancement due to one reason or the other. It has further been observed that to lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept and allowed the addition in the compensation in the age groups of 50 to 60 years. The relevant paragraph 58 is extracted here-in-below:-

*"58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] . Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self-employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be*

*consistency in the approach by the tribunals and the courts."*

35. The next contention of learned counsel for the insurance company was that there was violation of Section 134 (c) of the Act of 1988, therefore, the appellant insurance company is not liable to pay the amount of compensation in view of Section 168 of the Act of 1988. Section 134 (c) provides the duty of driver in case of accident and injury to a person. Section 134 (c) is extracted here-in-below:-

*"**134. Duty of driver in case of accident and injury to a person**.—When any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall—*

*(a) .....*

*(b) .....*

*[(c) give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely:—*

*(i) insurance policy number and period of its validity;*

*(ii) date, time and place of accident;*

*(iii) particulars of the persons injured or killed in the accident;*

*(iv) name of the driver and the particulars of his driving licence.*

***Explanation.**—For the purposes of this section the expression "driver" includes the owner of the vehicle.]"*

36. In view of above under Section 134 the duty has been cast upon the driver of the vehicle or other person in-charge of the vehicle to give information of insurance policy number and period of its validity, date, time and place of accident, particulars of the person injured or killed in the accident and name of the driver and the particulars of the driving license in writing to the insurer, who had issued the certificate of insurance. As per explanation, the "driver" includes the owner of the vehicle. Section 168 of the Act of 1988 provides the award of the claims tribunal, which is extracted here-in-below:-

*"**168. Award of the Claims Tribunal**.—(1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*

*Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such*

*claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.*

*(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.*

*(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."*

37. The aforesaid Section 168 provides for holding an enquiry by the claims tribunal on an application moved under Section 166 for compensation after affording opportunity to the parties including the insurer before making an award determining the compensation, which appears to it to be just. Section 149 of the Act of 1988 provides the duty of insurer to satisfy the judgment and award against the persons insured in respect of third party risks. Sub-section (2) of Section 149 provides that the grounds on which ensurer can defend the action. Sub-section (2) is extracted here-in-below:-

*"149. .....*

*(1) .....*

*(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—*

*(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—*

*(i) a condition excluding the use of the vehicle—*

*(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or*

*(b) for organised racing and speed testing, or*

*(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or*

*(d) without side-car being attached where the vehicle is a motor cycle; or (ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or*

*(iii) a condition excluding liability for injury caused or contributed to by conditions of war,*

*civil war, riot or civil commotion; or*

*(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.*

*....."*

38. In view of above, the grounds of section 134 (c) of the Act of 1988 is not provided under Section 149 (2) on which an ensurer can defend the action, therefore, this ground is not available to the appellant. Even otherwise, once an enquiry has been held by the tribunal after affording sufficient opportunity to the appellant insurance company, the plea of the appellant that since provisions of Section 134 (c) of the Act of 1988 have not been complied, therefore, the insurance company is not liable to make the payment of compensation is misconceived and not tenable because it has no concern with the claim of the dependents and family members of the deceased. Even otherwise, the appellant has failed to prove by any evidence that the provisions of Section 134 (c) was not complied. Thus, the judgment relied by learned counsel for the appellant in this regard in the case of **Khub Chand & Others Vs. State of Rajasthan & Others (Supra) and Sanjay Ramdas Patil Vs. Sanjay & Others (Supra)** are not of any assistance to the appellant.

39. In view of above, the grounds taken by the insurance company for assailing the impugned judgment and award in F.A.F.O. No.333 of 2023 are not tenable in the eyes of law. The appeal has been filed on misconceived and baseless grounds which is liable to be dismissed.

40. The F.A.F.O. No.18 of 2023 has been filed for enhancement of compensation on the ground that the tribunal has considered only the salary of the deceased and deducted the amount of over time being earned by him monthly on the ground that it was proved by the wife of the deceased Smt. Sallo Begum. It has also been alleged that the tribunal has failed to consider income of the deceased shown in Form-16 i.e. Rs.6,93,043/-, which was issued and proved by the department by placing evidence. The same has been vehemently opposed by the learned counsel for the insurance company on the ground that the over time income can not be considered for assessment of compensation because over time is given only for the days employee works over time, which can not be said to be fixed each and every month and treated regular monthly income. Even otherwise, the departmental witness has admitted the income shown in Form-16 as the arrears of salary, therefore, it can not be said that the said income was the annual income of the deceased. Thus the claimants are not entitled for any enhancement.

41. Perusal of the Form-16 filed before the tribunal does not indicate any over time income separately. Only the income has been shown. Shri Sanjeev Kumar Khandalwal, in-charge, salary appeared as PW-4 to prove the salary of the deceased. He stated that Paper No.27C/1 is salary slip of April, 2014. Paper No.27C/2 is a certified copy of the pay register. Paper No.27C/3 is a certificate of sending the copy of salary register. Paper No.27C/4 is the authorization letter for evidence. He admitted that Paper No.C4/7 indicate Rs.6,93,043/-, which is arrears of salary. He Stated in his cross-examination by opposite party no.3 that the total gross salary of the deceased in April 2014 was Rs.34,351/- and net Rs.27,380/-. He has also stated that

the deceased used to get the salary after deduction of TDS.

42. In view of above, the department admitted that the salary shown in Paper No.C4/7, which is copy of Form-16, Part-B is the arrears of salary amounting to Rs.6,93,043/- and total gross salary of April, 2014 was Rs.34,351/- and accident had occurred on 08.05.2014 . He has not deposed that the appellant used to get the over time regularly and it was part of salary, therefore, the contention of learned counsel for the appellant for enhancement is misconceived and not tenable. Thus the judgments relied by the learned counsel for the respondent in this regard are of no help to the claimants. The appeal for enhancement has been filed on misconceived and baseless grounds, which is liable to be dismissed.

43. In view of above, both the appeals filed by the insurance company as well as the claimants are liable to be dismissed being devoid of merit. The First Appeal From Order No.333 of 2023 and First Appeal From Order No.18 of 2023 are, accordingly, **dismissed**. No order as to costs.

44. The statutory deposit and any other amount, if any, deposited before this court in aforesaid appeals shall be remitted to the concerned tribunal expeditiously and in any case within four weeks from today to be adjusted towards the payments to be made to the claimant-respondents. The lower court record shall also be remitted within the aforesaid period.

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**(2024) 10 ILRA 607**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.10.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

First Appeal from Order No. 1648 of 2024

**Irfan Qureshi ...Appellant**
**Versus**
**Up State Industrial Development Auth. & Anr. ...Respondents**

**Counsel for the Appellant:**
Aditya Kant Sharma

**Counsel for the Respondents:**
Adarsh Bhushan, Vibhu Rai

**Civil Law - Registration Act, 1908 (As amended in U.P) - Section 17 - Specific Relief Act, 1963 - Section 39 - Transfer of Property Act, 1882 - Sections 49, 53-A & 54 - Plea of mandatory injunction - Maintainability - Father of respondent no.2, agreed to sell property to appellant for a certain amount - Subsequently part payment was paid by appellant - When sale deed was not executed, the suit was filed claiming a decree for mandatory injunction directing respondent no.2 to execute sale deed after receiving balance amount of consideration - Application seeking temporary injunction was filed by appellant for restraining defendants from interfering in possession of appellant - Application rejected - Except an alleged oral understanding between both the parties, there was no written contract or even any other document by which it could be inferred that property was agreed to be sold by father of respondent no.2, except certain photostat copies of bank drafts on which some notings were made - In absence of any written or registered or unregistered agreement for sale, the appellant's claim for injunction can't be accepted. (Para 4, 5, 18, 19)**

**Appeal Dismissed.** (E-13)

**List of Cases cited:**

1. Smt. Prabha Awasthi Vs Nisha Richharia & anr., 2012 (8) ADJ 557

2. FGP Limited Vs Saleh Hooseini Doctor & anr.(2009) 10 SCC 223 (Para 24 to 30)

3. Nanjegowda & anr.Vs Gangamma & ors.(2011) 13 SCC 232 (Para 9 to 12)

4. Shrimant Shamrao Suryavanshi & anr. Vs Prahlad Bhairoba Suryavanshi (D) by Lrs. & ors.JT 2002(2) SC 24

5. M/s Chaudhary Properties & 2 others Vs Laxmi Devi, Second Appeal No.318 of 2023, dated 10.05.2023

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Counter and rejoinder affidavits have been exchanged between the parties, therefore, with the consent of learned counsel for the parties, the instant appeal is being finally decided.

2. Heard Sri Samir Sharma, learned Senior Counsel, assisted by Ms. Ananya Shukla, for the appellant, Sri Anoop Trivedi, learned Senior Counsel, assisted by Sri Vibhu Rai, for the respondent no.2 and Sri Ajay Kumar Patel, learned counsel holding brief of Sri Adarsh Bhushan, for the respondent no.1.

3. The instant appeal is directed against the order dated 31.05.2024 whereby Judge, Small Causes Court, Bulandshahr has rejected the injunction application Paper 6-C2 under Order 39 Rule 1 CPC in Original Suit No.1054 of 2022.

4. Assailing the order impugned, Sri Samir Sharma, learned Senior Counsel, submits that father of the defendant-respondent no.2, namely, Sri C.D. Bajpai was owner of an Industrial Plot No.C-4 and he had agreed to sell the same to the appellant for a sum of Rs.70,00,000/- (rupees seventy lac only). It is pleaded in the plaint that a sum of Rs.35,00,000/- (rupees thirty five lac only) was paid by the appellant to the father of defendant-respondent no.2 and despite assurances given by him, when sale deed was not executed, the suit in question was filed claiming a decree for mandatory injunction directing the respondent no.2 to execute the sale deed after receiving balance amount of consideration. During the pendency of the suit, an application seeking temporary injunction was filed with a prayer that the defendants be restrained from interfering in possession of the appellant, inasmuch as, according to the appellant, in lieu of part payment, he had been delivered possession of the property.

5. The trial court has rejected the injunction application by observing that, in fact, the suit was filed in the nature of a suit for specific performance of an alleged agreement, however, in order to avoid liability to pay court fees, the relief has been cleverly couched in the form of mandatory injunction. After placing reliance on various authorities, the trial court has observed that in absence of a written agreement and for want of its registration, as per the law applicable in the State of U.P., the appellant has no case. Submission of appellant, however, is that once possession was delivered to the appellant, he was entitled to protect his possession and, therefore, rejection of injunction application is not according to law and Section 53-A of Transfer of Property Act, 1882 would apply in favour of the appellant.

6. Per contra, Sri Anoop Trivedi, learned Senior Counsel, submits that there being no written agreement between the appellant and the father of the defendant-respondent no.2, the suit for mandatory injunction is not maintainable. He further

submits that, at the most, the appellant might have a claim for refund of money in case he could succeed in establishing that the money had been paid in relation to the transaction of proposed sale, however, according to the Sri Trivedi, it was in respect of certain business transactions as disclosed in the objections against the injunction application and not concerning transfer of property.

7. Having heard the learned counsel for the parties, I find that mandatory injunctions can be granted under Section 39 of the Specific Relief Act, 1963. The said provision finds place in Chapter VIII and it applies when, in order to prevent breach of an obligation, it is necessary to compel performance of certain acts which the court is capable of enforcing and grant of injunction to prevent such breach is always in the discretion of the court. In the instant case, admittedly, the suit in question has not been filed claiming a decree for specific performance of an agreement, probably for the reason that there is no written agreement between the parties. Appellant's claim for relief of mandatory injunction based upon oral understanding requires to be dealt with in the light of law of the land.

8. Considering the arguments of Sri Samir Sharma, learned Senior Counsel, in relation to Section 53-A of Transfer of Property Act, this Court thinks it appropriate to deal with the legal proposition in that regard.

9. Section 17 of Registration Act, 1908 provides for documents, registration whereof is compulsory. There is an amendment made by U.P. Act No.57 of 1979 by inserting clause (f) in Section 17(1). The relevant provision i.e. Section 17(1), (as amended in U.P.), reads as under:

> "17. **Documents of which registration is compulsory**.- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866(XX of 1866), or the Indian Registration Act, 1871 (VII of 1871, or the Indian Registration Act, 1877(III of 1877), or this Act came or comes into force, namely:-
>
> ……...
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immovable property;
>
> (c) non-testamentary instruments, which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;
>
> …….
>
> (f) <u>any other instrument required by any law for the time being in force, to be registered</u>."

10. There is also a corresponding amendment in sub-section (2) of Section 17, inasmuch as, Clause (v), as it stood before Central Act 48 of 2001 was substituted partially vide Section 3 of Central Act 48 of 2001, w.e.f. 24th

September, 2001. Sub-section (2)(v) of Section 17 reads as under :-

> "(2) Nothing in clauses (b) and (c) of sub-section (1) applies to –
>
> ……...
>
> (v) any document other than contract for sale not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or"

11. An amendment was also made in Transfer of Property Act, 1882 by Section 30 of U.P. Act No.57 of 1976, w.e.f 1.1.1977. Section 54, as amended in U.P., reads as under:

> "54. "**Sale" defined**.- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made**.- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> **Contract of sale.-** A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property.
>
> Such contract can be made only by a registered instrument."

12. Consistent with the amendments referred to above, Section 49 of Act, 1908 was also simultaneously amended by Section 34 of U.P. Act No.57 of 1976 w.e.f. 1.1.1977 and the amended Section 49, as applicable in U.P. reads as under:

> **"Section 49. Effect of non-registration of documents required to be registered.-** No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882) or of any other law for the time being in force, to be registered shall-
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power or create any right or relationship, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power or creating such right or relationship,
>
> unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of part-performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882), or as evidence of any collateral transaction not required to be effected by registered instrument."

13. The aforesaid provisions make it clear that an agreement to sell in respect of immovable property lying in State of U.P. required registration necessarily i.e. compulsorily. Section 17 of Act, 1908 read with Section 54 of Act, 1882, as applicable in U.P., makes it very clear that a contract of sale, as defined in Section 54, can be made only by a registered instrument. By omission of explanation to sub-section (2) of Section 17 of Act, 1908, the legislature has made it very clear that in State of U.P., an agreement to sell immovable property would also require compulsory registration so as to create **any right, title** or interest in immovable property,. This view finds support from a decision of this Court in **Smt. Prabha Awasthi Vs. Nisha Richharia & Anr**, 2012 (8) ADJ 557, wherein a Division Bench referring to Section 17 of Act, 1908, as amended in U.P. w.e.f. 1.4.1977, read with Section 49, has observed as under:

> "Section 17 of the Registration Act, 1908 has been amended in the State of U.P. vide U.P. Act No.57 of 1976 w.e.f. 1st of April, 1977 by amending clause (b) of sub section (2) and by omitting the Explanation thereto of section 17 of the Registration Act. It follows that after the commencement of the aforesaid Amending Act, an agreement to sell in respect of immovable property lying in the State of U.P. necessarily requires registration. A document which necessarily requires registration being unregistered one cannot be read in evidence in view of section 49 of the aforesaid Act. It deals with the effect of non registered document required to be registered. Noticeably, section 49 of the Registration Act was also amended by the U.P. Act No.57 of 1976 vide section 34 simultaneously."

14. Though dispute before Division Bench in Prabha Awasthi (supra) related to an agreement executed in 2005 but while having a retrospect of the provisions of Act, 1908, as amended in U.P. in 1977, and the situation as had arisen, the Court has made above observations. However, since proviso to Section 49 of Act, 1908 permits an unregistered document to be received as evidence of part-performance of a contract for the purpose of Section 53-A of Act, 1882, this Court finds that permitting a document to be received in evidence for limited purpose as such would not have the effect of influencing the rights of the parties vis a vis the immovable property concerned. The general legislative policy under Section 49 of Act, 1908 is contained in three clauses i.e. (a), (b) and (c) and proviso carves out an exception in respect to clause (c) only and not (a) and (b) thereof. The inevitable conclusion qua the immovable property is that, an unregistered document shall not result in affecting the right etc. over the immovable property in any manner and also shall not confer any power to adopt it. To the extent the proviso operates, it permits that an unregistered document affecting immovable property may be given in evidence i.e. where a document remains unregistered and title does not pass, the agreement between the parties which preceded the ineffective document shall remain and may be received in evidence to look into the terms thereof. This by itself, would not confer any right since no such right has been conferred under the substantive law. Receiving in evidence does not mean conferment of substantive right.

The rule of evidence cannot enlarge or alter the provisions of substantive law. It cannot confer rights, if there are none under the substantive law.

15. The Court finds that even Section 53-A would have no application in the present case. Section 53-A of Act, 1882 reads as under:

> "**Part performance**.- Where any person contracts to transfer for consideration any immovable property **by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty :**
>
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,
>
> then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

16. In order to take shelter behind the above provision, one has to satisfy the following conditions, as are evident from bare reading of Section 53-A:

> (i) The contract should have been in writing, signed by or on behalf of transferor.
>
> (ii) The transferee should have got possession of immovable property covered by contract as a part-performance of the contract.
>
> (iii) If the transferee is already in possession and he continues in possession in part-performance of the contract, he further should have done some act in furtherance of the contract.

(iv) The transferee has either performed his part of contract or is willing to perform his part of the contract.

17. It has been held repeatedly that all the postulates of Section 53-A are sine qua none and a party cannot derive benefit by fulfilling only one or more conditions. It must satisfy all the conditions altogether. In taking the above view, I am fortified by Apex Court decisions in **FGP Limited Vs. Saleh Hooseini Doctor & Anr. (2009) 10 SCC 223 (Paras, 24, 25, 26, 27, 28, 29 & 30), Nanjegowda & Anr. Vs. Gangamma & Ors. (2011) 13 SCC 232 (paras 9 to 12 and Shrimant Shamrao Suryavanshi & Anr. Vs. Prahlad Bhairoba Suryavanshi (D) by Lrs. & Ors. JT 2002(2) SC 24.**

18. As far as the reliance placed by Sri Sharma on the judgment of this Court dated 10.05.2023 passed in Second Appeal No.318 of 2023 (M/s Chaudhary Properties & 2 others vs. Laxmi Devi), the facts of the said case were entirely different. In that case, a colony was developed by the appellants, who were colloniers/ builders and an advertisement was issued for allotment of plots. Pursuant to the advertisement, the plaintiff-respondent had applied for allotment and deposited certain amount of money. Pursuant to deposit of money, when a request to execute the sale deed was made in the light of some letter dated 30.12.2008 issued by the appellants therein, a registered letter was sent by the plaintiff to the builder to execute a registered sale deed and then suit for mandatory injunction was filed. Another relief claimed through amendment was as regards cancellation of letter dated 07.10.2011. The facts of the instant case are entirely different, inasmuch as except an alleged oral understanding between the appellant and the father of the respondent no.2, there is no written contract or even any other document by which it can be inferred that the property was agreed to be sold by the father of the respondent no.2, except certain photostat copies of the bank drafts on which some notings were made.

19. Without expressing any opinion as regards oral and documentary evidence to be led in the original suit or its maintainability, at this stage, while analysing the claim for injunction based upon a plea under Section 53-A of Transfer of Property Act and in absence of any written or registered or unregistered agreement for sale, this Court is not inclined to accept the appellant's claim for injunction.

20. In view of the above, this Court does not find any error in the order impugned.

21. The appeal fails and is, accordingly, **dismissed**.

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**(2024) 10 ILRA 613**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

First Appeal from Order No. 3075 of 2007

**Km. Cheenu ...Appellant**
**Versus**
**Bishambhar Singh & Anr. ...Respondents**

**Counsel for the Appellant:**
S.D. Ojha

**Counsel for the Respondents:**
Pankaj Rai

**Civil Law - Motor Vehicles Act, 1988 - Sections 166 - Enhancement of compensation - Claimant - appellant received grievous injuries in accident and became permanent disable to extent of 75% - FIR lodged against truck driver u/s 279, 338, 304A I.P.C. - Claim petition was filed - The Claims Tribunal after considering evidence found that drivers of both vehicles were equally negligent, responsible for accident and decided issue no.1 in favour of claimant, whereas issue nos.2 to 4 were decided in favour of opposite parties - (Para 2, 3, 6, 8)**

**Civil law - Motor Vehicles Act, 1988 - Claims Tribunal erred in deciding issue of contributory negligence ignoring fact that it was case of composite negligence - Claimant can claim compensation either from one vehicle or from both vehicles in view of law laid down by Hon'ble Apex Court in Khenyei (infra) - Since claim**

**petition was filed claiming compensation from owner and insurer of truck, Claims Tribunal erred in deducting 50% compensation on account of contributory negligence of driver of Maruti Van - Award was modified, compensation awarded was enhanced from Rs.1,08,875/- to Rs.23,69,971/- - Claimant was entitled for 6% interest on enhanced amount from date of award - (Para 17, 24)**

**Appeal partly allowed.** (E-13)

**List of Cases cited:**

1. Khenyei Vs New India Assurance Co. Ltd.& ors. reported in 2015(2) T.A.C. 677 (S.C.), (Para 12)

2. Laxmi Devi & ors.Vs Mohammad Tabbar & anr. reported in 2008 (2) T.A.C. 394 (S.C.)

3. Jagdish Vs Mohan reported in 2018(2) TAC 14

4. Master Ayush Vs The Branch Manager, Reliance General Insurance Co. Ltd.& anr., Civil Appeal Nos. 2205-2206 of 2022 (Arising out of SLP (Civil) Nos. 7238-39 of 2021),

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. This first appeal from order has been filed on behalf of claimant-appellant for enhancement of compensation against the judgment and award dated 8.8.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Bulandshahar in M.A.C.P. No.61 of 2006 (Km. Cheenu minor through her mother Smt. Rubi Vs. Bishambhar Singh and another) by which compensation of Rs.1,08,875/- along with 6% interest has been awarded in favour of claimant-appellant on account of injuries received by her.

2. The brief facts of the case are that on fateful day 22.8.2005 the claimant-appellant was returning from Agra to Bulandshahar by Maruti Van bearing no.RJ-01-C-8496 along with her other family members and at about 12 noon when they reached near Village Gijrauli, District Hathras, the offending truck bearing no.MP-6-E-5318 which was coming from opposite direction hit the Maruti Van. The offending truck was being driven by its driver very rashly and negligently. The claimant-appellant had received grievous injuries in the accident and has become permanent disable. The first information report was lodged against truck driver in Police Station Kotwali, Hathras, which was registered as Case Crime No.263 of 2005, under Sections 279, 338, 304A I.P.C.

3. The claim petition was filed on behalf of claimant-appellant (minor) through her mother under Sections 166 and 168 of Motor Vehicles Act claiming compensation of Rs.36,05,000/-. The claim petition was registered as M.A.C.P. No.61 of 2006. As per claim petition, the claimant had received grievous injuries in the accident and had become permanent disable to the extent of 75%. The age of claimant was only 2 years at the time of accident.

4. The opposite party/respondent no.1, who is owner of truck has appeared before the Claims Tribunal and filed his written statement denying the claim allegation. It was pleaded that the truck in question was insured from 15.10.2004 to 14.10.2005. It was also pleaded that registration certificate, insurance and permit of truck as well as driving licence of truck driver was valid and effective on the date of accident.

5. The opposite party/respondent no.2 the Oriental Insurance Company Limited has also filed its written statement

denying the claim allegation but it was admitted that truck was insured for third party for the period 15.10.2004 to 14.10.2005. It was pleaded that the accident was occurred on account of negligence of drivers of both the vehicles. It was also pleaded that the owner, driver and insurer of Maruti Van were necessary parties but were not impleaded in the claim petition and the claim petition is defective for non-joinder of necessary parties.

6. The Claims Tribunal had framed five issues for determination as rash and negligent driving of truck driver, contributory negligence of drivers of truck as well as Maruti Van, validity of driving licence of both the drivers, non-joinder of necessary party and lastly relief as well as liability for payment of compensation.

7. The claimant had produced Rubi Goel, who is mother of claimant as P.W.-1 and had also produced documentary evidence to prove her case. The opposite parties have not adduced any oral evidence and opposite party no.1 had filed documentary evidence in support of his defence.

8. The Claims Tribunal after considering the evidence and materials adduced by the parties, had recorded the finding while deciding issue nos.1, 2, 3 and 4 that drivers of both the vehicles were equally negligent and responsible for the accident. The Claims Tribunal has recorded the finding that there was contributory negligence on the part of both the drivers to the extent of 50-50%. The Claims Tribunal has further recorded the finding that driver of truck was having valid and effective driving licence to driver the truck, whereas the driver of Maruti Van was not having valid driving licence. The Claims Tribunal has also recorded the finding that there is no evidence to establish that Maruti Van was insured on the date of accident. The owner of Maruti Van was necessary party, but was not impleaded by the claimant and the claim petition is defective for non-joinder of necessary party. The Claims Tribunal has decided issue no.1 in favour of claimant, whereas issue nos.2, 3 and 4 were decided in favour of opposite parties.

9. The Claims Tribunal while deciding the issue no.5 has recorded the finding that the claimant had received grievous injuries in the accident and has become permanent disable on account of injuries received by her. The Claims Tribunal has further recorded that as per disability certificate which is Paper No.18C-2 issued by office of Chief Medical Officer, the disability of claimant was 75%. The opposite parties had not disputed the genuineness of disability certificate and it has been held that the claimant has become permanent disable to the extent of 75%. The Claims Tribunal has further recorded that since the claimant is aged about 2 years having no income, the income is accepted as Rs.15,000/- per annum as provided in 2nd Schedule of Motor Vehicles Act, 1988. The Claims Tribunal while calculating the compensation has applied the multiplier of 15. The Claims Tribunal while considering the medical expenses has recorded the finding that as per list of document Paper No.53C1 the claimant has filed bills/vouchers of Rs.47,628/- and through list of documents Paper No.33C-1 bills/vouchers of Rs.94,343/-, but had awarded only Rs.15,000/- for medical expenses as provided in Second Schedule of Section 163A of Motor Vehicles Act, 1988. The Claims Tribunal has further awarded Rs.5,000/- for mental and physical

pain, Rs.20,000/- for helping hand, Rs.5,000/- for special diet and Rs.4,000/- for transportation and total compensation was assessed as Rs.2,17,715/-. The Claims Tribunal after deducting 50% compensation on account of contributory negligence of driver of Maruti Van has awarded Rs.1,08,875/- against the insurer of truck. The Claims Tribunal has recorded the finding that the claimant is entitle to receive remaining 50% from owner and insurer of Maruti Van but since they were not impleaded as party in the claim petition, no direction can be issued for payment against them. The total compensation of Rs.1,08,875/- along with 6% interest has been awarded in favour of claimant-appellant.

10. Heard Sri S.D. Ojha, learned counsel for claimant-appellant, Sri Pankaj Rai, learned counsel appearing on behalf of respondent no.2 Insurance Company and perused the record. No one is present on behalf of respondent no.1, who is owner of truck.

11. It is submitted by learned counsel for claimant-appellant that a very meagre amount of compensation has been awarded by the Claims Tribunal in favour of claimant-appellant. The accident was occurred on account of sole negligence of driver of truck and there was no negligence on the part of driver of Maruti Van and the Claims Tribunal has erred in holding negligence of both the drivers. The F.I.R. was lodged by one Ghanshyam, who was travelling in Maruti Van and was an eye witness of the accident against the driver of truck. The Investigating Officer after due investigation has also submitted charge-sheet against truck driver which proves the rash and negligent driving of truck driver. The claimant has produced Smt. Rubi as P.W.-1, who was also travelling in Maruti Van and was an eye witness of the accident. She has stated on oath before the Claims Tribunal that accident was occurred on account of sole negligence of truck driver and this witness was not cross examined by the opposite parties on the issue of negligence and as such the statement of P.W.-1 was uncontroverted. The Claims Tribunal has recorded perverse finding of fact regarding negligence of driver of both the vehicles, in absence of any evidence of contributory negligence.

12. It is further submitted that even otherwise the claimant was travelling in Maruti Van and there was no contribution of claimant towards accident and in any case it was a case of composite negligence and it is open to the claimant to claim compensation either from one vehicle or from both the vehicles. He placed reliance on the judgment of Hon'ble the Apex Court in the case ***Khenyei vs. New India Assurance Company Limited and others*** reported in ***2015(2) T.A.C. 677(S.C.)*** that in case of composite negligence, it is open for the claimant to claim compensation either from the owner/driver and insurer of both the vehicles or from any one of them. Relevant paragraph 12 is quoted herein below:-

> *"12. A Full Bench of Madhya Pradesh High Court in Smt. Sushila Bhadoriya & Ors. v. M.P. State Road Transport Corpn. & Anr. [2005 (1) MPLJ 372] has also laid down that in case of composite negligence, the liability is joint and several and it is open to implead the driver, owner and the insurer one of the vehicles to recover the whole amount from one of the joint tort feasors. As to apportionment also, it has been*

*observed that both the vehicles will be jointly and severally liable to pay the compensation. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two as it is difficult to determine the apportionment in the absence of the drivers of both the vehicles appearing in the witness box. Therefore, there cannot be apportionment of the claim between the joint tort feasors. The relevant portion of decision of Full Bench is extracted hereunder :*

*"When injury is caused as a result of negligence of two joint tort-feasors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint tort-feasor, liability can be fastened on both the tort-feasors jointly and in case only one of the joint tort-feasors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feasors. If both the joint tort-feasors are before the Court and there is sufficient evidence regarding the act of each tort-feasors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-feasors, it may apportion the claim. However, it is not necessary to apportion the claim when it is not possible to determine the ratio of negligence of joint tort-feasors. In such cases, joint tort-feasors will be jointly and severally liable to pay the compensation.*

*On the same principle, in the case of joint tort- feasors where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There can not be apportionment of claim of each tort- feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.*

*To sum up, we hold as under:-*

*(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles.*

*Claimant may implead the owner, driver and insurer of both the vehicles or anyone of them.*

*(ii) There can not be apportionment of the liability of joint tort-feasors. In case both the joint tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of Jaw, there is no necessity to apportion the inter se liability of joint tort- feasors.*

*Reference is answered accordingly. Appeal be placed*

*before appropriate Bench for hearing."*

13. It is further submitted that the accident was occurred in the year 2005 and the Claims Tribunal has erred in accepting notional income of Rs.15,000/- per annum whereas the Hon'ble Apex Court in the case of ***Laxmi Devi & others vs. Mohammad Tabbar & Another reported in 2008 (2) T.A.C. 394 (S.C.)***, has accepted notional income of Rs.3,000/- per month (Rs.36,000/- per annum) for the accident which occurred in the year 2004. It is further submitted that the parents of the claimant had spent more than Rs.3,00,000/- in her medical treatment and bills/vouchers of about Rs.1,50,000/- has already been produced before the Claims Tribunal which were not disputed by the opposite parties and the Claims Tribunal has erred in awarding only Rs.15,000/- towards medical expenses.

14. Lastly, it is submitted that the claimant has become permanent disable to the extent of 75% and she is still under the medical treatment and the parents of claimant-appellant had spent a very huge amount even after the judgment of Claims Tribunal. The claimant-appellant had filed bills/vouchers and other documents related to her treatment before this Court as an additional evidence through application filed under Order 41 Rule 27 C.P.C. This Court vide order dated 6.4.2017 directed the Claims Tribunal to verify the documents related to medical expenses annexed with application filed under Order 41 Rule 27 C.P.C. dated 9.12.2013 as additional evidence. The Claims Tribunal had verified the medical bills of Rs.4,42,000/- vide its report dated 7.9.2019. The Claims Tribunal has awarded a very less amount of Rs.20,000/- for attendant whereas on account of injuries she could not perform her daily routine works without attendant. One attendant was engaged by parents of claimant on payment of Rs.2,000/- per month. The Claims Tribunal had also erred in awarding only Rs.5,000/- for physical and mental pain, Rs.5,000/- for special died and Rs.4,000/- for transportation. The compensation awarded by the Claims Tribunal is inappropriate looking the age and nature of injuries of claimant-appellant.

15. On the other hand, Sri Pankaj Rai, learned counsel appearing on behalf of respondent no.2 the Oriental Insurance Company Limited has submitted that admittedly it was a case of head on collision in between the insured truck and Maruti Van and the Claims Tribunal after considering the entire evidence and materials which are available on record has rightly recorded the finding that both the drivers were rash and negligent and were responsible for the accident to the extent of 50-50%. It is further submitted that the claimant-appellant was aged about 2 years at the time of accident having no income. The Claims Tribunal has rightly accepted Rs.15,000/- per annum as notional income, provided in IInd Schedule of Motor Vehicles Act, 1988. The medical expenses was also rightly awarded as per provisions of IInd Schedule which was inserted in Motor Vehicles Act, 1988 in the year 1994. Lastly, it is submitted that the compensation awarded by the Claims Tribunal is almost just and proper and there is no illegality in any manner. No ground for enhancement is made out. The appeal filed by claimant-appellant has no force and is liable to be dismissed with costs.

16. Considered the submissions of learned counsel for the parties and perused the record.

17. It is admitted fact that the claimant aged about 2 years along with her family members was travelling in Maruti

Van and it was a case of composite negligence. The Claims Tribunal has erred in deciding the issue of contributory negligence ignoring the fact that it was a case of composite negligence and it is open to the claimant to claim compensation either from one vehicle or from both the vehicles in view of law laid down by Hon'ble the Apex Court in the case of ***Khenyei*** (supra). Since the claim petition was filed claiming compensation from the owner and insurer of truck, the Claims Tribunal had erred in deducting 50% compensation on account of contributory negligence of driver of Maruti Van.

18. The Claims Tribunal has also erred in accepting notional income of Rs.15,000/- per annum as provided in IInd Schedule of Motor Vehicles Act, 1988 which was inserted in the year 1994, whereas in the present case the accident occurred on 22.8.2005 and as such the notional income of claimant is accepted as Rs.3,000/- per month as provided by Hon'ble the Apex Court in the case of ***Laxmi Devi*** (supra) for the accident occurred in the year 2004. The Claims Tribunal has not awarded any amount towards future prospects whereas the claimant-appellant is also entitled for 40% future prospects in view of law laid down by the Hon'ble Apex Court in the case of ***Jagdish vs. Mohan*** reported in ***2018(2) TAC 14.***

19. The Claims Tribunal has also erred in accepting 75% loss of earning capacity relying on the disability certificate which discloses 75% disability to the claimant, whereas as per the evidence adduced by claimant before the Claims Tribunal, the claimant-appellant has become permanent disable to the extent of 100%. Loss of income is accepted 100%.

20. So far as medical expenses are concerned, the claimant had fully proved her medical expenses by producing bills/vouchers of Rs.47,628/- and Rs.94,343/- before the Claims Tribunal and the Claims Tribunal has erred in awarding only Rs.15,000/- for medical expenses. The claimant-appellant is entitled for Rs.1,41,971/- towards medical expenses occurred till the award passed by the Claims Tribunal. The claimant-appellant has also filed several documents related to the treatment and medical expenses of claimant-appellant amounting to Rs.4,42,000/- through application filed under Order 41 Rule 27 C.P.C. dated 9.12.2013. This Court vide order dated 6.4.2017 sent the documents annexed with application under Order 41 Rule 27 C.P.C. to the concerned Claims Tribunal for verification of said documents. The Claims Tribunal has registered miscellaneous case as Misc. Case No.1631 of 2017. The Claims Tribunal after affording opportunity of hearing to the parties had verified the bills and vouchers filed on behalf of claimant-appellant as additional evidence and submitted its report to this Court by letter dated 7.9.2019. The medical expenses occurred after the judgment and award of Claims Tribunal dated 8.8.2007 till 9.12.2013 (filing application under Order 41 Rule 27 C.P.C.) amounting to Rs.4,42,000/- were duly verified by the concerned Claims Tribunal. The respondent Insurance Company has not disputed the fact that aforesaid amount has not been incurred in the medical treatment of claimant-appellant. The claimant-appellant is entitled for medical expenses occurred in her treatment. The medical treatment of the claimant-appellant is still going on as she is disable to the extent of 100%. Nothing has been awarded towards future medical expenses. The claimant-appellant is also

entitle for Rs.3,00,000/- towards future medical expenses looking the nature of injuries.

21. The Claims Tribunal had also failed to consider that on account of 100% disability the marriage prospects of claimant-appellant was substantially damaged and the claimant-appellant is subjected to frustration, disappointment, discomfort and inconvenience but nothing has been awarded in the aforesaid account to the claimant-appellant. The Hon'ble Apex Court in the case of ***Master Ayush Vs. The Branch Manager, Reliance General Insurance Company Limited and another*** passed in Civil Appeal Nos. 2205-2206 of 2022 (arising out of SLP (Civil) Nos. 7238-39 of 2021), has awarded Rs.3,00,000/- for loss of marriage prospects. The claimant-appellant is also entitled for Rs.3,00,000/- for loss of marriage prospects. The Claims Tribunal has awarded only Rs.20,000/- towards helping hand ignoring the fact that at the time of accident she was only 2 years old and was 100% disabled. The attendant charges payable to the appellant is assessed as Rs.2,000/- X 12 X 15 = Rs.3,60,000/-.

22. The Claims Tribunal has also erred in awarding only Rs.5,000/- for pain and suffering. The claimant-appellant is entitled for Rs.30,000/- for pain and suffering. The Claims Tribunal has also erred in awarding only Rs.4,000/- for transportation and Rs.5,000/- for special diet which is also unreasonable and is without any basis looking the nature of injuries as well as disability of the claimant-appellant. The claimant-appellant is entitled for Rs.20,000/- for transportation and Rs.20,000/- for special diet.

23. In view of aforesaid discussion, the quantum of compensation is reassessed as under:-

1) Monthly income = Rs.3,000/-

2) Annual income = Rs.3,000/- X 12 = Rs.36,000/-

3) Future prospects (40%) = Rs.14,400/-

4) Total annual income = Rs.36,000/- + Rs.14,400/- =Rs.50,400/-

5) Multiplier applicable (15) = Rs.50,400/- x 15 = Rs.7,56,000/-

6) Medical expenses

(i) Till award of Claims Tribunal dated 8.8.2007 = Rs.1,41,971/-

(ii) From 8.8.2007 till 9.12.2013 (additional evidence filed before this Court) = Rs.4,42,000/-

7) Future medical expenses = Rs.3,00,000/-

8) Attendant charges = Rs.3,60,000/-

9) Loss of marriage prospects = Rs.3,00,000/-

10) Pain and suffering = Rs.30,000/-

11) Transportation = Rs.20,000/-

12) Special diet = Rs.20,000/-

Total = Rs.7,56,000/- + Rs.1,41,971/- + Rs.4,42,000/- + Rs.3,00,000/- + Rs.3,60,000/- + Rs.3,00,000/- + Rs.30,000/- + Rs.20,000/- + Rs.20,000/-

= **Rs. 23,69,971**/-

24. In view of above, the appeal filed by appellant is hereby partly allowed and award of the Claims Tribunal is modified and compensation awarded by the Claims Tribunal is enhanced from Rs.1,08,875/- to Rs.23,69,971/-. The claimant is also entitled for 6% interest on enhanced amount from the date of award of Claims Tribunal dated 8.8.2007.

25. The respondent no.2 Oriental Insurance Company Limited is directed to pay enhanced amount along with interest

within two months from today to the claimant-appellant, failing which respondent Insurance Company is liable to pay interest at the rate of 10% on enhanced amount.

26. No order as to costs.

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**(2024) 10 ILRA 621**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.10.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Public Interest Litigation (PIL) No. 1050 of 2024
Connected with PIL Nos. 1238 of 2024, 1438 of 2024, 1573 of 2024,
1576 of 2024, 2250 of 2023, 1924 of 2024 and 1977 of 2024

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

**Counsel for the Petitioner:**
S/Sri Hirdesh Kumar Yadav, Madan Mohan Srivastava, Ram Bahadur Singh, Suneel Kumar Mishra, Vijay Kumar, Kunwar Bahadur Srivastava, Janardan Shukla, Udai Shankar Chauhan

**Counsel for the Respondents:**
S/Sri Manish Goyal, Addl. Advocate General assisted by J.N. Maurya, C.S.C. and Ravi Anand Agarwal, Rajesh Kumar Tripathi, S.C., Bhupendra Kumar Tripathi, Hari Narayan Singh, Rameshwar Prasad Shukla, A.K. Pandey, Pankaj Kumar Gupta, Arun Kumar Pandey, Sudhir Bharti & Bhupendra Kumar Tripathi

**A. Local Law – UP Revenue Code, 2006 – Section 77 – Construction of water tank – Bar u/s 77, how far relevant – Resolution passed by the Gaon Sabha to use small part of land for the purpose of construction of water tank or RCC Centre, out of the land marked for the purpose of Charagaah, Naveen Parti, Khalihaan etc. – Permissibility – Held, bar of Section 77 of U.P. Revenue Code would not come in the way, except if it is shown that there is mala fide, which is not the case in present PILs. – High Court found no merit in challenge of the construction of water tank and RCC Centre. (Para 21 and 27)**

**PIL disposed of.** (E-1)

**List of Cases cited:**

1. Gaon Sabha Vs St. of U.P. & ors..; 2023:AHC:224233

2. Basdev Vs St. of U.P. & ors..; 2023(161) RD 467

3. Saddam Hussain Vs St. of U.P. & ors..; 2024 SCC OnLine All 596

4. Writ Petition No. 35251 of 2017; V. Deevana, Nizamabad & ors.. Vs Prl Secy, Municipal Admn. & ors.. decided by Telangana High Court

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

1. This bunch of public interest litigations are filed by few villagers of concerned village mainly opposing construction of water tank and in one case construction of RCC Centre, on the land reserved in concerned village for Charagaah, Gadahi, Naveen Parti, Khalihaan or other public purposes.

2. Learned counsel for petitioners mainly argued that if a land is reserved for a particular purpose (such as Charagaah, Khalihaan etc.), nature of same cannot be changed except in exceptional circumstances by due prescribed process, however, due process has not been followed in the present cases and only on basis of resolution of Gram Sabha concerned, permission for construction was granted.

3. In Public Interest Litigation No. 1576 of 2024 (Radhey Shyam Gupta) it has been brought on record that nature of land has been changed vide order dated 03.09.2024 passed under Section 101 of U.P. Revenue Code, 2006, therefore, counsel for said petitioner has instruction not to press the public interest litigation.

4. During hearing, a question was raised by this Court that, whether there is any dispute that construction of water tank or RCC Centre is a work of public interest, i.e., for the interest of villagers at large, to which counsel for petitioners have specifically stated that it is a work in larger public interest.

5. Another query was raised by this Court, whether due to construction of water tank or RCC Centre, nature of land reserved for a particular purpose would entirely change, i.e., whether the area used for said purpose is large or small, i.e., due to construction land would become useless for said purpose, but no specific answer was given by learned counsel for petitioners. However, Sri Manish Goyal, learned Additional Advocate General, on basis of instructions, submitted that construction is on a very small part of land which cannot change nature of land, i.e., the purpose for which it is reserved and land can be used still for said purpose.

6. Another query was raised by this Court, whether there is any material on record that land was earlier used only for the purpose for which it was reserved and whether there is any material before this Court that atleast during last five years or so, it was used for said purpose only, since no material has been brought on record. In one of the case it has been mentioned that land reserved for a particular public purpose is also used for marriage and other functions organized by villagers. In another public interest litigation, part of land is used as a playground, as reflected from photographs annexed to said PIL.

7. Learned counsel for petitioners have vehemently referred Section 77 of U.P. Land Revenue Code that Bhumidhari right cannot be accrued in certain land which includes, Khalihaan, Manure pits and other land described therein. However, said reliance is vehemently opposed by learned Additional Advocate General referring other provisions such as Sections 59 and 63(2)(a) of U.P. Revenue Code that it is not a case where Bhumidhari right has been created in favour of any person or party. The land always vests in the State Government and by an order it is reserved for specific purpose in Gaon Sabha. Section 77 of U.P. Revenue Code, bars that on a land reserved for public purpose, no bhumidhari rights can be created but sub-section (2) of Section 77 of U.P. Revenue Code provides that class of public utility land may be changed under due procedure, whereas in present cases nature of land may not be changed since only a very small part is proposed to be used for other public purposes. The land is being used for a public purpose which does not create any Bhumidhari right, therefore, the bar of Section 77 of U.P. Revenue Code cannot come in way for construction of water tank or RCC Centre.

8. It is the case of State that for the purpose of construction of water tank and boring, an exercise was undertaken to find out a fit place for it and only thereafter on basis of resolution of Gaon Sabha, suitable land was earmarked and construction was started and in some of the villages it has

already been concluded after spending money of tax payers.

9. It is the categorical stand of State that in PIL No 1238 of 2024 on the land reserved as Khalihaan, some villagers have encroached a part of it, against whom proceedings were initiated under Section 67(1) of U.P. Revenue Code, however, the same has not been disclosed in said PIL as well as petitioner has not raised any voice for their removal, therefore, said PIL is nothing but is filed on basis of pick and choose, only to make an objection to a public cause. Learned counsel for petitioner in said PIL has not been able to deny above allegations. Since a small part of land was used, therefore, there was no mandatory requirement to pass such orders.

10. In PIL No. 1576 of 2024 (Radhey Shyam Gupta), a complete process has been undertaken and order has been passed under Section 101 of U.P. Revenue Code for exchange, therefore, there is a request to withdraw the public interest litigation.

11. In PIL No. 1238 of 2024 (Yogendra Pandey and another), learned Additional Advocate General, on instruction, has specifically stated that the work on Gata No. 1411 under the scheme of Jal Jeevan Yojna is stopped since there was no resolution for construction on that land, therefore, grievance of petitioners in said PIL is satisfied. The construction is carried out on the other earmarked land on basis of resolution of Gaon Sabha.

12. In PIL No. 1438 of 2024 (Ravindra Nath Rai), the allegation of petitioner is that land which is shown as Naveen Parti was a Charagaah and correction has not been made despite an order was passed many years ago as well as that construction of water tank is in the middle of Gata and work is at a very initial stage.

13. So far as correction in revenue record is concerned, no proceedings were undertaken either by Gaon Sabha concerned or petitioner, therefore, at this stage Court cannot enter into said dispute. However, in case construction has not been commenced and it is in the middle of said land, the project can be relooked so that it may be shifted to a corner, if other requirements are satisfied otherwise it may be made sure that construction of water tank may not render the land, if used as a Charagaah, later on unuseful.

14. In PIL No. 1573 of 2024 (Zafar Ali), it is the case of State that out of land measuring about 4550 sq. meter reserved for Khalihaan, only 42 sq. meter land is being used for construction of RCC Centre and rest of land is available for the purpose of Khalihaan as well as construction has already been concluded and village has been identified as a model village. This fact has not been disputed by learned counsel for petitioner.

15. In PIL No. 1924 of 2024 (Dilip and another), the land is reserved as a Naveen Parti, which is spread in number of Gatas and out of which only part of 0.0610 of Gata No. 2039Ga is utilized, which would not disturb the use of remaining area as Naveen Parti.

16. In PIL No. 1977 of 2024 (Ramesh Singh) the land is used for Garahi and Naveen Parti. Initially petitioner made objection for cutting of trees, however a report is placed on record that since the trees belong to Forest Department and for

the purpose of construction some trees were required to be cut and where it was found that some villagers have illegally cut the trees, proceedings were initiated.

17. PIL No. 2250 of 2023 (Sunil Kumar) was filed on two grounds. First is to stop the construction of water tank and second to remove encroachment over the land by private Respondent-5, the present Pradhan. In this regard it is directed that present PIL shall be considered as an information to Lekhpal to initiate inquiry as required in accordance with provisions of Section 67 of U.P. Revenue Code.

18. During hearing learned counsel for respective Gaon Sabhas have raised a problem that Pradhans of concerned Gaon Sabhas are not responding to their letters seeking instruction and for that this Court has passed an order for personal appearance of respective Pradhans of concerned Gaon Sabhas.

19. All Pradhans of respective Gaon Sabhas have appeared in person, except of Gaon Sabha Jagannathpur, Tehsil Nagina, District Bijnor (PIL No. 2250 of 2023). Court has interacted with Pradhans which includes two women also but surprisingly none of the Pradhan knew about their functions, as mentioned in Section 15 of U.P. Panchayat Raj Act, 1947.

20. Learned Additional Advocate General has submitted that he will take this matter before concerned department to initiate some training programme either on basis of Cluster or Commissionarate to make aware Pradhans, specifically women, about their rights and functions and to discourage the concept of Pradhanpati. In this regard reference may be taken of a judgment passed by this Court in **Gaon Sabha vs. State of U.P. and others, Neutral Citation No. 2023:AHC:224233**.

21. The outcome of above discussion is that since there is no change of Bhumidhari rights, therefore, on basis of resolution of Gaon Sabha if State has taken a decision to use a very small part of land for the purpose of construction of water tank or RCC Centre, out of the land marked for the purpose of Charagaah, Naveen Parti, Khalihaan etc. the bar of Section 77 of U.P. Revenue Code would not come in the way, except if it is shown that there is mala fide, which is not the case in present PILs.

22. As referred above, in PIL No. 1573 of 2024, construction of RCC Centre has already been concluded and village has come in the category of model village. In PIL No. 1576 of 2024, an order has already been passed under Section 101 of U.P. Revenue Code for exchange, which is not challenged, therefore, nothing survives in objection.

23. Petitioners have not come up with very specific case that land which is reserved for the purpose of Charagaah, Khalihaan etc. was earlier used for said purpose only since in some of the case it is used for marriage functions or playground also, therefore, objection on construction of water tank is nothing but an objection for the sake of it only.

24. In PIL No. 1238 of 2024 petitioner has objected only construction of water tank but has not even referred about the encroachment on said land and for such type of PIL the Court is of the view that piousness of public interest litigation is rendered unpious and the same cannot be

considered to be a genuine public interest litigation.

25. Learned counsel for petitioners have placed reliance on some judgments but no judgment is applicable in present set of facts since in present case a very small part of land is used for other public purpose. The notification placed on record are mainly for required steps if such land is being used for company or other purpose i.e. Bhumidhari rights were created, which is not a case in hand. Reliance placed on **Basdev vs. State of U.P. and others, 2023(161) RD 467** by petitioners will also not be useful since it was with regard to Section 19A of U.P. Consolidation of Holdings Act, 1953, where land reserved for public purpose was allotted to villages for construction of residence on valuation whereas in present case no private interest was created.

26. Per Contra learned Additional Advocate General has rightly placed reliance on **Saddam Hussain vs. State of U.P. and others, 2024 SCC OnLine All 596 and V. Deevana, Nizamabad and others vs. Prl Secy, Municipal Admn. and others, (Writ Petition No. 35251 of 2017)** decided by Telangana High Court, where construction of water tanks was considered to be a public work and challenge to it was rejected.

27. In aforesaid circumstances, I do not find that there is any merit to challenge the construction of water tank and RCC Centre which are also for interest of villagers and since land earmarked for it is undisputedly a very small part of respective land, which does not render said land unuseful for the said purpose as well as that since no Bhumidhari right is created, therefore, bar under Section 77 of U.P. Revenue Code does not exist.

28. In view of above, all the public interest litigations are **disposed of** with direction to concerned department to initiate some training programme for Pradhans within a period of three months from today, either on basis of Cluster or Commissionarate to make aware Pradhans, specifically women, about their rights and functions and to discourage concept of Pradhanpati.

29. With regard to PIL No. 1438 of 2024 (Ravindra Nath Rai), it is directed that if construction of water tank is not commenced, authorities concerned may take steps to shift the same in corner of said Gata, if possible.

30. In PIL No. 2250 of 2023 (Sunil Kumar), it is directed that any person from family of Pradhan or Pradhan himself, if has encroached on land belongs to Gaon Sabha, shall release the same within one month from today and in case it is not released within said period, a resolution be passed to initiate proceeding under Section 67 of U.P. Revenue Code, 2006.

31. In PIL No. 1238 of 2024, petitioner is directed to file any subsequent PIL on correct material to espouse larger public cause only.

32. Before parting, it is necessary to observe that whenever even a very small part an area, reserved for a public purpose, is used for other public purpose, the Gaon Sabha concerned and officials of State will take endeavour to make out a larger consensus amongst the villagers so that

they may not approach this Court to oppose the public cause.

33. A copy of this order be sent to Principal Secretary, Panchayat Raj Department, Government of U.P. Lucknow for compliance.

34. Registrar (Compliance) to take steps.

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**(2024) 10 ILRA 626**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 18.10.2024**

**BEFORE**

**THE HON'BLE MAHESH CHANDRA TRIPATHI, J**
**THE HON'BLE PIYUSH AGRAWAL, J.**

Civil Misc. Review Application No. 4 of 2023

**Chetram @ Mintu & Ors. ...Applicants**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Applicants:**
Ashish Mishra, Jai Shanker Misra

**Counsel for the Respondents:**
C.S.C., Kaushlendra Nath Singh

**Civil Law - Review - Code of Civil Procedure,1908 - Section 141- Order 47, Rule 1 - Constitution of India - Art. 226 - Writ Petition - R**eview is permissible only when there is error apparent on the face of record i.e. error should be grave and palpable, and the error must be such as would be apparent on mere looking of record, without requiring any long drawn process of reasoning, and reappraisal of entire evidence for finding the error, as same would amount to exercise of appellate jurisdiction. Review lies only on the grounds mentioned in Order 47, Rule 1 read with Section 141 CPC. Party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other "sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in the said provision of C.P.C. **N**either review court can examine the merit of the judgment as an appellate court nor in the garb of review petition, re-hearing of the matter can be permitted by this Court - **In the instant case e**ach and every aspect of the matter was considered by the Division Bench and thereafter, the writ petition was dismissed. No case was made out to review the judgment. (Para 22, 23)

**Dismissed.** (E-5)

**List of Cases cited:**

1. Gajraj Singh & ors.Vs St. of U.P. & ors.2011 (11) ADJ 1 (FB)

2. Pratap Singh Vs St. of UP & ors. Writ C No.6022 of 2008 decided on 17.02.2012

3. Kanwar Raj Singh (D) through Legal Representatives Vs GEJO (D) Through Legal Representatives & ors. (2024) 2 SCC 416

4. Ram Saran Lall Vs Domini Kuer AIR 1961 SC 1747

5. Shivdeo Singh Vs St. of Pun. . AIR 1963 SC 1909

6. A.P. Sharma Vs A.P. Sharma 1979 (4) SCC 389

7. Meera Bhanja Vs Nirmla K. Chaudhary 1995 (1) SCC 170

8. Satyanarayan Laxminarayan Hegde Vs Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137

9. Parsion Devi & ors. Vs Sumitri Devi & ors. 1997 (8) J.T. SC 480

10. Smt. Meera Bhanja Vs St. Nirmala Kumari Choudhary 1985 (1) SCC 170

11. Lily Thomas Vs U.O.I.AIR 2000 SC 1650

12. Subhash Vs St. of Mah & anr. AIR 2002 SC 2537

13. St. Haryana Vs Mohinder Singh JT 2002 (1) 197

14. U.O.I.Vs B. Valluvar 2006 (8) SCC 686

15. St. of Haryana & ors. Vs M.P. Mohila 2007 (1) SCC 457

16. Bhagwant Singh Vs Deputy Director of Consolidation & anr. AIR 1977 All. 163

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Piyush Agrawal, J.)

**Civil Misc. Delay Condonation Application No.1 of 2023**

1. Learned counsel for the respondents states that he is not inclined to file an objection to the delay condonation application and he has no objection in case delay condonation application is allowed.

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

**Review Application**

1. Heard Sri Jai Shanker Misra, learned counsel for the applicants/petitioners and Sri Kaushalendra Nath Singh, learned counsel for the respondent/NOIDA.

2. The instant review application is preferred to review the judgment and order dated 22.04.2022 passed by the Division Bench in Writ C No.10106 of 2022 (Chetram Chauhan @ Mintu and others vs. State of U.P. and 3 others).

**Factual Matrix**

3. Record reflects that the applicants-petitioners were owners with transferable right of Khasra No.422M/0.9700 hec., 428M/0.6410 hec. and 570M/0.7460 hec. situated in Village Sadarpur, Tehsil Dadri, District Gautam Buddh Nagar. The State Government vide notifications dated 30.03.2002 and 28.06.2003 had acquired the land of different villages of NOIDA and Greater NOIDA including the land of petitioners in Khasra No.422 and 428. The petitioners have invoked the writ jurisdiction for a direction commanding second respondent/Chief Executive Officer, New Okhala Industrial Development Authority (NOIDA), Gautam Buddh Nagar to pay compensation @ Rs.44,000/- per square meter in place of Rs.22,000/- per square meter for 5% additional abadi land in respect of the acquired land of petitioners i.e. Khasra Nos.422M & 428M situated in Village Sadarpur, Pargana & Tehsil Dadri, District Gautam Buddha Nagar in the light of the judgment and order dated 21.10.2011 passed by the Full Bench of this Court in **Gajraj Singh & others Vs. State of U.P. & others**[1]. A Division Bench vide judgment and order dated 22.04.2022 had dismissed the writ petition. For ready reference, the judgment and order dated 22.04.2022 is quoted herein under:-

"1. The prayer made in the present petition is for a direction to the respondent no.2 to pay compensation @ Rs. 44,000/- per square meter in place of Rs. 22,000/- per square meter for 5% additional abadi land with reference to the acquisition thereof in Village - Sadarpur, Pargana & Tehsil - Dadri, District - Gautam Buddha Nagar in terms of the judgement of the Full Bench of this Court in Gajraj Singh & others Vs. State of U.P. & others reported in 2011 (11) ADJ 1 (FB).

2. At the very outset, learned counsel for the respondents pointed out that challenge to the acquisition pertaining to land of Village - Sadarpur vide same notification was considered by the Full Bench of this Court in Gajraj Singh (supra) and the writ petitions were dismissed. Hence, the petitioners cannot be granted any benefit in terms thereof.

3. To this, learned counsel for the petitioners submitted that only three writ petitions pertaining to Village - Sadarpur were dismissed and not all of them.

4. We are not impressed with this argument. Whatever writ petitions, pertaining to acquisition of land in Village - Sadarpur vide same notification were listed before the Full Bench of this Court, the same were specifically dismissed. That does not mean that any further relief, which was not granted to the writ petitioners before the Full Bench of this Court, could be granted to any other land owners.

5. For the reasons stated above, we do not find any merit in the present petition. The same is, accordingly, dismissed."

Submission of the review applicants/petitioners

4. Learned counsel for the applicants-petitioners vehemently submitted that earlier the petitioners had preferred Writ Petition No.44 of 2012 (Raj Kumar and others vs. State of UP and others) and the same was disposed of by the Division Bench vide an order dated 04.01.2012 in terms of the Full Bench judgement passed in Gajraj Singh's case (supra). In this backdrop, it was pressed that once the Division Bench had already disposed of the said writ petition in terms of judgement of Full Bench in Gajraj Singh's case (supra) then the applicants-petitioners are entitled to get full compensation @ 64.7% and admittedly, the same has been accorded to the petitioners.

5. Learned counsel for the applicants further submitted that while dismissing the writ petition, the Division Bench had considered the benefit of additional compensation in the light of Full Bench judgment in Gajraj Singh's case (supra), which has already been accorded to the petitioners by the NOIDA. He submitted that mainly three writ petitions pertaining to Village Sadarpur were considered and dismissed by the Full Bench in **Gajraj Singh's** case (supra) and therefore, it cannot be presumed that no benefit had been extended qua the land, which was acquired in Village Sadarpur. In support of his submission, he has placed reliance on the judgement and order passed in **Pratap Singh vs. State of UP and others**[2]. The operative portion of the order is as under:-

"In result, the writ petitions included in Group-A, Group-B and Group-C are decided as follows:-

(i)The Writ Petition Nos.41833 of 2011, 49068 of 2011, 50654 of 2009, 56821 of 2009, 63443 of 2009 and 51115 of 2011 of Group-A, relating to village Devla, district Gautam Budh Nagar are allowed and the notifications dated 26th May, 2009 and 22nd June, 2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector. Rest of the writ petitions of Group-A are disposed of in terms of direction No.3 and other directions in earlier judgment and order dated 21st October, 2011 (Gajraj and others vs. State of U.P. and others) reported in 2011(11) ADJ.

(ii)All the writ petitions of Group-B are dismissed as barred by laches.

(iii)The writ petitions of Group-C relating to village Bisrakh Jalalpur, district Gautam Budh Nagar are disposed of in terms of direction No.3 and other directions in earlier judgment and order dated 21st October, 2011 (Gajraj and others vs. State of U.P. and others) reported in 2011(11) ADJ.

All the writ petitions are decided accordingly. No costs."

6. Learned counsel for the applicants next submitted that while passing the order in Pratap Singh's case (supra) the Division Bench had taken note of list of Group-A cases relating to different villages of NOIDA and Greater NOIDA and also taken note of item no.211, Village Sadarpur, wherein the notification under Section 4 dated 30.03.2002 and the notification under Section 6 of the Act dated 28.06.2003 were mentioned and the notification of land of petitioners covered the benefit as per direction no.3 and other directions in the earlier judgment passed in Gajraj Singh's case (supra). In support of his submission, he had placed reliance on item no.7 of 191st Board Meeting of NOIDA Authority dated 21.12.2016, by which the Board had resolved to pay the equivalent amount of the developed land of additional 5% abadi plot of the tenure holder. Even, the said relief is also liable to be accorded in the light of the 191st Board meeting of the NOIDA dated 21.12.2016. The Division Bench without considering the aforementioned grounds had rejected the claim of the petitioners and in case the order dated 22.04.2022 is not reviewed, the applicants-petitioners would suffer irreparable loss and injury.

**Submission of counsel for the respondent/authority**

7. The review application was resisted by Sri Kaushalendra Nath Singh, learned counsel for the respondent authority on the ground that in the instant matter, admittedly the disputed plot had been purchased by the NOIDA authority through mutual negotiation. The sale deeds were executed on 28.11.2001 and the same was registered by the Registrar on 30.07.2002. The applicants were well conversant with the fact, that they had no right to press any relief in the light of the Full Bench judgement in Gajraj Singh's case (supra). The applicants-petitioners tried to get the benefit of the date of registration by the Registrar dated 30.07.2002 but in fact, the same was not the date of the sale deed. The sale deed had already been executed way back on

28.11.2001 and the entire sale consideration was also passed on to the petitioners on the said date. The said fact is also reflected from the sale deed itself, wherein it had been acknowledged that the entire compensation had been accepted by the petitioners in the month of November, 2001. In support of his submission, he had also placed reliance on the sale deed, which had also been brought on record by the petitioners.

8. Sri Kaushalendra Nath Singh further raised an objection that the additional compensation was paid to only those persons, whose land were acquired by means of notifications, which were under challenge before the Full Bench in Gajraj Singh's case (supra). Initially, the petitioners tried to mislead the Court that their land were subject matter of challenge in the preliminary notification i.e. Section 4 of the Act but in the final notification i.e. under Section 6 of the Act, the said land was not included. Therefore, the land of the petitioners were never acquired and the same were taken through sale deeds, which were executed on 28.11.2001 and the entire sale consideration was handed over on the said date. Even while filing the earlier writ petition, the petitioners claimed that their land were also acquired by means of notification and succeeded in obtaining disposal order in the light of judgement passed in Gajraj Singh's case (supra) and later on, the petitioners had instituted the said writ petition with material concealment. Even on the basis of the earlier order passed in Writ C No.44 of 2012, once it was brought into the notice of the NOIDA Authority that the petitioners were not entitled for any additional compensation in the light of the judgement passed in Gajraj Singh's case (supra) then the recovery notice has been issued for return of the additional compensation, which was wrongly collected by the petitioners by giving wrong facts.

9. Sri Kaushalendra Nath Singh vehemently contended and placed reliance on 180th Board meeting dated 29.11.2013, wherein the decision was taken to accord enhanced compensation of 64.7% to the farmers keeping in mind the interest of the tenure holders whose land were acquired between 30.03.2002 to 17.03.2009. In the instant matter, admittedly the notification under Section 4 was issued on 30.03.2002 and the notification under Section 6 of the Act was issued on 28.06.2003 but prior to it, the petitioner's land was already purchased by the NOIDA Authority in the month of November, 2001. Even the petitioners are not entitled to get the additional compensation of 64.7% or 5% developed land in the light of the Full Bench judgement in Gajraj Singh's case (supra). The judgment and order dated 22.4.2022 passed by the Division Bench is well considered and same does not fall within the parameters of review as there is no infirmity in the same, as such review petition is clearly not maintainable.

10. He further placed reliance on the judgements passed by the Apex Court in **Kanwar Raj Singh (D) through Legal Representatives vs. GEJO (D) Through Legal Representatives and others3 and Ram Saran Lall v. Domini Kuer**[4], wherein it had been held that Section 47 of the Registration Act, 1908 applies to a document only after it has been registered, and it has nothing to do with the completion of the sale when the instrument is one of sale.

**Analysis by the Court**

11. After respective arguments have been advanced, the parameter provided for exercise of Review jurisdiction is being looked into.

12. The review application can be allowed only on (1) discovery of new and important matter of evidence which, after exercise of due diligence, was not within the knowledge of the person seeking review, or could not be produced by him at the time when the order was made, or (2) when some mistake or error on the face of record is found, or (3) on any analogous ground. But review is not permissible on the ground that the decision was erroneous on merits as the same would be the province of an Appellate Court.

13. In the case of **Shivdeo Singh v. State of Punjab**[5], Hon'ble Apex Court took the view that there is nothing under Article 226 of the Constitution of India, which precludes High Court from exercising the power of review, which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. It was held that every Court including High Court inheres plenary jurisdiction, to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

14. Hon'ble Apex Court in the case of **A.P. Sharma v. A.P. Sharma**[6], has cautioned that power of review of High Court is not the same as appellate powers and review on the ground that certain documents have not been considered, which formed the record. Hon'ble Apex Court, in the case of **Meera Bhanja v. Nirmla K. Chaudhary**[7], has taken the view that review must be confined to error apparent on the face of record, error must be such as would be apparent on mere looking without any long drawn process of reasoning, and reappraisal of evidence on record for finding out error would amount to exercise of appellate jurisdiction, which is not at all permissible.

15. In the case of **Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale**[8], Hon'ble Supreme Court has made the following observations in connection with an error apparent on the face of the record :-

> "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ.
>
> In our view the aforesaid approach of the Division Bench dealing with the review proceedings clearly shows that it has overstepped its jurisdiction under Order 47, Rule 1, C.P.C. By merely styling the reasoning adopted by the earlier Division Bench as suffering from a patent error. It would not become a patent error or error apparent in view of the settled legal position indicated by us earlier. In substance, the review Bench has re appreciated the entire evidence, sat almost as Court of appeal and has reversed the findings reached by the earlier

Division Bench Even if the earlier Division Bench findings regarding C.S. Plot No. 74 were found to be erroneous, it would be no ground for reviewing the same, as that would be the function of an appellate Court. Learned counsel for the respondent was not in a position to point out how the reasoning adopted and conclusion reached by the Review Bench can be supported within the narrow and limited scope of Order 47, Rule 1, C.P.C. Right or wrong, the earlier Division Bench judgment had become final so far as the High Court was concerned. It could not have been reviewed by reconsidering the entire evidence with a view to finding out the alleged apparent error for justifying the invocation of review powers. Only on that short ground, therefore, this appeal is required to be allowed. The final decision dated 8th July, 1986 of the Division Bench dismissing the appeal from appellate decree No.569 of 1973 insofar as C.S. Plot No. 74 is concerned as well as the review judgment dated 5th September, 1984 in connection with the very same plot, i.e. C.S. Plot No. 74 are set aside and the earlier judgment of the High Court dated 3rd August, 1978 allowing the Second Appeal regarding suit plot No. 74 is restored. The appeal is accordingly allowed. In the facts and circumstances of the case, there will be no order as to costs."

16. In **Parsion Devi and others v. Sumitri Devi and others**[9], Hon'ble Supreme Court has taken the view that review proceeding has to be strictly confined to the ambit and scope of Order 47, and therein the two earlier judgments referred to above have been relied upon. Again in **Smt. Meera Bhanja v. St. Nirmala Kumari Choudhary**[10], Hon'ble Supreme Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

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

18. Hon'ble Apex Court, in the case of **Lily Thomas v. Union of India**[11], after considering the dictionary meaning of word "review" has taken the view that power of review can be exercised for correction of mistake and not to substitute a view. Such powers can be exercised within the limits of the statute, dealing with exercise of power; the review cannot be treated as an appeal in disguise, and mere possibility of two views on the subject is not a ground of review.

19. In **Subhash Vs. State of Maharastra & another**[12], the Apex Court emphasized that Court should not be misguided and should not lightly entertain the review application unless there are

circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review. In **State Haryana v. Mohinder Singh**[13], the Apex Court disapproved the judgment of High Court, wherein earlier writ petition was disposed of by High Court being infructuous and giving some directions, and subsequent to the same, review was sought, which was allowed, same was clearly termed to be overstepping of jurisdiction, and amounting to giving of one more chance of hearing.

20. In the case of **Union of India v. B. Valluvar**[14], Hon'ble Apex Court has again considered the parameters of review jurisdiction of High Court and held that same shall be exercised within the limitations as provided under Section 114 read with Order 47 Rule of C.P.C., and without recording finding as to there existed error apparent on the face of the record, merit cannot be gone into. Hon'ble Apex Court in the case of **State of Haryana and others v. M.P. Mohila**[15], has taken the view that in the garb of clarification application, recourse to achieve the result of review application, cannot be permitted.

21. In the case of **Bhagwant Singh Vs. Deputy Director of Consolidation & another**[16], this Court rejected the review application filed on a ground which had not been argued earlier because the counsel, at initial stage, had committed mistake in not relying on and arguing those points, and held as under:-

> "It is not possible to review a judgment only to give the petitioner a fresh inning. It is not for the litigant to judge of counsel's wisdom after the case has been decided. It is for the counsel to argue the case in the manner he thinks it should be argued. Once the case has been finally argued on merit and decided on merit, no application for review lies on the ground that the case should have been differently argued."

**Conclusion**

22. On the touchstone of the dictum noted above, the review is permissible only when there is error apparent on the face of record i.e. error should be grave and palpable, and the error must be such as would be apparent on mere looking of record, without requiring any long drawn process of reasoning, and reappraisal of entire evidence for finding the error, as same would amount to exercise of appellate jurisdiction. Further, the review lies only on the grounds mentioned in Order 47, Rule 1 read with Section 141 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other "sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in the said provision of C.P.C.

23. The applicants/petitioners could not demonstrate anything to satisfy the Court on the three grounds of review as mentioned in the earlier part of this judgement, hence the judgement dated 22.4.2022 does not fall under the parameters of review. It is by now settled that neither review court can examine the

merit of the judgment as an appellate court nor in the garb of review petition, re-hearing of the matter can be permitted by this Court.

24. Perusal of judgment under review dated 22.4.2022 passed by this Court shows that each and every aspect of the matter has been considered by the Division Bench and thereafter, the writ petition in question was dismissed. No case is made out to review the judgment passed on 22.4.2022.

25. Consequently, the review application is **dismissed**

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**(2024) 10 ILRA 634**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 17.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Transfer Application (Civil) No. 267 of 2023
&
Transfer Application (Civil) No. 269 of 2023

**Shubhi Saxena ...Petitioner**
**Versus**
**Rahul Srivastava & Anr. ...Respondents**

**Counsel for the Petitioner:**
Shobhit Saxena

**Counsel for the Respondents:**
Vijyant Nigam

**Civil Law – Criminal Procedure Code, 1908 - Section 24 - Order 39 Rule 2 - Hindu Marriage Act, 1955 - Section – 13 - Guardians and Wads Act, 1890 - Sections 7 & 25: -** Transfer Application – seeking transfer of custody and divorce Cases from Lucknow to Bareilly – court finds that – applicant's permanent resides in Lucknow and the minor Child resides there and studying at Lucknow – and the applicant's frequent transfer do not justify the transfer of cases – held, both custody and divorce cases should ideally be decided by the same court for the interest of justice – application lacks merit and the same is dismissed.
(Para – 12, 13, 14)

**Transfer Application Dismissed.** (E-11)

**List of Cases cited:**

1. Delma Lubna Coelho Vs Edmond Clint Fernandes - 2023 SCC Online SC 440,

2. Sumita Singh Vs Kumar Sanjay & anr.– 2001 vol. 10 SCC 41.

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

1. Heard Sri Shobhit Saxena, the learned counsel for the applicant and Sri Vijyant Nigam, the learned counsel for the opposite parties.

2. Transfer Application (Civil) No. 267 of 2023 has been filed 'under Section 24 read with under Order 39, Rule 2 of Civil Procedure Code, 1908' seeking transfer of Case No. 353 of 2023, under Section 7 read with Section 25 of Guardian and Wards Act from the Court of Principal Judge, Family Court, Lucknow to the Court of Principal Judge, Family Court, Barelly.

3. Transfer Application (Civil) No. 269 of 2023 has been filed 'under Section 24 read with under Order 39, Rule 2 of Civil Procedure Code, 1908' seeking transfer of Case No. 4412 of 2022, under Section 13 of Hindu Marriage Act, 1955 from the Court of Principal Judge, Family Court, Lucknow to the Court of Principal Judge, Family Court, Bareilly.

4. The statutory provision regarding transfer of cases is contained in

Section 24 of Civil Procedure Code, 1908 and Order XXXIX Rule 2 of Civil Procedure Code deals with grant of temporary injunctions to restrain repetition or continuance of breach. Order XXXIX Rule 2 C.P.C. does not deal with transfer of cases and the mention of Order XXXIX Rule 2 CPC, 1908 in the heading of the application indicates that the application has been prepared in a careless manner, which cannot be appreciated by the Court.

5. The applicant has sought transfer of the case on the ground that the applicant is presently posted is posted as HRM Regional Officer, Bank of Baroda at Bareilly. In the description of the applicant given in the transfer application, she has disclosed that she is a resident of Lucknow.

6. The opposite party no. 1 has filed objections against the transfer applications inter alia stating that the applicant is in a transferable service. The applicant was posted at Faizabad at the time of her marriage, in the year 2020 she was transferred to Sultanpur and in the year 2022 she was again transferred to Bareilly. The applicant can be transferred anywhere in India after every two to three years and in these circumstances, it will be most convenient for the applicant to contest the case at Lucknow which is the place of her permanent residence.

7. The applicant has filed rejoinder affidavits refuting the aforesaid averment and she has stated that she will remain posted at Bareilly for six years. The applicant has annexed an incomplete extract of the transfer policy of the bank and the learned counsel for the petitioner has submitted that clause 4.16 of the transfer policy provides that an officer can be posted anywhere within the region as per the need of the bank. However, the officers who have been in the same city/place/center within a region for six years or above, will be subjected to transfer to another city/place/center within the same region or any other region of the zone, subject to non identification for transfer to another zone.

8. The aforesaid clause merely speaks about continuous posting in a particular region for a period of six years or above and it does not make any mention that an officer cannot be transferred out of a city within the same reason for a period of six years.

9. The learned counsel for the applicant has placed reliance on an order of the Hon'ble Supreme Court in **Sumita Singh v. Kumar Sanjay & Anr**: (2001) 10 SCC 41, wherein the Hon'ble Supreme Court transferred a suit keeping in view the fact that the wife would be required to travel a distance of about 1100 kilometers for attending the case. In the present case, the applicant is having her permanent address at Lucknow itself and presently she is posted at Bareilly, a place which is at a distance of merely 250 kilometers from Lucknow.

10. The learned counsel for the applicant has submitted that the convenience of the wife has to be considered while deciding the transfer application. No doubt there is force in the submission of the learned counsel for the petitioner that convenience of wife is to be considered by the Court but when the past posting record of the applicant shows that she has been transferred from every city after every two years, the present place of posting of the applicant/wife at Bareilly does not give a good ground for transfer of

the case from Lucknow to Bareilly when she is likely to be transferred repetitively in future also and the cases are pending at Lucknow where the applicant's permanent residence is situated and the minor child of the parties, for whose custody a case has been filed at Lucknow, is also residing and studying at Lucknow.

11. The learned counsel for the opposite party has relied upon a decision of the Hon'ble Supreme Court in the case of **Delma Lubna Coelho v. Edmond Clint Fernandes**, 2023 SCC OnLine SC 440, wherein the Hon'ble Supreme Court has observed that : -

> *"Number of Transfer Petitions are filed in matrimonial cases, primarily by the wives seeking transfer of the matrimonial proceedings initiated by the husband. This Court normally has been accepting the prayer made while showing leniency towards ladies. In Anindita Das v. Srijit Das, (2006) 9 SCC 197, this Court observed that may be this leniency was being misused by women. Hence, each and every case has to be considered on its own merits."*

12. From the aforesaid facts, it appears that the present place of posting of the applicant – wife does not provide a good ground for transfer of the case relating to custody of a minor child who is residing and studying at Lucknow, from Lucknow to Bareilly, more particularly when the applicant's permanent residence is also at Lucknow and she is in a transferable service and she gets transferred very frequently – almost every two to three years. The divorce suit should also be decided by the same Court where custody suit is pending and, therefore, it will not be in the interest of justice to transfer the divorce case as well.

13. Therefore, there appears to be no good ground for transfer of (i) Case No. 353 of 2023, Rahul Srivastava & Anr. v. Smt. Shubhi Saxena, under Section 7 read with Section 25 of the Guardian and Wards Act and (ii) Case No. 4412 of 2022, under Section 13 of Hindu Marriage Act, 1955 from the Court of Principal Judge, Family Court, Lucknow to the Court of Principal Judge, Family Court, Bareilly.

14. Both the applications lack merit and the same are ***dismissed.***

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**(2024) 10 ILRA 636**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.10.2024**

**BEFORE**

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

Writ -A No. 11016 of 2023

**Smt. Farzana ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Indra Kumar Mishra

**Counsel for the Respondents:**
C.S.C., Shivam Yadav

**A. Civil Law - Constitution of India,1950-Article 226-The petitioner sought family pension after the death of her husband, a technician who retired in the year 2018 and passed away in 2022-Despite repeated applications, the Chief Treasury officer denied her claim, citing divorce allegation made by the deceased husband in a complaint to the District Magistrate and claims of the petitioner's remarriage-**

**Held, witness testimonies including alleged second husband and his wife revealed that claims were based on mistaken identity-the investigation confirmed that there were two women named farzana both having former husbands named shakir, but the petitioner was not remarried-direction issued to Chief Treasury Officer, District Magistrate and Executive Engineer to ensure payment of petitioner's family pension, including arrears within one month.(Para 1 to 23)**

**The writ petition is allowed.** (E-6)

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

1. Heard Mr. Indra Kumar Mishra, learned Counsel for the petitioner, Mr. Sharad Chandra Upadhyay, learned Standing Counsel appearing on behalf of respondent nos. 1, 2 and 3 and Mr. Shivam Yadav, learned Counsel appearing for respondent no. 4.

2. The petitioner has instituted this writ petition, praying that a *mandamus* be issued to the respondents, commanding them to pay her family pension, admissible under the rules and due to her on account of the services of her deceased husband, the late Shakir Husain.

3. The petitioner's husband retired on 31.01.2018 from the post of a Technician Grade-II/ Lineman in the Establishment of the Executive Engineer, Electricity Distribution Division-I, Bareilly. He was in receipt of his retirement pension until his demise on June the 7th, 2022. He had opened an account with the Punjab National Bank, Civil Lines Branch, Bareilly, bearing Account No. 0043000100429856, where the petitioner was his nominee. In support of the claim, the petitioner has annexed a xerox copy of the Passbook relating to the Bank Account last mentioned. There is on record a xerox copy of a memo dated 25.02.2019, carrying two attested photographs of the petitioner and her husband, submitted to the office of the Executive Engineer for the purpose of sanction and payment of pension and family pension. The memo dated 25.02.2019 is signed by the late Shakir Husain, who appeared in person while submitting the memo before the Executive Engineer, as the petitioner claims. The petitioner's husband had made an application for pension and family pension on 22.05.2018, and in that application, shown the petitioner's name as his wife. This application was made to the Executive Engineer, Electricity Distribution Division-I, Bareilly. A xerox copy of the said application is also on record. After her husband's demise on 07.06.2022, armed with his death certificate dated 05.07.2022 issued by the Nagar Nigam, Bareilly, the petitioner moved an application for the release of family pension in her favour, opening an Account in her name with the Indian Bank, Civil Lines Branch, Bareilly on 13.10.2022. The petitioner made further applications for grant of family pension on 16.12.2022, 19.05.2023 and 09.06.2023, addressed to various officers of the State, such as the Chief Secretary, the Chief Treasury Officer, Bareilly and the District Magistrate, Bareilly, requesting that the family pension due to her, on account of her husband's services, be released in her favour. All of these led to no result, as it seems.

4. Aggrieved by the inaction on the respondents' part in releasing the petitioner's due family pension, the petitioner has instituted the present writ petition.

5. On the 26th of July, 2023, an application was made in the writ petition, seeking to implead the Executive Engineer, Electricity Distribution Division-I,

Madhyanchal Vidyut Vitaran Nigam Ltd., Bareilly, as a party respondent to the writ petition. This application was allowed and the petition adjourned to 07.08.2023 with a direction that the name of Mr. Shivam Yadav, learned Counsel for the Electricity Distribution Corporation be printed on the respondents' side. On 07.08.2023, acting upon what Mr. Shivam Yadav, learned Counsel appearing for the Electricity Distribution Division-I, Madhyanchal Vidyut Vitaran Nigam Ltd., Bareilly, stated at the Bar, this Court passed the following order:

> *"Upon instructions received, Mr. Shivam Yadav, Advocate appearing on behalf of the Executive Engineer, Electricity Distribution Khand Ist, Madhyanchal Electricity Distribution Nigam Limited, Bareilly states that the petitioner's papers for sanction and release of family pension have been forwarded to the Chief Treasury Officer, Bareilly and that the sanction and release of the petitioner's pension is awaiting action by the Chief Treasury Officer, Bareilly.*
>
> *Let the Chief Treasury Officer, Bareilly file his affidavit within a week indicating why the petitioner's family pension have not been sanctioned and released so far.*
>
> *Lay this petition as fresh on* ***17.08.2023****.*
>
> *Let this order be communicated to the Chief Treasury Officer, Bareilly by the Registrar (Compliance)* ***within 24 hours****."*

6. On 17.08.2023, a counter affidavit was filed on behalf of the Chief Treasury Officer, Bareilly, wherein a very startling stand was taken in paragraph Nos.12, 15 and 16, which read:

> "12. That in reply to the contents of paragraph no.9 of the writ petition, it is submitted that Smt. Farzana has made application on 19-5-2023 thereafter on 9-6-2023 for release of family pension after death of her husband Shakir Husain. In respect of said letters it is submitted here that Late Shakir Husain during his life time during 'Janta Darshan' by his application dated 8-9-2021 being IGRS No.2015021008558 dated 24-9-2021 informed that Talak(divorce) is already done with Smt. Farzana, neither he has any concerned with her nor they are living together and through said letter requested that after his death, family pension may not be given to Smt. Farzana. The true/photo copy of request letter dated 6-9- 2021 made by Late Shakir Husan on 'Janta Darshan' before District Magistrate, Bareilly is being filed herewith and marked as ANNEXURE NO. CA-1 to this affidavit.
>
> 15. That in reply to the contents of paragraph no.12 of the writ petition it is submitted that taking into consideration the request letter dated 8-9-2021 made by Late Shakir Husain that Talak (divorce) is already done with Smt. Farzana, neither he has any concerned with her nor they are living together and through said letter requested that after his death, family pension may not be given to

Smt. Farzana, therefore in pursuance of said letter, answering respondent vide its letter No.399 dated 24-6-2023 made information to the District Magistrate, Bareilly, stated all facts to him, also asked for suitable direction for payment of family pension to the petitioner, thereafter on instruction of District Magistrate, the answering respondent written letter on 5-7-2023 to the Tehsildar, Tehsil Sadar, Bareilly to made enquiry and informed that Talak(divorce) is done with Smt. Farzana(petitioner) with her husband Late Shakir Husain or not, so that further action may be taken. The true/photo copies of letters to District Magistrate dated 24-6-2023 and letter to Tehsildar, Tehsil Sadar, Bareilly dated 5-7-2023 are being filed herewith collectively for kind perusal of this Hon'ble Court and marked as **ANNEXURE NO.CA-2** to this affidavit.

16. That the contents of paragraph no.13 of the writ petition are not admitted as stated, hence denied. In reply thereof it is submitted that till today the answering respondent is awaiting for reply from the District Magistrate, Bareilly as well as the Tehsildar, Tehsil Dadar, Bareilly in pursuance of letter dated 5-7-2023 and as when answering respondent will get response he will made necessary effort to release the family pension in favour of the petitioner."

7. Noticing the aforesaid stand by the Chief Treasury Officer, Bareilly and the rejoinder affidavit filed on behalf of the petitioner, denying the fact of a divorce between the petitioner and her husband or that he had submitted to the District Magistrate any application until his demise on 07.06.2022 of the kind mentioned in the Chief Treasury Officer's affidavit, this Court proceeded to admit the writ petition to hearing on 28.08.2023 and passed the following order:

*"Parties have exchanged affidavits.*

*Admit.*

*Heard Mr. I. K. Mishra, learned counsel for the petitioner, Mr. Shivam Yadav, learned counsel appearing on behalf of respondent no.4 and Mr. Yashwant Singh, learned Standing Counsel appearing on behalf of respondent nos.1, 2 and 3.*

*Let Mr. Shivam Yadav, Advocate produce the service book relating to the late Shakir Hussain, Ex-Technician, Grade-II, who retired on 31.01.2018 from the office of the Executive Engineer, Electricity Distribution Khand- Ist, Madhyanchal Electricity Distribution Nigam Ltd., Katzu Marg, Bareilly.*

*Mr. Shivam Yadav, Advocate will also produce the original of the pension nomination form, a copy of which is annexed at page no.24 of the paper book.*

*An affidavit shall also be filed by day after tomorrow by the Executive Engineer indicating whether any decree of divorce passed by a Court of competent jurisdiction or a duly authenticated talaknama was produced before the Executive Engineer by the late Shakir Hussain.*

*List for further hearing* ***day after tomorrow i.e. 30.08.2023 at 2:00 p.m****.*

*Let this order be communicated to the Executive Engineer, Electricity Distribution Khand-Ist, Madhyanchal Electricity Distribution Nigam Ltd., Katzu Marg, Bareilly, District Bareilly by the Registrar (Compliance) today."*

8. In compliance with the order dated 28.08.2023, an affidavit of compliance was filed by the Executive Engineer, Electricity Distribution Division-I, Bareilly on 25.09.2023, where it is averred in paragraph No.3 that after the petitioner's husband's retirement on 31.01.2018, he appeared along with his wife before the Executive Engineer and a Pension Payment Order (for short, 'PPO') was drawn on 21.02.2019, that is within one month of the deceased employee's retirement. The PPO carries photographs of the deceased employee along with the petitioner. In the PPO dated 21.02.2019, the petitioner's nomination has been registered as the employee's wife. The service-book is said, in paragraph No.5 of the affidavit of compliance, to have been left blank as regards nomination or the employee's marital status. It is next averred in paragraph No.6 of the affidavit of compliance that after the retired employee's demise, the petitioner's claim for release of family pension was forwarded by the Executive Engineer to the Zonal Office, Bareilly, and from that office, it has been forwarded to the Chief Treasury Officer for further action. The Executive Engineer has also said that he had endorsed the petitioner's claim through his letters dated 17.01.2023, 24.02.2023 and 11.08.2023, regarding her entitlement to family pension as the deceased's widow. In paragraph Nos.9, 10 and 11 of the affidavit, it is averred:

"9. That it is clearly stated herein that no Decree of Divorce or Talaknama or any other document has been produced by the deceased employee or by the petitioner. In the absence of any such document, the respondent corporation has forwarded the claim of the petitioner for requisite payments in light of the Rules.

10. That in light of the aforesaid submission, the deponent categorically submits that all dues to the petitioner's husband till his death were duly paid and so far as family pension is concerned the appropriate steps endorsing the claim of the petitioner have been duly forwarded.

11. That this Hon'ble Court had directed the original pension nomination form to be produced before this Hon'ble Court, which is appended on page No. 24 of the Writ Petition, it is submitted that such form has been forwarded to the Zonal Office of the Corporation i.e. to Lucknow and therefore, at present it is not available with the deponent, however, the deponent undertakes that in case this Hon'ble Court further requires the original form to be produced before this Hon'ble Court, the deponent would fetch the form from the General Manager (Finance/Nodal Officer) MVVNL, Lucknow, U.P. and produce the same before the Hon'ble Court, however, it is submitted that the nomination form which is appended with the writ

petition is genuine, as the same is also available with the answering respondent in his records. The copy of the clear nomination form along with the attested photographs of the employee and his wife i.e., petitioner and attested passbook is annexed herewith and marked as Annexure No. CA-4 to this affidavit."

9. Despite the aforesaid affidavit of compliance filed by the employers, when the matter next came on 08.12.2023, the Chief Treasury Officer would not relent in his stand that the petitioner had been divorced by the deceased employee merely because an application, purporting to be signed by the petitioner's late husband, when alive, had been made to the Collector. The Chief Treasury Officer took a stand that despite receipt of the PPO from the petitioner's husband's employers, he directed an inquiry to be made into the allegations regarding the divorce between the petitioner and her husband. Nothing was produced before the Court on 18.12.2023 of the kind of a decree of divorce or a talaqnama. There was just no evidence about any divorce, either with the Chief Treasury Officer or the petitioner's husband's employers, except that the Chief Treasury Officer was convinced that there was a divorce. When the Court indicated its inclination on 08.12.2023 to summon the Chief Treasury Officer, Bareilly in order to elicit from him the basis for his belief that the petitioner and her husband had divorced, Mr. Girijesh Kumar Tripathi, the learned Additional Chief Standing Counsel sought telephonic instructions. He informed the Court that the Tehsildar had reported that the petitioner, after her husband's death, had remarried. These developments led this Court to issue a commission to the Principal Judge, Family Court, Bareilly to hold an inquiry, after taking necessary evidence, determining the fact if the petitioner had remarried, in order to curtail controversy. On 08.12.2023, this Court passed the following order:

*"Prima facie, the stand taken by the Chief Treasury Officer, Bareilly in the order dated 05.07.2023 appears to be very untenable. Despite the Pension Payment Order being forwarded by the Corporation, the petitioner's husband's employers, the Chief Treasury Officer, Bareilly has directed an inquiry to be made into allegations to the effect that the petitioner's husband when alive had said that he had divorced his wife, the petitioner.*

*Unless, there is some evidence about a divorce, like a decree of Court or other valid instrument effecting divorce, a divorce between spouses is not to be readily inferred; certainly not because the husband has proclaimed about it in a complaint. There has to be evidence in aliunde about it. No such evidence has been referred to in the order dated 05.07.2023. So far as this order is concerned, it does not at all stand in the way of the petitioner's right to receive family pension.*

*Upon the Court noticing this order, annexed to the counter affidavit filed by the Chief Treasury Officer, District-Bareilly, the Court was minded to summon him and take appropriate action but Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel came to his rescue and sought*

*telephonic instructions. He informed the Court that the Tehsildar has reported that the petitioner, after her husband's demise, has remarried. Now, this is a matter which does not figure in the Chief Treasury Officer's order, and, may be, is a later development.*

*In order to curtail controversy and swiftly determine the rights of the petitioner, who, if not remarried, as the Chief Treasury Officer has communicated by instructions to the learned Additional Chief standing Counsel, would suffer irreparable injury by reason of non-payment of her family pension.*

***A commission** is issued to the Principal Judge, Family Court, Bareilly to hold an inquiry taking necessary evidence to determine if there is prima facie evidence that the petitioner has remarried; or the said fact is utterly incorrect.*

*The finding of the Principal Judge, Family Court recorded on commission will of course be a piece of evidence and not a decision of any kind. It will be taken into consideration by this Court for the limited purpose of judging the petitioner's entitlement to receive family pension.*

*For the purpose of enabling the Principal Judge, Family Court, Bareilly to decide the issue, the petitioner, the Chief Treasury Officer, Bareilly and the Tehsildar, who submitted a report to the Chief Treasury Officer, Bareilly that the petitioner has remarried, shall all appear before the learned Principal Judge on **12.12.2023 at 11.00** am in his Court. All parties will produce all the relevant evidence in their possession regarding the fact of the petitioner's remarriage, or, otherwise. Oral testimony of these parties, particularly, the petitioner and the Tehsildar, who made inquiries or any other relevant persons, may also be recorded by the learned Principal Judge.*

*The Principal Judge, Family Court, Bareilly will submit a report to this Court on or before 16.12.2023.*

*Put up this matter for further hearing on 16.12.2023 at 2.00 p.m.*

*Let this order be communicated to the petitioner by her learned Counsel, who is present in Court today.*

*The Registrar (Compliance) is directed to communicate this order to the concerned Tehsildar through the Chief Treasury Officer, Bareilly, the Principal Judge, Family Court, Bareilly and the Chief Treasury Officer, Bareilly **today.**"*

10. The learned Principal Judge, Family Court, Bareilly proceeded to execute this Court's commission, examining on oath witnesses and other evidence to determine if the petitioner is remarried or the said fact is incorrect. On 12.12.2023, Shailendra Kumar, Chief Treasury Officer, Ram Nayan Singh, Tehsildar, Jai Prakash, Lekhpal and the petitioner, Farzana appeared before the Principal Judge, Family Court. The witnesses were examined on oath and cross-examined by the other side. The Lekhpal is recorded to have stated that he

would produce Dilshad and his mother as witnesses. Dilshad is said to be the man whom Farzana was believed by the Chief Treasury Officer to have remarried after her husband's demise. On 13.12.2023, Dilshad, Farzana, wife of Dilshad, daughter Qadir, Rizwan and Bundan were examined. They were cross-examined by the other side. The Tehsildar and the Chief Treasury Officer made a statement that they would not produce any further witnesses.

11. In his deposition, the Chief Treasury Officer, Shailendra Kumar stood by his statement that the deceased, Shakir Husain had remarried a woman, called Farzana and had made an application to the District Magistrate on 08.09.2021, speaking about divorcing his wife and also saying that after his demise, his former wife be not paid any pension. However, he could not produce any evidence about Shakir Husain's divorce or the petitioner's remarriage to Dilshad. In his cross-examination done on behalf of the petitioner, he admitted that there was no document evidencing a divorce between parties. The complaint made to the District Magistrate did not carry a photograph of parties nor an affidavit in support. He also admitted that there is no nikahnama on record, evidencing the petitioner's re-marriage to Dilshad.

12. There is evidence of the Tehsildar, Ram Nayan Singh and the Lekhpal, Jai Prakash also on record, but that would not resolve the controversy until the testimony of Dilshad son of Iqbal believed by the Lekhpal and the Tehsildar to be the man, who had married Farzana, is considered, as well as the testimony of the woman, Farzana wife of Dilshad, daughter of Qadir, different from the petitioner, Farzana. Dilshad son of Iqbal testified before the Family Judge that he was living in Haziapura for the past 8-9 years. He was married to Farzana, daughter of Qadir, a resident of Wakarganj, near City Railway Station. They were married about 15-16 years ago. Upon looking at the petitioner, Farzana in the chambers of the Judge, Dilshad said that she was not his wife and they were never married. Dilshad also stated that his wife's former husband was also named Shakir. He too lived in Haziapur. His wife's former husband, Shakir had died about 4 years ago. He had married Farzana during the lifetime of her former husband, Shakir, after he had divorced her. His wife's former husband, Shakir was a Chowkidar with the Ashrayasthal in the Establishment of the Nagar Nigam, Bareilly. He filed on record a Aadhaar Card of his wife, called Farzana. The Court at this stage has recorded a remark that in the Aadhaar Card, the name of her former husband recorded is Shakir, but her photograph on the Aadhaar Card does not resemble the petitioner. The witness said in his short cross-examination that the petitioner was not his wife.

13. Now, Dilshad's wife Farzana was examined. Upon being confronted with the petitioner, Farzana and asked if she knew the petitioner, she stated that she had never met her. This witness Farzana (not the petitioner) said that her former husband was also named Shakir son of Munne and, he too, was a resident of Haziapur. She had married Dilshad during his lifetime. Shakir, her husband had divorced this person Farzana orally. She had two sons and a daughter, begotten of her former husband, Shakir. The petitioner, Farzana was never married to her husband in the past or at present. In her cross-examination, she said that her husband Shakir was not employed in the Electricity Department, but the Nagar

Nigam, Bareilly. He had died about 3 years ago. She did not know if he received any pension from the Nigam.

14. The other two witnesses, who were examined, to wit, Rizwan son of the late Nazakat Husain, did come up with a story that the petitioner, he had heard, was living separately from her husband for the past 3 years and was seen moving about with one Bundan. Bundan was his acquaintance. Bundan would visit the petitioner, Farzana and her husband. The petitioner, Farzana and Dilshad were never married. Dilshad's wife, Farzana is another woman, this witness testified. The witness said that he had no knowledge about Shakir's complaint (made to the District Magistrate). The witness said that he had never seen Farzana being divorced by Shakir nor did he see her being married to Bundan. He had heard a rumour in the locality that Farzana and Bundan had done a nikah. In his cross-examination, the witness said that he did not know the man, who had told her about the petitioner, Farzana and Bundan tying the knot. The witness also said that Bundan had never told her that he had married Farzana. Rather, Bundan denied having married Farzana.

15. Bundan, when examined as a witness, stood steadfast by the fact that he had never married Farzana either during the lifetime of her husband Shakir or after his demise. The petitioner, Farzana was his wife's cousin, and, therefore, they would frequent her home. His wife's name was Parveen. The witness did not know if the petitioner was divorced. He testified to the fact that Shakir at the time of his demise was looked after by the petitioner and the parties' children. He did not know about any bickerings between the petitioner and her husband. The petitioner, Farzana had two sons and a daughter. One son was 21 years of age, the other son 8 years and the daughter 20 years old.

16. On a wholesome examination of the testimony on record threadbare, the learned Principal Judge, Family Court, Bareilly returned the following findings in his commission report dated 14.12.2023:

> "उपरोक्त तथ्यों एवं परिस्थितियो में विदित है कि प्रस्तुत प्रकरण में दो फरजाना नाम की महिलायें हैं, जिसमें से एक अपीलार्थी फरजाना है, जिसका पति शाकिर हुसैन था तथा दूसरी फरजाना वह है जिसके पूर्व पति का भी नाम शाकिर हुसैन था तथा उसने उनके जीवनकाल में ही दिलशाद से शादी कर लिया। इस प्रकार दो महिलायें फरजाना नाम की हैं तथा उनके पतियों के नाम भी शाकिर हुसैन है लेकिन अपीलार्थी का पति शाकिर हुसैन बिजली विभाग में काम करता था तथा फरजाना का पति शाकिर हुसैन नगर निगमे में चौकीदार था। उक्त फरजाना ने अपने पति के जीवनकाल में ही दिलशाद से शादी कर लिया है। इस प्रकार यह स्पष्ट है कि अपीलार्थी फरजाना ने दिलशाद से शादी नहीं की है बल्कि दूसरी फरजाना ने दिलशाद से शादी की है जिसका पति नगर निगम बरेली में चौकीदार था। सम्भवत: जॉच में भूल इस कारण हुई क्योंकि दोनो महिलायें एक ही नाम की थी तथा एक ही मोहल्ले की निवासी थी व उनके पूर्व पतियों के नाम भी एक ही थे।
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> जहाँ तक अपीलार्थी फरजाना का शाकिर हुसैन से तलाक लेने का सम्बन्ध है, इस बिन्दु पर कोई लिखित तलाकनामा दाखिल नहीं है। अपीलार्थी के पति शाकिर हुसैन की मृत्यु हो चुकी है। कथित शिकायतकर्ता शाकिर के परिवार के किसी सदस्य को परीक्षित नहीं कराया गया है तथा न ही उन्हें मुख्य कोषाधिकारी अथवा तहसीलदार की ओर से प्रस्तुत किया गया है। अतः अपीलार्थी फरजाना को उनके पति शाकिर हुसैन द्वारा तलाक दिये जाने का तथ्य प्रथमदृष्टया साबित नहीं है।
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> जहाँ तक अपीलार्थी फरजाना द्वारा दूसरा विवाह किये जाने का सम्बन्ध है, इस सम्बन्ध में पहले यह कहा गया था कि फरजाना ने दिलशाद के साथ शादी की परन्तु सभी साक्षियों को एक-दूसरे के सामने उपस्थित कर परीक्षित किया गया तो यह विदित हुआ

कि अपीलार्थी फरजाना ने दूसरी शादी नहीं की थी तथा इस तथ्य को दिलशाद ने भी स्वीकार किया है तथा कथन किया है कि उसकी पत्नी फरजाना अपीलार्थी नहीं है। साक्षी रिजवान ने अपीलार्थी फरजाना को बुन्दन के साथ घूमने का कथन किया है तथा यह भी बताया है कि मौहल्ले में इस बात की चर्चा है कि दोनों ने शादी कर लिया है परन्तु बुन्दन ने उपस्थित होकर इस तथ्य से इंकार किया तथा कथन किया कि उसने अपीलार्थी फरजाना से शादी नहीं की है, केवल रिश्तेदार होने के कारण उसके घर आता-जाता है। अतः अपीलार्थी फरजाना का अपने पति शाकिर की मृत्यु के बाद पुनः विवाह किया जाना प्रथमदृष्टया साबित नहीं है।

अतः श्रीमान जी से सादर अनुरोध है कि उक्त आख्या माननीय उच्च न्यायालय के समक्ष आवश्यक कार्यवाही हेतु सादर प्रस्तुत की जाये।"

17. From a perusal of the statements of the various persons recorded by the learned Principal Judge, Family Court, Bareilly, acting on this Court's commission, it is pellucid that the Chief Treasury Officer's doubt, that has led to deprivation of the petitioner's pension, is not based on a comedy of errors, but a tragedy of them. From the stand taken by the various witnesses, particularly, Dilshad and his wife, the other Farzana, it is evident that the other Farzana, different from the petitioner, had a former husband, also by the name Shakir, whom she got a divorce from him during his lifetime and remarried Dilshad. The petitioner's husband too was Shakir Husain. It is not clear how a complaint was laid to the Collector, but evidently it was baseless. The fact that Dilshad remarried the other Farzana after she was divorced by her first husband, Shakir, led to an inquiry in the complaint being misdirected and reaching an incorrect conclusion by the Lekhpal and the Tehsildar that it was the petitioner, Farzana, who had divorced her husband, Shakir and remarried Dilshad. The petitioner's husband, Shakir was employed with the Electricity Department, whereas the other Farzana's first husband, who had divorced that Farzana, was an employee of the Nagar Nigam. The clincher has come in evidence when Dilshad, on being confronted with the petitioner Farzana, has said that she was not his wife.

18. One of the other witnesses, who threw some doubt that the petitioner, Farzana too had remarried Bundan, could not substantiate the fact as Bundan himself denied it stoutly saying that he stays with his wife, named Parveen, who is a cousin of the petitioner, Farzana. There is absolutely no documentary evidence, like a *talaqnama* or *nikahnama* ever showing the petitioner having been divorced by her husband, Shakir Husain, or marrying Dilshad or some other man during her husband's lifetime or thereafter.

19. After looking to this testimony, the learned Standing Counsel for the State did not object to the proceedings before the Commissioner or attempted to show that there was any error about them. The report of the Commissioner was also not objected to in any manner. The learned Standing Counsel appearing for the respondents apparently realized their folly in mistaking another Farzana for the petitioner and going astray into holding the petitioner disentitled.

20. This Court is convinced that the petitioner is different from the other Farzana, daughter of Iqbal, who remarried Dilshad, after a divorce by her husband, Shakir, a man different from the petitioner Farzana's husband, Shakir Husain. There is, thus, absolutely no reason for the Chief Treasury Officer, Bareilly, objecting to release of family pension to the petitioner, in according with the PPO issued by the

Executive Engineer, Electricity Distribution Division-I, Bareilly in her favour.

21. In the circumscribes, this writ petition succeeds and is allowed. A mandamus is issued to the Chief Treasury Officer, District Bareilly, the District Magistrate, Bareilly and the Executive Engineer, Electricity Distribution Division-I, Madhyanchal Vidyut Vitaran Nigam Ltd., Bareilly to ensure amongst themselves payment of the petitioner's family pension together with arrears within a period of one month from the date of receipt of a copy of this udgment. If arrears of pension are not paid within a month, the petitioner will be entitled to 6% per annum interest simple for the period of delay. A mandamus shall also issue commanding all the said respondents to the effect that current family pension shall be immediately released in the petitioner's favour and paid to her regularly hereafter in the same manner as any other recipient of family pension.

22. There shall be no order as to costs.

23. Let a copy of this judgment be communicated to the Principal Secretary, Government of U.P., Lucknow, the District Magistrate, Bareilly, the Chief Treasury Officer, Bareilly and the Executive Engineer, Electricity Distribution Division-I, Madhyanchal Vidyut Vitaran Nigam Ltd., Bareilly by the Registrar (Compliance).

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**(2024) 10 ILRA 646**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

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

Writ -C No. 38900 of 2018
Along with other connected cases

**Greater Noida Industrial Development Auth. ...Petitioner**
**Versus**
**Hem Singh & Ors. ...Respondents**

**Counsel for the Petitioner:**
Mr. M.C. Chaturvedi, Sr. Adv., Mr. Aditya Bhushan Singhal & Sri Vineet Kumar Pandey

**Counsel for the Respondents:**
C.S.C., Mr. Gopal Narain & Sri Akash Pandey

**(A) Industrial Law - Regularization of Workmen's Services - Section 2-A, 6-E(2)(b), 6-F, 6-H (1) - U.P. Industrial Disputes Act, 1947 - Section 3, Greater Noida Service Regulations, 1993 - Determination of master-servant relationship and applicability of industrial law principles for regularization of workmen employed in permanent nature of work - Industrial Tribunal has the jurisdiction to order regularization of employees if evidence suggests unfair labor practices, including denial of benefits for permanent work despite long-term employment.(Para -14,15,16)**

Respondent-workmen employed by Greater Noida Industrial Development Authority - claimed regularization - alleging continuous work in permanent roles - Tribunal ruled in favor of regularization – with all services benefits - citing unfair labor practices by the Authority - Authority contested the lack of a direct employment relationship. (Paras 3-15)

**HELD: -** No illegality in the award of the labour court for regularization of the services of the workmen. No interference required. Recovery certificate issued to pay workmen's dues valid. Court directed Collector to recover amount and pay it to workmen within 3 months, starting from January 4, 2024.(Para -22 to 26)

**Petitions dismissed**. (E-7)

**List of Cases cited:**

1. ONGC EMS Vs The Exe. Director Basin Manager, ONGC (India) Ltd., 2020 0 Supreme (SC) 613

2. ONGC Vs Krishan Gopal & ors., 2020 0 Supreme (SC) 120

3. Workmen of Nilgiri Coop Vs St. of T.N. & ors., 2004 (3) SCC 514

4. BSNL Vs Bhurumal, 2014 (7) SCC 177

5. Raj. St. Ganganagar S. Mills Ltd. Vs St. of Raj. & ors., 2004 (6) SCC 504

6. M.C.F. Vs Sri Niwas, 2004 (8) SCC 195

7. The Superintending Engineer Vs M. Natesan etc., 2019 (6) SCC 448

8. M/s Triveni Engineering Vs St. of U.P. & ors., 2024 (1) ADJ 515

9. O.N.G.C. Vs Krishan Gopal & ors., 2020 SCC Online (SC) 150

10. U.O.I. & Ors. Vs Ilmo Devi & anr., 2021 SCC Online (SC) 899

11. Ganesh Digamber Jambhrunkar & ors. Vs The St. of Maha. & ors., 2023 Live Law (SC) 801

12. Gopal Krishna Indley Vs 5th Addl. D.J., Kanpur & ors., 1981 AIR Alld 300

13. U.P. St. R.T.C. Vs The St. Transport Appellate (Tribunal), U.P., Lucknow & ors., 1977 AIR Alld 1

14. Gopal Vs BSNL Ltd., 2014 (213) DLT 325

15. R.M. Yellati Vs Asst. Exe. Engineer, (2006) 1 SCC 106

16. Jaipur Zila Sahkari Bhoomi Vikash Bank Ltd. Vs Shri Ram Gopal Sharma & Ors., 2002 (92) FLR 667

17. M/S Western India Match Co. Ltd. Vs The Western India Match Co. Workers Union & ors., 1970 (1) SCC 225

18. Chief Conservator of Forests & anr. Vs Jagannath Maruti Kondhare & ors., (1996) 2 SCC 293

19. The B.B.I. Ltd. Vs Delhi Vs The Employees of the Bharat Bank, Ltd., Delhi, AIR 1950 Supreme Court 188

20. M/s Basti Sugar Mills Ltd. Vs Ram Ujagar & Ors., 1964 0 AIR (SC) 355

21. Mahanadi Coalfields Ltd. Vs Brajrajnagar Coal Mines Workers' Union, 2024 0 Supreme (SC) 224

22. SAIL & Ors. Vs National Union Waterfront Workers & ors.,

23. Pradip Chandra Parija & ors. Vs Pramod Chandra Patnaik & ors., (2002) 1 SCC 1

24. FCI Vs Gen. Secy. FCI India Employees Union & ors., 2019 (160) FLR 233

25. ONGC Ltd. Vs Petroleum Coal Labour Union & ors., 2015 (146) FLR 443

26. Nagar Mahapalika Gorakhpur Vs Labour Court, Gorakhpur, 1996 2 LBESR 776

27. I.C.I. (India) Limited (Formerly I.E.L. Ltd.), Fertilizer Division, Panki, Kanpur Vs St. of U.P. & ors., 2012 (133) FLR 976

28. M/s. U.P. St. Road Transport Corporation, Jhansi & anr. Vs Ramji Naik & anr., 2007 (115) FLR 371

29. U.P. St. Electricity Board Vs P.O., Labour Court, FLR 1996 74 2600

30. The St. of U.P. Vs Ram Chandra Trivedi, AIR 1976 Supreme Court 2547

31. Mattulal Vs Radhe Lal, AIR 1974 Supreme Court 1596

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

1. Heard Mr. M.C. Chaturvedi, learned Senior Advocate, assisted by Mr. Vineet Pandey and Mr. Aditya Bhushan

Singhal, Advocates for the Petitioner-Authority/ Respondent-Authority, Sri Gopal Narain, Advocate assisted by Sri Akash Pandey, Advocate for Respondents-Workmen / Petitioners-Workmen and the learned standing counsel for the state-respondents in all the writ petitions.

2. Since common issues are involved in all the writ petitions, hence all the writ petitions are clubbed and heard together and are being decided by a common order and Writ Petition No.38900 of 2018 shall be treated as a leading petition.

3. Brief facts of the case are that U.P. Industrial Area Development Act, 1976 (hereinafter referred to as the "Act of 1976") came into force on 1.4.1976 and Petitioner-Greater Noida Industrial Development Authority (hereinafter referred to as the "GNIDA") was constituted under Section 3 of the Act of 1976. The services of the employees of the GNIDA are governed by the provisions of Greater Noida Service Regulations, 1993. Respondent nos. 2 to 6, as elected representatives of workmen of petitioner, moved an application under Section 2-A of the U.P. Industrial Dispute Act, 1947 (hereinafter referred to As the "Act of 1947") before Conciliation Officer/Assistant Labour Commissioner on 17.4.1998, stating that workmen had continuously worked in the petitioner-authority but their services have not been regularized. The aforementioned case was registered as C.B. No. 17/1998 and C.B. No.1/2002. The Assistant Labour Commissioner, Ghaziabad issued notice in the conciliation proceeding wherein the petitioner-authority filed objection, stating that workmen are not employees of the petitioner-authority, accordingly, conciliation proceeding was failed and matter was referred to the State Government. The State Government vide letter / orders dated 31.1.2000 & 14.9.2007 referred the dispute for adjudication to the Industrial Tribunal, Meerut which were registered as Adjudication Case Nos.6 of 2000 & 4 of 2007 wherein the Labour Court issued notice to the petitioner-authority as well as the workmen for adjudication of the industrial dispute. The petitioner as well as respondent-workmen/union filed their written statement in the aforementioned adjudication case. Both the parties filed their rejoinder to the written statements filed by the respective parties. The respondent-workmen/union also filed case under Section 6-F of the Act of 1947 which was registered as Misc Case Nos. 15 of 2004 to 27 of 2004 and 45 of 2005 to 47 of 2005. An application dated 26.11.2011 was also filed in the aforementioned Adjudication Case No.6/2000 for consolidating the aforementioned misc. cases with Adjudication Case No.6/2000. Both the parties adduced oral evidence in support of their cases. On the application 83-D of the respondent- workmen/ union for consolidating the Adjudication Case No.6/2000 (which was filed with regard to 129 workmen) and Adjudication Case No.4/2007 (which was filed with regard to 111 workmen) was allowed by Industrial Tribunal/respondent no.6 vide order dated 7.10.2016. Respondent no.6/Industrial Tribunal vide award dated 29.5.2018 as published on 4.9.2018 allowed the claim of respondent-workmen, directing the petitioner-authority to regularize the services of the respondent-workmen from the date of reference order and all consequential benefit in Adjudication Case No.6/2000 and Adjudication Case

No.4/2007. Hence, Writ Petition No.38900 of 2018 for the following relief:-

> **"Issue writ, order or direction in the nature of certiorari, quashing the award passed in Adjudication Case (Abhinirnay Vivad) No.6 of 2000 notified on the notice board of respondent no.6 on 4.9.2018 (award dated 29.5.2018 published by the order of the State Government No.512 on 9.8.2018) (Annexure No.1)."**

Writ Petition No.38893 of 2018 has been filed for the following relief:-

> **"Issue writ, order or direction in the nature of certiorari, quashing the award passed in Adjudication Case (Abhinirnay Vivad) No.4 of 2007 notified on the notice board of respondent no.1 on 4.9.2018 (award dated 29.5.2018 published by the order of the State Government No.512 on 9.8.2018) (Annexure No.1)."**

4. Sixteen Misc. Cases filed by sixteen workmen (Misc. Nos.15/2004 to 27/2004 and 47/2005 to 49/2005) were heard together and allowed vide award/order dated 27.5.2018 as published on 13.7.2018, holding that services of workmen shall not be treated as terminated w.e.f. 6.2.2003 and they shall be treated in service with all service benefit, hence, 16 writ petitions were filed by petitioner-authority for quashing the order dated 27.5.2018/13.7.2018 passed in 16 misc. cases.

5. In the absence of any interim order in the writ petitions filed by the Petitioner-Authority, respondent-workmen – Kamgar Union initiated proceeding under Section 6(H)(1) of the Act of 1947, wherein a recovery certificate dated 4.1.2024 has been issued for recovery of the amount in question. However, no recovery has been effected by the respondent concerned, hence, respondent-workmen-Kamgar Union filed Writ C Nos. 8474 & 8454, both of 2024 for the following relief:-

> **"Issue a writ, order or direction in the nature of mandamus, commanding the respondent no.2 to recovery the amount of the recovery certificate dated 4.1.2024 and sent to the Deputy Labour Commissioner".**

6. This Court vide order dated 20.12.2018 directed the learned counsel for respondent to file counter affidavit but no interim order was granted in the instant writ petition. In pursuance of the order dated 20.12.2018, affidavits are exchanged between the parties.

7. Learned Senior Counsel for the Petitioner-Authority submitted that there was no master-servant relationship between the petitioner-authority and the respondent-alleged workmen, as such, the respondent-workmen cannot raise industrial dispute. He further submitted that there is no document regarding appointment of the respondent- alleged workmen in the petitioner-authority, as such, the respondent no.6/ Industrial Tribunal cannot order for regularization of the services of the respondent- alleged workmen along with other service benefits. He further submitted that workmen had worked through different contractor on different job and the contractors have not been impleaded before

the Industrial Tribunal, as such, no relief can be granted in favour of respondent-alleged workmen by the Industrial Tribunal. He further submitted that the representatives of the workmen cannot contest the matter before the Industrial Tribunal as they were never elected as representative of alleged workmen and no proof of authorization was placed on record before the Industrial Tribunal by the representative of the alleged workmen. He further submitted that respondent- alleged workmen has not performed any permanent nature of work, as such, the order of regularization passed by the Industrial Tribunal is without jurisdiction. He submitted that there is no vacant post of permanent nature in the petitioner-authority, as such, the order of regularization passed by the Industrial Tribunal is without jurisdiction. He further submitted that 129 gardeners whose list has been annexed in Adjudication Case No.6/2000 and 111 gardeners / Safar Karamchari whose list has been annexed in Adjudication Case No.4/2007 were never appointed by the petitioner-authority and they have not even worked continuously for more than 240 days in a calendar year, as such, no relief can be granted in favour of respondent- alleged workmen by the Industrial Tribunal. He further submitted that the impugned award passed by respondent no.6/Industrial Tribunal is totally perverse and cannot be sustained in the eye of law. He further placed the written statement of the petitioner-authority, respondent-alleged workmen as well as the evidence adduced by both the parties in order to demonstrate that there was no direct master-servant relationship between the petitioner-authority and the respondent- alleged workmen. He further placed reliance upon the following judgments of Hon'ble Apex Court, of this High Court and that of the Delhi High Court in support of his argument:-

**"1. 2020 0 Supreme (SC) 613, ONGC Employees Mazdoor Sabha vs. The Executive Director Basin Manager, Oil and Natural Gas Corporation (India) Ltd.**

**2. 2020 0 Supreme (SC) 120, Oil and Natural Gas Corporation vs. Krishan Gopal and Others.**

**3. 2004 (3) SCC 514, Workmen of Nilgiri Coop vs. State of Tamilnadu and Others.**

**4. 2014 (7) SCC 177, BSNL vs. Bhurumal.**

**5. 2004 (6) SCC 504, Rajasthan State Ganganagar S. Mills Ltd. vs. State of Rajasthan and Others.**

**6. 2004 (8) SCC 195, Municipal Corporation Faridabad vs. Sri Niwas.**

**7. 2019 (6) SCC 448, The Superintending Engineer vs. M. Natesan etc.**

**8. 2024 (1) ADJ 515, M/s Triveni Engineering vs. State of U.P. and Others.**

**9. 2020 SCC Online (SC) 150, Oil and Natural Gas Corporation vs. Krishan Gopal and**

**Others.**

**10. 2021 SCC Online (SC) 899, Union of India and Others vs. Ilmo Devi and Another.**

**11. 2023 Live Law (SC) 801, Ganesh Digamber Jambhrunkar and Others vs. The State of Maharashtra and Others.**

**12. 1981 AIR Allahabad 300, Gopal Krishna Indley vs. 5th**

**Addl. District Judge, Kanpur and Others.**

**13. 1977 AIR Allahabad 1, U.P. State Road Transport Corporation vs. The State Transport Appellate (Tribunal), U.P., Lucknow and Others.**

**14. 2014 (213) DLT 325, Gopal vs. Bharat Sanchar Nigam Ltd."**

8. On the other hand, Sri Gopal Narain, learned counsel appearing for the respondent-workmen/Union submitted that respondent no.6-Industrial Tribunal after considering the evidence adduced by the parties as well as the ratio of law laid down by Hon'ble Apex Court, has passed the impugned award for regularization of the services of the workmen. He further submitted that the petitioner-authority has failed to prove that workmen have not worked in the petitioner-authority. He further submitted that proper opportunity was afforded to the petitioner-authority to lead evidence in support of their cases. He submitted that the petitioner-authority has never taken the plea of continuous working of the workmen before the Industrial Tribunal, hence, they cannot be permitted to raise such plea for the first time in the writ petition. He further submitted that claim of the workmen for regularization was pending, as such, according to the provisions contained under Section 6-E(2)(b) of the Act of 1947, the petitioner-authority cannot terminate the services of the workmen. He submitted that proceeding under Section 6-F of the Act of 1947 was rightly initiated by the workmen which has been decided under the impugned award, holding that termination was illegal with all service benefits. He further submitted that petitioner-authority has failed to prove that workmen were employed by the contractor. He further submitted that finding of fact has been recorded by the Industrial Tribunal that petitioner-authority had adopted the unfair labour practice, accordingly, there is no illegality in the impugned award. He further placed the written statement filed by the petitioner-authority in the aforementioned adjudication case in order to demonstrate that respondent-workmen were working in the petitioner-authority. He placed reliance upon the following judgments of Hon'ble Apex Court and that of this High Court in support of his arguments:-

**"1. (2006) 1 Supreme Court Cases 106, R.M. Yellati vs. Asst. Executive Engineer.**

**2. [2002 (92) FLR 667], Jaipur Zila Sahkari Bhoomi Vikash Bank Ltd. vs. Shri Ram Gopal Sharma and Others.**

**3. 1970 (1) SCC 225, M/S Western India Match Co. Ltd. vs. The Western India Match Co. Workers Union and Others.**

**4 (1996) 2 SCC 293, Chief Conservator of Forests and Another vs. Jagannath Maruti Kondhare and Others.**

**5. AIR 1950 Supreme Court 188, The Bharat Bank India Limited vs. Delhi vs. The Employees of the Bharat Bank, Ltd., Delhi.**

**6. 1964 0 AIR (SC) 355, M/s Basti Sugar Mills Ltd. vs. Ram Ujagar and Others.**

**7. 2024 0 Supreme (SC) 224, Mahanadi Coalfields Limited vs. Brajrajnagar Coal Mines Workers' Union.**

**8. (2001) 7 Supreme Court Cases 1, Steel Authority of India Ltd. And Others vs.**

**National Union Waterfront Workers and Others.**

**9. (2002) 1 SCC 1, Pradip Chandra Parija and Others vs. Pramod Chandra Patnaik and Others.**

**10. 2019 (160) FLR 233, Food Corporation of India vs. Gen. Secy. FCI India Employees Union and Others.**

**11. 2015 (146) FLR 443, ONGC Ltd. vs. Petroleum Coal Labour Union and Others.**

**12. 1996 2 LBESR 776, Nagar Mahapalika Gorakhpur vs. Labour Court, Gorakhpur.**

**13. 2012 (133) FLR 976, I.C.I. (India) Limited (Formerly I.E.L. Ltd.), Fertilizer Division, Panki, Kanpur vs. State of U.P. and Others.**

**14. 2007 (115) FLR 371, M/s. U.P. State Road Transport Corporation, Jhansi and Another vs. Ramji Naik and Another.**

**15. FLR 1996 74 2600, U.P. State Electricity Board vs. P.O., Labour Court.**

**16. AIR 1976 Supreme Court 2547, The State of U.P. vs. Ram Chandra Trivedi.**

**17. AIR 1974 Supreme Court 1596, Mattulal vs. Radhe Lal.**

9. I have considered the arguments advanced by learned counsel for the parties and perused the records.

10. There is no dispute about the fact that under the impugned award, the respondent no.6/Industrial Tribunal has passed the award for regularization of the services of the workmen with all service benefits.

11. In order to appreciate the controversy, involved in the matter, perusal of Section 2(Z) of the Act of 1947 and Rule 40 of the U.P. Industrial Disputes Rules, 1957 will be relevant which is as under:-

**"2(Z) of the U.P. Industrial Disputes Act, 1947:-.**

**"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-**

**(I) who is subject to any Army Act, 1950 or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or**

**(ii) who is employed in the police service or as an officer or other employee of a prison, or**

**(iii) who is employed mainly in a managerial or administrative capacity, or**

**(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in**

**him, functions mainly of a managerial nature."**

**Rule – 40 of U.P. Industrial Dispute Rules, 1957:-**

**"40. Representation of Parties (1) The parties may, in their discretion, be represented before a Board, Labour Court or Tribunal,—**

**(i) in the case of a workman subject to the provision of sub-section (3) of Section 6-I, by—**

**(a) an officer of a Union of which he is member, or**

**(b) an officer of a Federation of Unions to which the union referred to in clause (a) above, is affiliated, and**

**(c) where there is no union of workmen, any representative, duly nominated by the workman who are entitled to make an application before a Conciliation Board under any orders issued by Government, or any member of the executive, or other officer;**

**(ii) in the case of an employer, by**

**(a) an officer of a union or Association of employers of which the employer is a member, or**

**(b) an officer of a federation of unions or associations of employers to which the union or association referred to in clause (a) above, is affiliated, or**

**(c) by an officer of the concern, if so authorized in writing by the employer:**

**Provided that no officer of a federation of union shall be entitled to represent the parties unless the federation has been approved by the Labour Commissioner for this purpose.**

**(2) A party appearing through a representative shall be bound by the acts of that representative.**

**(3) An application for approval of a federation of unions for representing the parties before a Board, Labour Court and Tribunal shall be made in Form XX to the Labour Commissioner:**

**Provided that no federation of unions, shall be entitled to apply for approval unless a period of two year has elapsed since its formation.**

**(4) On receipt of an application under sub-rule (3) above,the Labour Commissioner may, after making such enquiries, as he deems fit, approve the federation or reject the application. In case a federation is approved its name shall be notified in the Official Gazette otherwise the applicant shall be informed of the position in writing by the Labour Commissioner.**

**(5) The Labour Commissioner or the Registrar of the Trade Union, Uttar Pradesh, may, at any time before or after a federation has been approved, call for such information from the federation as he considers necessary and the federations shall furnish the information so called for.**

**(6) Every approved federation shall, _**

**(a) intimate to the Labour Commissioner and to the registrar of Trade Unions, Uttar Pradesh, in Form XXI every change in the address of its head office and in the members of the executive (including its office bearers) within seven days thereof; and**

**(b) submit to the Labour Commissioner and to the Registrar of Trade Unions, Uttar Pradesh by December 31 every year a list of unions affiliated to it in Form XXII.**

**(7) The Labour Commissioner may, at any time and for reasons to be recorded in writing, withdraw the approval granted to a federation under sub-rule (4) above.**

**(8) A party aggrieved by the order of the Labour Commissioner under sub-rule (4) or (7) may within one month from the date of the receipt of such order prefer an appeal before the State** Government, whose decision in the matter shall be final and binding. ]"

12. The perusal of the industrial dispute which was referred for adjudication in adjudication cases are also necessary which are as under:-

**लीडिंग अभिनिर्णय वाद संख्या 06/2000**

**औद्योगिक विवाद का विवरण**

**क्या सेवायोजक द्वारा संलग्न सूची में अंकित अपने 129 श्रमिको को एक वर्ष की अनवरत सेवा करने के पश्चात् नियमित व स्थायी न किया जाना उचित तथा वैधानिक है? यदि नहीं, तो संबंधित श्रमिकगण किस हितलाभ और आनुतोष पाने के अधिकारी है और अन्य किस विवरण के साथ?**

**अभिनिर्णय वाद संख्या 04/2007**

**औद्योगिक विवाद का विवरण**

**" क्या सेवायोजक द्वारा संलग्न सूची में अंकित 111 श्रमिको को तीन वर्षों की अनवरत सेवा पूर्ण करने के उपरान्त नियमित व स्थायी न किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं, तो संबंधित श्रमिकगण क्या हितलाभ/उपशम पाने के अधिकारी है, किस तिथि से व अन्य किन विवरणों सहित?"**

13. The perusal of the written statements filed by the Petitioner-Authority as well as the Respondent-Workmen will also be relevant , which are as under:-

**Written Statement filed by the Petitioner- Authority**

**"Before Industrial Tribunal (V) U.P. at Meerut**

**Adj. Case no. 6/2000**

**Between**

**5 Elected representative i.e. Development Authority Noida.**

**Matter of Dispute**

**क्या सेवायोजको द्वारा संलग्न सूची में अंकित 129 श्रमिको की एक वर्ष की अनवरत सेवा करने के पश्चात नियमित न किया जाना उचित तथा वैधानिक है यदि नही तो सम्बन्धित श्रमिकगण किस हित लाभ और अनुतोष पाने के अधिकारी है और अन्य किस विवरण के साथ**

**Written statement for and on behalf of the opp. Party namely Greater Noida Industrial Development Authority, Noida.**

**Sir,**

**It is respectfully , submitted as under:-**

**1. That Greater Noida Industrial Development Authority Noida ( hereinafter referred to as the Opp. Party) is a**

**statutically body, entrusted with development of Greater Noida. The Main job of the Opp. Party is to develop the colony, roads grandens and severage etc. And for this purpose the opp. Party is employing a number of contract labours through different contractors.**

**2. That 129 persons as shown to the reference order never had any master servant relationship with the opp. Party and such question of their regularization with the opp. Party does not arise. However, persons shown in the annexure of the reference order either worked through different contractors assingned for the different jobs which cannot be catergorically claimed in the absence of records of the concerned contractors who has not been made party to the dispute before this Hon'ble Tribunal.**

**3. That, 5 alleged elected representatives are not competent to raise and represent the dispute under reference as they have never been elected and authorized by concerned 129 persons to raise and represent teir disputed before this Hon'ble Tribunal.**

**4. That no proof of authorization has been filed on the records of the case in respect of their competency to raise and represent the dispute under reference.**

**5. That majority of the workmen of the concern neither interested in the dispute under reference nor they have ever allowed 5 repereesentative to represent the dispute before this Hon'ble Court.**

**6. That the persons concerned through Greated Noida Mali and Safai Kamgar Union persons have filed writ petition regarding the same dispute i.e. regularization heir services with the opp. Party before Hon'ble Court at Allahabad in writ petition no. 40540/99 in which orders were passed by the Hon'ble Court directing the union to apply with 3 following options through order of the Hon'ble High Court at Allahabad dated 15.5.01.**

**1. to raise labour dispute**

**2. to apply of the service Tribunal**

**3. to appraoach state government for abolition of contract labour under the provisions of Regularizatio and Abolition Act, 1970, and rules made thereunder.**

**7. That in pursuance of the direction of the Hon'ble High Court the union has filed a C.B. case with regard to the matter of dispute which is under reference before this Hon'ble Court Tribunal before Shri Ghanshyam Prakash Asstt. Labour Commissioner Noida which form the subject matter of C.B. case no. 01/02 dated 25.01.2002.**

**8. That it is pertinent to point out here that orders of the Hon'ble High Court Allahabad has been obtained by the union after suppressing the facts regarding pendency of the cse before this Hon'ble Tribunal.**

**9. That no cause of action ever existed between the parties as mentioned in the above reference order in the absence of master servant relationship of the applicants with the opp. Party.**

**10. That the state government have not referred the true nature of dispute before this Tribunal as existed between the parties which is with regard to taking up of these persons in employment of the opp. Party after abolition of contract labour and not for regularization of their services before this Hon'ble Court Tribunal.**

**11. That for the reasons stated from para 3 to 9 above the present order of reference is bad in law.**

**12. That for the reasons from para 3 to 10 above, this learned Tribunal has no jurisdiction to proceed with the present disputes under the present proceeding.**

**13. That without prejudice to the aforesaid legal objections, the opp. Party hereby sunits forllowing facts on the merit of the above noted case.**

**14. That 129 persons as shown in the reference order never had any master servant relationship with the opp. Party and as such question of their regularization with the opp. Party does not arise. However persons shown in the annexure of the reference order neither worked through different contractors assigned for the different jobs which cannot be categorically claimed in the absence of records of the concerned contractors who has not been main party to the dispute before this Hon'ble Tribunal.**

**15 That the opp. Party does not have any work of permanent nature nor perosns concerned ever performed any permanent nature of work with the opp. Party either directly or through any contractor.**

**16. That there is no vacant post of permanent nature on which regularization of the perosons concerned can be made by the opp. Party.**

**17. That in the absence of any master servant relationship with the opp. Party question of regularization of the persons concerned can be considered as other senior candidates are available with the opp. Party in case any vacancy arises with the opp. Party.**

**18. The claim of the applicants has no force of law and is liable to be rejected with costs.**

**Prayer**

**It is, therefore, prayed that matter of dispute and legal objections taken by the opp. Party may kindly be decided in favour of opp. Party, rejecting the claim of the applicants.**

**For and on behalf of the opp. Party**

**sd/-**

**Rajesh Kumar**

**(Manager Law)"**

**<u>Written Statement filed by the Respondent-Workmen</u>**

"समक्ष- पीठासीन अधिकारी, औद्योगिक न्यायाधिकरण (5) उ०प्र० मेरठ
अभिनिर्णय विवाद संख्या 06 सन 2000

मै० ग्रेटर नोएडा औद्योगिक विकास प्राधिकरण

कामर्शियल काम्प्लेक्स, सेक्टर-20
नोएडा गौतमबुद्धनगर

--- सेवायोजक

बनाम

पॉच चुने गये प्रतिनिधिगण --- कर्मकार पक्ष

विवरण मॉगपत्र/याचिका ओर से श्रमिक/ कर्मकार पक्ष:

**1.** यह कि सेवायोजक प्रतिष्ठा उ०प्र० सरकार का एक उपक्रम है जो यू०पी० अर्बन प्लानिंग एण्ड डेवेलपमेन्ट एक्ट 1973 की धारा 4 के अन्तर्गत गठित किया गया है ताकि अपने क्षेत्र में आने वाले क्षेत्र को औद्योगिक विकास की दृष्टि से विकसित कर उद्योगो को सुविधायें उपलब्ध करा सके।

**2.** यह कि सेवायोजको के द्वारा उक्त कार्य एक सुव्यवस्थित प्रक्रिया के तहत योजनाबद्ध तरिके से कर्मकारों के सहयोग से किया जाता है। जिसमें क्षेत्र का सौन्दर्यकरण एवं विकास भी सम्मिलित है। उक्त के अतिरिक्त सेवायोजको के द्वारा वाणिज्यिक एवं आवासीय भवनों, प्लाटो, उद्यान, पार्कों, सड़को आदि को निर्मित व विकसिक करने का कार्य भी सम्पादित किया जाता है और उक्त कार्य के लिये सेवायोजको के द्वारा नागरिको से मूल्य व शुल्क लिया जाता है और मानव आवश्यकता की पूर्ति की जाती है इस प्रकार से सेवायोजको के द्वारा किए जाने वाले क्रिया कलाप उद्योग की परिधि में आवर्त होता है।

**3.** यह कि सेवायोजक प्रतिष्ठान मे नियोजित कर्मकार विभिन्न पद व वर्ग में नियोजित है जिनकी सेवाए उ०प्र० शासन द्वारा औद्योगिक नियोजन (स्थायी आदेश) अधिनियम 1946 की व्यवस्थाओ के तहत निर्मित व रचित माडल स्टेण्डंग आर्डर्स से शासित होने के साथ साथ अन्य श्रम कानूनों से शासित होती है।

**4.** यह कि इस लिखित विवरण मांगपत्र/ याचिका के साथ संलग्न "एक" मे वर्णित कर्मकार सेवायोजक प्रतिष्ठान मे अपने अपने नाम के समक्ष अंकित तिथि से माली के स्थायी व नियमित पद पर अनवरत रूप से कार्य सेवायोजको के नियन्त्रण, सुपरविजन व आदेशो के तहत करते आ रहे है। सेवायोजको के द्वारा ही सम्बन्धित कर्मकारों को खाद बीज पौध, औजार व अन्य निर्देश दिन प्रतिदिन दिये जाते है तथा कार्य की मजदूरी भुगतान की जाती है। इस प्रकार से पक्षों मे सेवक व सेवायोजक का सीध सम्बन्ध है।

**5.** यह कि सम्बन्धित कर्मकारों के द्वारा किये जाने वाले कार्य स्थायी व नियमित प्रकृति के है, इसलिये सेवायोजको के द्वारा सम्बन्धित कर्मकारों को कार्य की प्रकृति व उत्तरदायित्व के अनुसार स्थायी व नियमित पद का वेतन व पदनाम तथा अन्य सुविधाए दी जानी चाहिए थी क्योंकि उसके लिये सम्बन्धित कर्मकार विद्यमान अधिकार रखते है जबकि सेवायोजक माडल एम्प्लायर में आवर्त होते है किन्तु सेवायोजको ने माडल एम्प्लायर की भूमिका नही निभाई बल्कि इसके विपरीत उनके द्वारा अनुचित व अविधिक रूप से कार्यरत कर्मकारों के साथ आदिकालीन अराजकतावादी आचरण करते हुए उन्हे कष्टकारी व्यवहार व आचरण करते हुए पद व उत्तरदायित्व के अनुरूप वेतन व सुविधाए न देकर बहुत कम वेतन देकर उनका शोषण किया जाता रहा है और किया गया जबकि सेवायोजको के द्वारा सम्बन्धित कर्मकारो मे से किसी को भी कोई परिचयपत्र वेतन पर्ची, नियुक्ति पत्र आदि प्रलेख सीधे कार्य पर रखने, कार्य लेने व मॉगने के बावजूद नही दिये गये। जबकि उन्हे सेवायोजको के द्वारा जीविका की सुरक्षा भी प्रदान नही की गई है। इस प्रकार से सेवायोजको के द्वारा किया गया कृत्य अनुचित श्रम व्यवहार मे आवर्त होता है। यहॉ यह भी सुसंगत है कि उ०प्र० शासन के नगर विकास अनुभाग-4 के दिनांक 20.6.1997 के दैनिक वेतन पर कार्यरत कर्मकारों को नियमित व प्रोन्नत करने का अधिकार दिया गया है। श्रम न्यायालय व औद्योगिक न्यायाधिकरण को कार्य की उपलब्धता के आधार पर पद सृजित करने की अधिकार है।

**6.** यह कि सम्बन्धित कर्मकारो के द्वारा सेवायोजको से अपने को कार्य व उत्तरदायित्व के अनुरूप वेतन व अन्य सुविधाए अन्य स्थायी कर्मकार के अनुसार दिए जाने का अनुरोध किया

किन्तु सेवायोजको के द्वारा अपने लाभ के वशीभूत होकर सम्बन्धित कर्मकारो के द्वारा अपनी सदभाविक मॉग को पूरा कराने के लिए पॉच प्रतिनिधि चुने गए और यह विवाद प्रस्तुत किया गया है।

**7.** यह कि सेवायोजक प्रतिष्ठान न्यूनतम वेतन अधिनिय **1948** की व्यवस्थाओ के अनुसार **"**अनुचित व्यवसाय**"** मे आता है।

**8.** यह कि संविदा श्रमिक (उन्मूलन एवं नियमन) अधिनियम **1970** मे भी यह व्यवस्था की गई है कि ऐसे सभी उपक्रम जो नियमित व स्थायी प्रकृति के है तथा अधिनियम की धारा **10(2)** के खण्डो मे आवर्त होते है मे ठेके पर कर्मकार रखकर कार्य कराना निषेध होगा और है। इस आधार पर भी सेवायोजको का कृत्य अविधिक होने के कारण मान्य नही है और विधिक रूप से मनमाना व अविधिक है।

**9.** यह कि सेवायोजको के द्वारा सम्बन्धित कर्मकारो को स्थायी व नियमित कर्मकारो की भांति वेतन व अन्य सुविधाए न देना भारतीय संविधान के अनुच्छद **21, 23** के विपरीत है तथा **38, 39, 41, 42,** एवं **47** मे की गई व्यवस्थाओ जो आज्ञात्मक व निर्देशात्मक प्रभाव रखते है**,** के अनुकूल नही है।

**10.** यह कि सम्बन्धित कर्मकारो के द्वारा समय समय पर अपनी मॉग के बावत सेवायोजको तथा अन्य उच्चाधिकारियों से प्रार्थना की गई लेकिन आश्वासन के अतिरिक्त उन्हे कुछ नही दिया गया**,** इसलिये यह फोरम अपनाया गया जो न्याय संगत व उचित है।

**11.** यह कि सेवायोजको के द्वारा सम्बन्धित कार्मकारों की सेवा के बावजूद कम वेतन व कम सुविधाए दी जा रही है जिससे वह अपना जीवन भारतीय संविधान के अनुच्छेद **21** की व्यवस्था व भावना के अनुसार व्यतीत नही कर के गुलामों जैसा जीवन जी रहे है।

अतः माननीय न्यायाधिकरण से अनुरोध है कि समुचित सरकार द्वारा संदर्भित संदर्भादिश को सम्बन्धित कर्मकारों के पक्ष में निर्णित कर उन्हें उनके कार्य व उत्तरदायित्व के अनुसार स्थायी व नियमित किया जाकर तदानुसार वेतन व अन्य हित लाभ उन्हें उस तिथि से दिये जाए जिस तिथि से उनके द्वारा इस बावत मॉग की गई। सम्बन्धित कर्मकारो के उक्त कार्यवाही मे हुए व्यय को भी सेवायोजको से दिलाया जाए तथा अन्य प्रतिकर जिसे माननीय न्यायाधिकरण उचित समझे सम्बन्धित कर्मकारो को सेवायोजको के विरूद्ध दिलाया जाए।

हम पॉच श्रमिको के चुने गए प्रतिनिधिगण

प्रमाणित करते है कि विवरण मॉगपत्र की

धारा **1, 2, 4, 5, 6, 10** का कथन हमारे ज्ञान मे

तथा धारा **3, 7, 8** व **9, 11** का कथन विधि

परामर्शधीन हमारे विश्वास मे सत्य है।

प्रमाणित स्थल मेरठ दिनांक **25.02.02**

श्रमिको पॉच चुने गये प्रतिनिधि

हेम सिंह

महेश कुमार

रामकिशन

फिरे राम

इन्द्रपाल

द्वारा-

नरेश कुमार वर्मा

**(**सत्य प्रतिलिपि**)"**

14. The perusal of the averments made in the written statements filed by the petitioner-authority as well as respondent-workmen demonstrate that 129 workmen in Adjudication Case No.6 of 2000 and 111 workmen in Adjudication Case No.4 of 2007 have worked in the petitioner-authority. The respondent no.6 / Industrial Tribunal has considered the evidence adduced by the parties and has recorded finding of fact that the workmen in Adjudication Case Nos.6 of 2000 and 4 of 2007 have worked as gardeners and Safar Karamchari for the last so many years in the petitioner-authority against the permanent nature of work, as such, the workmen are fit to be regularized and denial of the same will amount to unfair

labour practice. The Industrial Tribunal has also recorded finding of fact that the petitioner-authority has not pleaded that the respondent-workmen were appointed through particular contractor. The finding of fact has also been recorded that petitioner-authority has failed to produce the evidence that the nature of work which were being discharged by the workmen, were not perennial in nature. The finding of fact has also been recorded that petitioner-authority has not produced the original record before the Industrial Tribunal in order to demonstrate that respondent-workmen have not worked in the petitioner-authority, accordingly, an adverse inference has been drawn against the petitioner-authority.

15. Considering the entire aspect of the case, the Industrial Tribunal has passed the order for regularization of the services of the workmen in the petitioner-authority from the date of making reference along with other service benefit. The Industrial Tribunal while deciding the 16 misc. cases, under Section 16-F of the Act of 1947 has recorded finding of fact that petitioner-authority has violated the provisions of Section 6-E(2)(b) of the Act of 1947 and terminated the services of the workmen w.e.f. 6.2.2003 which is illegal, as such, workmen shall be deemed to be in employment of petitioner-authority which is proper exercise of jurisdiction by Tribunal.

16. So far as the jurisdiction of the Industrial Tribunal with respect to regularization of the services of the workmen is concerned, the Hon'ble Apex Court in the case of **ONGC Limited vs. Petroleum Coal Labour Union and Others** (supra) has held that regularization can be ordered by the Industrial Tribunal, however, the aforementioned case of **ONGC Ltd**. (supra) has been ordered to be revisited by the Hon'ble Apex Court in Oil and Natural Gas Corporation vs. Krishna Gopal and Others (supra). Paragraph Nos. 23, 24 & 25 of the **Oil and Natural Gas Corporation** (supra) will be relevant for perusal which is as under:-

> **"23. The following propositions would emerge upon analyzing the above decisions:**
>
> **i) Wide as they are, the powers of the Labour Court and the Industrial Court cannot extend to a direction to order regularisation, where such a direction would in the context of public employment offend the provisions contained in Article 14 of the Constitution;**
>
> **(ii) The statutory power of the Labour Court or Industrial Court to grant relief to workmen including the status of permanency continues to exist in circumstances where the employer has indulged in an unfair labour practice by not filling up permanent posts even though such posts are available and by continuing to employ workmen as temporary or daily wage employees despite their performing the same work as regular workmen on lower wages;**
>
> **(iii) The power to create permanent or sanctioned posts lies outside the judicial domain and where no posts are available, a direction to grant regularisation would be impermissible merely on the**

**basis of the number of years of service;**

**(iv) Where an employer has regularised similarly situated workmen either in a scheme or otherwise, it would be open to workmen who have been deprived of the same benefit at par with the workmen who have been regularised to make a complaint before the Labour or Industrial Court, since the deprivation of the benefit would amount to a violation of Article 14; and**

**(v) In order to constitute an unfair labour practice Under Section 2(ra) read with Item 10 of the Vth Schedule of the ID Act, the employer should be engaging workmen as badlis, temporaries or casuals, and continuing them for years, with the object of depriving them of the benefits payable to permanent workmen.**

**24. The decision in PCLU needs to be revisited in order to set the position in law which it adopts in conformity with the principles emerging from the earlier line of precedent. More specifically, the areas on which PCLU needs reconsideration are:**

**(i) The interpretation placed on the provisions of Clause 2(ii) of the Certified Standing Orders;**

**(ii) The meaning and content of an unfair labour practice Under Section 2(ra) read with Item 10 of the Vth Schedule of the ID Act; and**

**(iii) The limitations, if any, on the power of the Labour and Industrial Courts to order regularisation in the absence of sanctioned posts. The decision in PCLU would, in our view, require reconsideration in view of the above decisions of this Court and for the reasons which we have noted above.**

**25. We accordingly request the Registry to place the proceedings before the Hon'ble Chief Justice of India so as to enable His Lordship to consider placing this batch of appeals before an appropriate Bench."**

17. On the point of regularization of services of the workmen, the Hon'ble Apex Court in the case of **Steel Authority of India Limited (supra)** (Five-Judges-Judgment), has held in paragraph nos.112 & 113 as under:-

**"112. The decision of the Constitution Bench of this Court in Basti Sugar Mills' case (supra) was given in the context of reference of an industrial dispute under the Uttar Pradesh Industrial Disputes Act, 1947. The appellant Sugar Mills entrusted the work of removal of press mud to a contractor who engaged the respondents therein (contract labour) in connection with that work. The services of the respondents were terminated by the contractor and they claimed that they should be reinstated in the service of the appellant. The Constitution Bench held.**

**The words of the definition of workmen in Section 2(z) to mean "any person (including an apprentice) employed in any industry to do**

**one skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied" are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contractor or the management. Unless however, the definition of the word 'employer" included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between "employer" and workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by Sub-clause (iv) of Section 2(i). The position thus is: (a) that the respondents are workmen within the meaning of Section 2(z), being persons employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant-company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of presumed which is ordinarily a part of the industry. It follows therefore, from Section 2(z) read with Sub-clause (iv) of Section 2(i) of the Act they are workmen of the appellant-company is their employer.**

**113. It is evident that the decision in that case also turned on the wide language of statutory definitions of the terms "workmen" and "employer." So it does not advance the case pleaded by the learned Counsel."**

18. The Hon'ble Apex Court in the case of **Chief Conservator of Forests and Another** (supra) (**Three-Judges-Judgment**), has held in paragraph nos.18 to 22 as under:-

**"18. This takes us to the second main question as to whether on the facts of the present case could it be held that the appellants were guilty of adopting unfair labour practice. As already pointed out, the respondents alleged the aforesaid art by relying on what has been stated under item 6 of Schedule IV of the State Act which reads as below:**

**"To employ employee as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees."**

**19. The Industrial Court has found the appellants as having taken recourse to unfair labour practice in the present cases because the respondents-workmen who had approached the Court had admittedly been in the employment of the State for 5 to 6 years and in each year had worked for period ranging from**

**100 to 330 days. Ms. Jaising draws our attention in this context to the statement filed by the appellants themselves before the Industrial Court, a copy of which is at pages 75 to 76 or C.A. No. 4375/90. A perusal of the same shows that some of the respondents had worked for a few days only in 1977 and 1978, though subsequently they themselves had worked for longer period, which in case of Gitaji Baban Kadam, whose name is at serial No. 4 went upto 322 in 1982, though in 1978 he had worked for 4-1/2 days. (Similar is the position qua some other respondents).**

**20. According to Ms. Jaising the lesser number of days worked by say Gitaji in 1978, could have been because of his having sought employment in that year towards the fag-end or it may also be because of the fact that to start with large number of persons were engaged, which by 1981-82 got settled around 60, as would appear from the statement at page 66 of the aforesaid appeal. It is brought to our notice that only 25 such person had approached the Industrial Court of Pune (this number is 15 in the other batch) and as regards these 25 there should not be any doubt that they worked for long despite which they were continued as casuals, which fact is enough to draw the inference that the same was with the object of depriving them of the status and privileges of permanent employees. Learned Counsel urges that on these facts it was the burden of the employer to satisfy the Industrial Court that the object was not as alleged by the workmen.**

**21. Shri Dholakia would not agree to this submission as, according to him, the item in question having not stopped merely by stating about the employment of persons as casuals for years being sufficient to describe the same as unfair labour practice, which is apparent from what has been in the second part of the item, it was the burden of the workmen to establish that the object of continuing them for years was to deprive them of the status and privileges of permanent employees. Ms. Jaising answers this by contending that it would be difficult for any workmen to establish what object an employer in such a matter has, as that would be in the realm of his subjective satisfaction known only to him. She submits that we may not fasten a workman with such a burden which he cannot discharge.**

**22. We have given our due thought to the aforesaid rival contentions and, according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the**

**inference mentioned in the second part of the item, if badlis, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to Industrial Court of Pune (and 15 to Industrial Court, Ahmednagar) had been kept as casuals for long years with the primary object of depriving them the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmedanager, whose need is on increase because of increase in pollution. Permanency is thus writ large on the face of both the types of work. If, even in such projects, persons are kept in jobs on casual for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants."**

19. The Hon'ble Apex Court in the case of Pradip Chandra Parija and Others (supra) has held that where there are conflicting view of Hon'ble Apex Court on any issue, then the proper course for the High Court is to follow the ratio of law laid down by the Larger Bench of Apex Court. Paragraph Nos. 6 & 9 of the judgment rendered in Pradip Chandra Parija and Others (supra) will be relevant for perusal, which is as under:-

**"6. In the present case the Bench of two learned judges has, in terms, doubted the correctness of a decision of a Bench of three learned judges. They have, therefore, referred the matter directly to a Bench of five judges.**

**In our view, judicial discipline and propriety demands that a Bench of two learned judges should follow a decision of a Bench of three learned judges. But if a Bench of two learned judges concludes that an earlier judgment of three learned judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment.**

**If, then, the Bench of three learned judges also comes to the conclusion that the earlier judgment of a Bench of three learned judges is incorrect, reference to a Bench of five learned judges is justified.**

**9. In the result, we are of the view that these matters could only have been referred to a Bench of three learned judges. We, accordingly, order that they shall be placed before a Bench of**

**three learned judges. Having regard to the lapse of time, they shall be so placed in January, 2002."**

20. The Hon'ble Apex Court in another case in **State of U.P. vs. Ram Chandra Trivedi** (supra) has again reiterated the same view in paragraph no.22 of the judgment which is as under:-

**"22. Thus on a conspectus of the decisions of this Court referred to above, it is obvious that there is no real conflict in their ratio decidendi and it is no longer open to anyone to urge with any show of force that the constitutional position emerging from the decisions of this Court in regard to cases of the present nature is not clear. It is also to be borne in mind that even in cases where a High Court finds any conflict between the views expressed by larger and smaller benches of this Court, it cannot disregard or skirt the views expressed by the larger benches. The proper course for a High Court in such a case, as observed by this Court in Union of India & Anr. V.K.S. Subramanian, to which one of us was a party, is to try to find out and follow the opinion expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court which practice, hardened as it has into a rule of law is followed by this Court itself."**

21. The Apex Court in **Mattulal** (supra) has held that in case there are contradictory decisions of Hon'ble Apex Court, then the former decision of the larger bench must be followed than the later. Relevant paragraph of the judgment rendered in **Mattulal** (supra) is as under:-

**"Now there can be no doubt that these observations made in Smt. Kamla Soni's case(1) are plainly in contradiction of what was said by this Court earlier in Sarvate T. B.'s case.(2) It is obvious that the decision in Sarvate T.B.'s case(2) was not brought to the notice of this Court while deciding Smt. Kamla Soni's case(1), or else this Court would not have landed itself in such patent contradiction. But whatever be the reason, it cannot be gain said that it is not possible to reconcile the observations in these two decisions. That being so, we must prefer to follow the decision in Sarvate T.B.'s case(2) as against the decision in Smt. Kamla Soni's case(1) as the former is a decision of a larger Bench than the latter."**

22. Considering the aforementioned aspect of the case as well as the finding of fact recorded by the labour court under the impugned award/order, there is no scope of interference by this Court under Article 226 of the Constitution of India as well as in view of the Five-Judges-Judgment of the Hon'ble Apex Court in **Steel Authority of India and Others** (supra), there is no illegality in the award of the labour court for regularization of the services of the workmen.

23. Considering the entire facts and circumstances of the case, no interference is required in the matter.

24. The writ petitions filed by the Petitioner-Greater Noida Industrial Development Authority against the award passed by Industrial Tribunal in Adjudication Case No.6/2000, 4/2007 as well as in 16 misc. cases under Section 6-F of the Act of 1947 are accordingly dismissed.

25. In view of the dismissal of all eighteen petitions filed by petitioner-Greater Noida Industrial Development Authority, there is no illegality in the issuance of recovery certificate on the basis of the proceeding initiated by the workmen under Section 6-H(1) of the Act of 1947, accordingly, two writ petitions filed by the petitioners-workmen/Safai Kamgar Union are hereby finally disposed of with the direction to respondent no.2/Collector, Gautam Buddha Nagar to proceed with the matter to recover the amount in question under recovery certificate dated 4.1.2024 for its payment to the petitioner-workmen, as expeditiously as possible, preferably within a period of 3 months from today.

26. No order as to costs

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**(2024) 10 ILRA 665**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.10.2024**

**BEFORE**

**THE HON'BLE SAURABH SHYAM SHAMSHERY, J.**

Writ -B No. 2871 of 2024

**Keshav Prasad Singh & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Anjali Singh

**Counsel for the Respondents:**
C.S.C., Mohan Kumar Singh, Shailesh Kumar Shukla

**(A) Civil Law - Challenge to an ex-parte decree under Section 229-B U.P. ZALR Act, via Order 9 Rule 13 CPC, alleging fraud and forgery, with a 48-year delay - Code of Civil Procedure, 1908 - Order 9 Rule 13 - ex-parte decree, Section 151 -Inherent power, Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 229-B - Declaratory suit - Delay condonation under the Limitation Act - Fraud allegations must be specific and substantiated with material evidence - fraud initiates every solemn act - fraud cannot be considered on vague ground and for that there must be substance - it required satisfaction of high standard of proof. (Para -21,22)**

**(B) law of limitation - 8 key points - (i) Law of limitation is based on public policy to end litigation after a fixed period. (ii) Rights or remedies not exercised for a long time must cease to exist. (iii) Limitation Act provisions should be construed differently (strictly or liberally). (iv) Substantial justice may be considered, but not to defeat the law of limitation.**
**(v) Courts may condone delays if sufficient cause is shown, but this power is discretionary.**
**(vi) Similar cases getting relief does not entitle others to the same benefit. (vii) Merits of the case are not considered when condoning delays. (viii) Delay condonation applications are decided based on set parameters. (Para - 15)**

Suit under Section 229-B - resulting in an ex-parte decree - Petitioners filed an application under Order 9 Rule 13 C.P.C. in 2022 (48 years later) - alleging fraud and forgery - claiming they were impersonated as plaintiffs and signatures were forged - trial court dismissed application on grounds of delay and lack of evidence of fraud - decision upheld by Board of revenue - rejecting explanation for delay – hence Petition.(Para - 2 to 10)

**HELD: -** Petitioners have miserably failed to provide reasonable explanation to condone huge delay of about half a century of years. Application under Order 9 Rule 13 C.P.C. was rightly dismissed by trial court and upheld by Board of Revenue. (Para -23)

**Petition dismissed.** (E-7)

**List of Cases cited:**

Pathapati Subba Reddy (Died) By L.Rs. & ors. Vs Special Deputy Collector (LA), 2024 SCC OnLine SC 513

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

1. Heard Sri Siddharth Nandan, Advocate holding brief of Ms. Anjali Singh, learned counsel for petitioners, Sri U.K. Saxena, learned Senior Counsel assisted by Sri Shailesh Kumar Shukla, learned counsel for respondent No. 5 and Sri Anil Kumar Singh Baghel, learned Standing Counsel for State.

2. In the present case, in the year 1974, a suit was filed under Section 229-B of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, by father of the respondent No.5 against father of the petitioner.

3. The said suit was decreed ex-parte by a judgment dated 01.02.1975, whereby the contesting respondents were declared co-sharer with petitioners and accordingly the respondent No.5 got his name mutated in Revenue Record.

4. The above proceedings remain unnoticed by present petition for about 48 years. It is petitioners' case that when on 25.04.2022, some part of land in suit was acquired by National Highway Authority and respondent No.5 claimed entire compensation in his name only and nothing was provided to petitioners on basis of a sale-deed between respondent No.5 and National Highway Authority, matter was enquired.

5. At this stage, petitioners allegedly came to know about a decree passed in the year 1975 and, therefore, they filed an application under Order 9 Rule 13, read with Section 151 C.P.C. on 04.05.2022 alleging that their signatures were forged and without authority they were made plaintiff in the suit by contesting respondent only to get benefit in exclusion of petitioners by putting their imposters. There was no reason to file a suit against their father.

6. In above application, no separate application for condonation of delay was filed but in paragraph No.11, the reasons for condonation of delay were mentioned and in paragraph 12 of it, a prayer was made to condone the delay. For reference, the relevant paragraphs of application are reproduced hereinafter :-

*"1- यह कि कथित मूल वाद हम सायल समेत हमारे सगे भ्रातागण रामाशंकर सिंह, राम अवध सिंह को श्री कृष्ण सिंह के स्थान पर किसी इम्पोस्टर को खडा करके हम लोगों का फर्जी हस्ताक्षर हम चारो भाईयो का बनवाकर दिनांक 20.11.74 को योजित किया गया है।*

*2- यह कि कथित मूल वाद पत्रावली में हम चारों भाइयों के स्थान पर किसी इम्पोस्टर को खडा करके वाद पत्र, वकालतनामा व समन आदि पर फर्जी इम्पोस्टर द्वारा हस्ताक्षर कर व करवाकर, अदालत को धोखा देकर वास्तविक तथ्य को छिपाते हुए भगवान सिंह व राजाराम सिंह, उमा शंकर सिंह कथित मूल वाद के प्रतिवादीगण श्रे०नं० 2 द्वारा एकपक्षीय आदेश व डिक्री हासिल किया गया है।*

*3. यह कि कथित मूल वाद की तमामतर कार्यवाई फर्जी व साजिशी तौर पर की व करायी गयी है।*

*4. यह कि हम सायल अथवा हमारे भाईयो द्वारा न तो कथित मूल वाद दाखिल किया गया और न*

*श्री राजेश तिवारी एड० को वकील मुकर्रर किया और न कभी उक्त कथित वाद को योजित करने व एकपक्षीय आदेश व डिक्री हासिल करने की आवश्यकता ही पड़ी।*

*5. यह कि अदालत द्वारा कथित मूल वाद की पत्रावली पर हम चारो भाईयों के नाम पर बने हस्ताक्षर के अवलोकन मात्र से प्रथमतया यह सिद्ध हो जायेगा कि कथित मूल वाद की पत्रावली पर बनाये गये हस्ताक्षर संदिद्ध है क्योकि कथित मूल वाद की पत्रावली के वाद पत्र व वकालत नामा व समन के पुश्त पर बनाये गये हस्ताक्षर आपस में भिन्न भिन्न लिखावत में है। इसका स्वतः संज्ञान लेने का क्षेत्राधिकार अदालत हाजा को प्राप्त है।*

*6. यह कि कथित मूल वाद के योजित होने व निर्णीत होने के समय रामाशंकर सिंह कोल माइन्स धनबाद में सर्विस करते रहे और सन् 2003 में रिटायर हुए। रिटायर होने के बाद भी वहीं पर सपरिवार रहते रहे और 2012 में वफात कर गये, इसी तरह राम अवध सिंह पटना मेडिकल कालेज में एम०बी०बी०एस० के छात्र थे तथा सर्विस से 2012 में रिटायर्ड हुए, उनका भी परिवार बाहर रहता रहा तथा केशव प्रसाद सिंह प्रा० विद्यालय मिठवार में अध्यापक थे और 2008 में अवकाश प्राप्त हुए है एवं श्रीकृष्ण सिंह उस समय टाउन पालीटेकनिक के छात्र थे और पढाई के बाद सर्विस करने लगे और 2016 में रिटायर्ड हुए है इनका परिवार भी बाहर रहता है।*

*7. यह कि विवादित भूमि हम सायल के पिता रामचीज सिंह व हम सायल व हमारे भाइयो द्वारा स्वयं की उपार्जित धन से कबाला ली गयी भूमि रही है कदापि इसमें किसी प्रकार से भगवान सिंह व राजा राम सिंह का कोई हक व हिस्सा व स्वत्व नहीं रहा है और न है और न कभी उनका कब्जा दखल रहा है।*

*8. यह कि विपक्षी सं० 1 उमाशंकर काफी चतुर चालाक व फितरबात व्यक्ति है और अपनी फितरबाजी से बदनियति द्वारा हम चारो भाईयों के नाम पर फर्जी हस्ताक्षर कर व कराकर फर्जी मूल वाद योजित किये और अहलकारान को साजिश में करके साजिशी तौर पर अप्रत्यक्, रूप से अपनी स्व० सिद्धि के लिये एकपक्षीय आदेश व डिक्री हासिल कर लिये।*

*9. यह कि विवादित भूमि से कभी कोई वास्ता सरोकार विपक्षी श्रेणी नं० 1 अथवा उनके पिता व चाचा राजाराम सिंह व भगवान सिंह का नहीं रहा है और न है और न कभी काबिज दखील रहे है और न ही हम सायल व विपक्षी श्रेणी नं० 2 का कब्जा दखल रहा है व है।*

*10. यह कि कथित मूल वाद योजित करके एकपक्षीय आदेश व डिक्री पारित करा लेने से सख्त नुकसान हम सायल समेत विपक्षी श्र० नं० 2 का है किन्तु तजवीजसानी दाखिल करते वक्त गांव पर मौजूद न रहने के कारण इन्हे विपक्षीगण श्रे० नं० 2 कायम किया गया है।*

*11- यह कि दिनांक 25.04.2022 को विपक्षी उमाशंकर सिंह द्वारा गांव में यह कहते हुए सुना गया कि विवादित भूमि तो ग्रीन रोड़ में जा रही है और उसमें हमारा नाम व हक हिस्सा के बावत बहुत पहले डिक्री हो चुकी है। हमारा हिस्सा आधार हो गया है, तब प्रार्थी द्वारा कागजात की छानबीन कराने लगे एवं दौरान छानबीन उक्त एकपक्षीय आदेश व डिक्री की जानकारी हुई तब राजस्व अभिलेखागार बलिया में जरिये मुहर्रिर मुआइना की दरखास्त दिनांक 28.04.2022 को दिलवाया। दिनांक 02.05.2022 को पत्रावली उपलब्ध हुई तो कुल फर्जी व साजिशी कार्यवाही व एकपक्षीय आदेश व डिक्री की पूर्णरूपेण जानकारी हुई है। इसके पहले कदापि किसी प्रकार की जानकारी हमें नहीं हो पायी है और न होने दी गयी।*

*12. यह कि तजवीजसानी प्रार्थना पत्र प्रस्तुत करने में जानबूझकर विलम्ब नहीं हुआ है बल्कि जो भी देर हुआ है, वह नाजानकारी एवं उपरोक्त परिस्थितियों में हुआ है जो दफा 5 मियाद कानून के अन्तर्गत क्षमा होने योग्य है।''*

7. The contesting respondents have filed objections wherein it was prayed to reject the said application on ground of delay as well as on merit.

8. During pendency of above referred recall application, petitioners have also moved an application on 04.08.2022 for appointment of a handwriting expert to verify the allegation of forged signatures.

9. The application filed under Order 9 Rule 13 was dismissed by an order dated 08.03.2024, mainly on ground that father of petitioners has not objected or

challenged the order dated 01.02.1975 during his life time. Petitioners' father was served and there was no ground to condone the huge delay. The relevant part thereof is mentioned hereinafter :-

*''उभयपक्षों के विद्वान अधिवक्ता के तर्क सुने गये तथा पत्रावली का अवलोकन किया गया। अवलोकन से स्पष्ट होता है कि प्रार्थना पत्र पोषणीयता एवं कालबाधिता दिनांक 29.09.2022 व प्रथम धार्यता प्रार्थना पत्र 29.05.2023 तथा तजबीजसानी प्रार्थना पत्र दिनांक 04.05.2022 पर विस्तृत बहस सुनने के उपरान्त यह तथ्य प्रकाश में आया कि पिता रामचीज ने अपने जीवनकाल में आदेश दिनांक 01.02.1975 को चुनौती नहीं दिया और अगर पुत्र ने पिता के विरूद्ध वाद दाखिल कर अनुतोष मांगा और वह अनुतोष स्वीकृत हो गया तो कालान्तर में वहीं पुत्र पिता के उत्तराधिकारी हुआ तो पुत्र को पुनः उक्त कृत्य को चुनौती देने का अधिकार नहीं है और पिता का संज्ञान पुत्र का संज्ञान माना जायेगा क्योंकि रामचीज सिंह प्रतिवादी सम्मन मूल वाद मे वाजाफ्ता खास तामील है और सम्मन तामीला दिनांक 19.12.1974 का है, संज्ञान लेने की तिथि के बाद अब काल सीमा विस्तारित नहीं किया जा सकता। इस प्रकार पोषणीयता व कालसीमा के बिन्दु पर ही पुर्नस्थापन वाद निरस्त होने योग्य है। इस तथ्य को विशिष्ट रूप से अस्वीकार भी नहीं किया गया। मूल वाद में संलग्न सम्मन के पुश्त पर तजबीजसानीकर्ता के पिता का हस्ताक्षर विद्यमान नहीं था। उनके स्थान पर किसी छद्मवेशी ने हस्ताक्षर बनाया है या पिता पुत्र का रिश्ता भी कटु था, का उल्लेख नहीं है व फ्राड के तथ्य न तो अपने अभिवचन में कहा गया है और न सिद्ध किया गया है। मा० उच्च न्यायालय ने 1976 एल०आर० पेज 42 पर यह स्पष्ट अवधारित किया है कि प्रगण्ड किया जाना चाहिए। पिता पुत्र के मध्य के विवाद को लगभग 46 वर्ष बाद रिओपेन करने का औचित्य नहीं रह जाता। पुर्नस्थापनकर्ता द्वारा जो दृष्टांत दर्शित किये गये हैं. वह वर्तमान वाद से भिन्न है। इसलिए दृष्टांत वर्तमान वाद में लागू नहीं होते। मूल वाद पिता व पुत्र के मध्य निर्णीत हुआ है अब इस स्तर पर पुनः जागृत करने का औचित्य नहीं रह जाता पुर्नस्थापनकर्ता की धार्यता का प्रश्न है, व्यवहार संहिता के आदेश -9 रूल-13 प्रतिवादी के विरुद्ध एकपक्षीय आदेश को निरस्त करने के लिए धारा - 151 जहां स्पष्ट प्राविधान वर्णित है, वहां 151 शक्तियों का प्रयोग नहीं किया जा सकता। पिता का सम्मन मूल वाद में बजाफ्त खास तामील है, पिता का संज्ञान पुत्र का संज्ञान माना जायेगा, केशव के अन्य भाईयों ने भी इसे पुर्नस्थआपन वाद के माध्यम से चुनौती नहीं दिया है, 46 वर्षों के विलम्ब का संतोषजनक स्पष्टीकरण भी प्रस्तुत नहीं किया गया है। इस प्रकार पुर्नस्थआपन वाद कालबाधा एवं पोषणीयता के बिन्दु पर ही निरस्त करने योग्य है। ''*

10. The above referred order was challenged by petitioners before the Board of Revenue, however, it was also got dismissed by order dated 13.06.2024 on similar ground and for reference, relevant part thereof is mentioned hereinafter :-

*''5- उभयपक्षों के विद्वान अधिवक्ताओं के तर्कों तथा पत्रावली पर उपलब्ध अभिलेखों के अवलोकन से यह स्पष्ट होता है कि वाद संख्या 138/74 रामाशंकर आदि बनाम रामचीज आदि में पारित आदेश दिनांक 01.02.1975 के विरूद्ध निगरानीकर्तागण की तरफ से पुनर्स्थापन दिनांक 04.05.2022 को प्रस्तुत किया गया। आदेश दिनांक 01.02.1975 से उक्त वाद प्रतिवादी रामचीज सिंह के विरूद्ध डिक्री किया गया था। पत्रावली पर उपलब्ध वाद पत्र के अवलोकन से यह स्पष्ट होता है कि निगरानीकर्ता संख्या 1 व 2 तथा निगरानीकर्ता संख्या 3 लगायत 6 के पिता उपरोक्त वाद में वादी थे जिनके द्वारा अपने पिता रामचीज सिंह के विरूद्ध उपरोक्त वाद प्रस्तुत किया गया था एवं स्वयं वादीगण को प्रतिवादी संख्या 2 व 3 के साथ विवादित भूमि का सहभूमिधर घोषित किये जाने की प्रार्थना की गई। उक्त पुनर्स्थापना प्रार्थना पत्र में मुख्य रूप से उपरोक्त वाद की समस्त कार्यवाही फर्जी व एकपक्षीय रूप से निष्पादित किये जाने के आधार पर पुनर्स्थापना प्रार्थना पत्र प्रस्तुत किया गया। उक्त पुनर्स्थापना प्रार्थना पत्र के विरूद्ध प्रतिपक्षी संख्या 4 द्वारा आपत्ति प्रस्तुत करते हुए पुनर्स्थापना प्रार्थना पत्र को अपोषणीय व कालबाधित होने के आधार पर निरस्त किये जाने की प्रार्थना करते हुए यह कथन किया गया कि पुनर्स्थापना प्रार्थना पत्र लगभग 48 वर्ष बाद प्रस्तुत किया गया है। जिसका उद्देश्य मात्र*

*विवादित भूमि के अधिग्रहण के पश्चात मुआवजे की धनराशि को अवैधानिक रूप से प्राप्त जीवनकाल में कभी भी आदेश दिनांक 01.02.1975 निगरानीकर्तागण पर बाध्यकारी है। अवर न्यायालय ने प्रश्नगत आदेश में उल्लिखित आधारों पर यह मन्तव्य व्यक्ति किया है कि मूल वाद पिता व पूत्र के मध्य निर्णीत हुआ है, अतः 46 वर्ष पश्चात वाद को पुनः जागृत करने का कोई औचित्य नहीं है। पत्रावली पर उपलब्ध वाद पत्र एवं पुनर्स्थापना प्रार्थना पत्र के विरूद्ध प्रस्तुत आपत्ति में उल्लिखित सजरा खानदान से यह स्पष्ट होता है कि उपरोक्त वाद के सभी पक्षकार एक ही खानदान के हैं तथा वादीगण उपरोक्त वाद के प्रतिवादी संख्या 1 के पुत्रगण हैं। अतः उपरोक्त के आधार पर प्रतिवादी संख्या 1 रामचीज सिंह को आदेश दिनांक 01.02.1975 की अपने जीवनकाल में जानकारी न होना तर्कपूर्ण प्रतीत नहीं होता है। अवर न्यायालय द्वारा प्रश्नगत आदेश में पुनर्स्थापना प्रार्थना पत्र को निरस्त किये जाने का जो आधार लिया गया है वह न्यायसंगत व विधिक सिद्धान्तो के अनुकूल होने के कारण उसमें हस्तक्षेप किये जाने का कोई औचित्य प्रतीत नहीं होता है। निगरानी बलहीन होने के कारण ग्राह्यता स्तर पर निरस्त किये जाने योग्य है।*

*उपरोक्त तथ्यों, परिस्थितियों एवं विवेचना के आलोक में प्रस्तुत निगरानी ग्राह्यता स्तर पर निरस्त की जाती है। बाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो। स्थगनादेश यदि कोई हो तो उसे भी निरस्त किया जाता है। ''*

11. In the aforesaid circumstances, this writ petition is being filed. Learned counsel for petitioners has harped mainly upon that contesting respondents have included petitioners as plaintiff as imposter and their signatures were forged, however, there is no expert opinion on record as well as application filed for expert opinion does not appear to be effectively pressed.

12. So far as merit is concerned, it could not be considered at this stage since this case is presently arising out of an application filed under Order 9 Rule 13 C.P.C. i.e. to set aside ex-parte order whereby it was dismissed since no explanation was given to condone delay i.e. delay was not condoned.

13. Learned counsel for contesting respondents has supported the impugned order that a huge delay of about 48 years has not been explained properly. No separate application was filed for condonation of delay as well as that allegation of fraud and forgery was not established even prima facie.

14. Heard counsel for parties and perused the record.

15. The Supreme Court in a very recent case of **Pathapati Subba Reddy (Died) By L.Rs. and Others Versus Special Deputy Collector (LA), 2024 SCC OnLine SC 513** has dealt with consideration of condonation of delay in such applications and for reference, relevant paragraph thereof is reproduced hereinafter :-

*"26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:*

*(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;*

*(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;*

*(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense*

*whereas Section 5 has to be construed liberally;*

*(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;*

*(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;*

*(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;*

*(vii) Merits of the case are not required to be considered in condoning the delay; and*

*(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."*

16. In the present case, delay is huge, which is about 48 years i.e. about half century of years. Date of knowledge of an order passed in the year 1975 after such huge delay is being referred on basis of a very vague explanation that petitioner came to know about said order only when compensation was given to contesting respondent in the year 2022, when part of land was acquired by National Highway Authority. Nothing substantive was stated in the said paragraph.

17. It is not the case of petitioners that they were not in possession of their share as decided by the decree. Rather it appears that it is a dispute since now money is involved. In case, petitioners have a share in land which is acquired, their requisite share in compensation will be decided by the Land Acquisition Officer.

18. The petitioners have also not challenged the sale-deed executed by contesting respondent with National Highway Authority in the year 2022, till date.

19. It is also well settled that there is no mandatory requirement to file a separate application for condonation of delay, therefore, the averment made in said application in paragraph 11 which is also quoted earlier is also being considered.

20. In the said paragraph, it is being stated that on 25.04.2022, they heard that their father were saying that the land acquired by National Highway Authority belongs to contesting defendants on basis of some decree. Such averment is very vague as well as that a further explanation that only thereafter petitioners have inquired about suit proceedings does not inspired confidence as well.

21. The Court is conscious that ‘fraud initiates every solemn act’, however, fraud has to be asserted effectively and not

in a vague manner. The allegation that petitioners' signatures were forged in the suit being one of plaintiffs does not inspire confidence since no expert opinion is placed on record in this regard as well as application for same was not even pressed before learned Trial Court or Revisional Court.

22. The fraud cannot be considered on vague ground and for that there must be substance but in present case, it is absolutely vague without any material, since it required satisfaction of high standard of proof, which is absolutely absent.

23. Petitioners have miserably failed to provide reasonable explanation to condone huge delay of about half of century of years and as referred above, in such cases, instead of liberal, a strict approach has to be adopted, therefore, I do not find that there is any illegality in impugned order whereby application filed under Order 9 Rule 13 C.P.C. was rejected by learned Trial Court on ground that extraordinary delay of 48 years remained unexplained and such findings were rightly upheld by Board of Revenue. Accordingly, this writ petition is **dismissed**.

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**(2024) 10 ILRA 671**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 17.10.2024**

**BEFORE**

**THE HON'BLE SARAL SRIVASTAVA, J.**

Writ -C No. 26449 of 2022

**M/S Young Style Overseas ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sanjay Goswami, Shreyas Srivastava, Sudhanshu Kumar

**Counsel for the Respondents:**
Chandan Kumar, Swapnil Kumar

**A. Civil Law - Indian Stamp Act,1899-section 47-A(3)-Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002(SARFAESI Act,2002)-Section 13, rule 8,9-Whether sale of property under SARFAESI Act through public tender is exempt from reassessment under section 47-A of the Indian Stamp Act,1899-The petitioner purchased a mortgaged property through a tender process conducted under SARFAESI Act-the District Magistrate later determined a deficiency of Rs. 1.45 crore in stamp duty, claiming that the sale price did not reflect the market value of the industrial property-The petitioner argued tht the tender process constituted a public auction and stamp duty was correctly paid based on the sale consideration-Held, the court set aside the Collector's determination of stamp duty deficiency, holding that the sale under SARFAESI rules was a public sale, with the sale consideration representing the market value-the court found no fraudulent intent or undervaluation justifying reassessment under section 47-A.(Para 1 to 108)**

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

**List of Cases cited:**

1. V.N. Devadoss Vs Chief Rev. Contl. Offr.-cum-Insp. & ors.(2009) 7 SCC 438

2. Ballyfabs Intrnl. Ltd. Vs St. of W.B. & ors., WPA No. 7006 of 2020

3. Vishwanath Agarwal Vs St. of U.P. & ors.(2004) 96 RD 635

4. Secy. Of St. Vs Sunderji Shivaji & Co. & ors.(1938) AIR Privy Council 12,

5. Purushottam Ramanata Quenim Vs Makan Kalyan Tandel & ors., Civil Appeal No. 844 of 1973

6. Sumati Nath Jain Vs St. of U.P. & ors.(2016) ILR 1 All 132

7. Kaka Singh Vs The Addl. Collr. & D.M.( F& R), Bulandshahr (1986) AIR All 107

8. Hajari Lal Sahu Vs St. of U.P. & ors.(2004) 1 AWC 899

9. Vijay Kr. & anr. Vs Commr. Meerut Div. Meerut & anr. (2008) 7 ADJ 293

10. Shanti Bhushan (D) Thr. Lr. & ors.Vs St. of UP & ors.(2023) SCC Online SC 489

11. St. of Raj. & ors.Vs Khandaka Jain Jewellers (2007) 14 SCC 339

12. M/s. Saya Traders Vs St. of UP Writ-C No. 31061 of 2010

13. Ashok Kr. & ors.Vs Chief Contrl. Rev. Authority & ors.(2011) AIR All 142

14. Duncans Indus. Ltd. Vs St. of UP & ors.(2000) AIR 1 SCC 633

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

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Sanjay Goswami and Sri Shreyas Srivastava, learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Additional Advocate General assisted by Sri Chandan Kumar, learned counsel for the respondents.

2. The petitioner in the instant writ petition has assailed two orders dated 17.08.2022 and 02.08.2017 passed by the District Magistrate/Collector (Stamp), Agra (hereinafter referred to as ‘respondent no.2’) in Stamp Case No.94 of 2013-14. Respondent no.2 by order dated 02.08.2017 decided the issue no.1 formulated by the Chief Controlling Revenue Authority vide order dated 16.12.2011, and by order dated 17.08.2022, he determined the deficiency in stamp duty to the tune of Rs.1,45,35,270/-

3. The brief facts of the case are that the petitioner is a partnership firm having its registered office in Agra and is primarily dealing in the export of shoes.

4. As per the petition, one M/s. Wasan Shoes Limited was the owner of Khasra No.191 (old) having an area of 2 Bigha, 5 Biswa, and 16 Biswansi, and Khasra No.192 (old) having an area of 3 Bigha, 11 Biswa, and 8 Biswansi situated at Mauja Mangtai, Bodhla, Bichpuri Road, Tehsil and District Agra (hereinafter referred to as 'property').

5. The aforesaid properties are bounded on the North by Nala/Bichpuri Road, and on the South, East, and West by agricultural land. M/s Wasan Shoes Limited was running a factory over the aforesaid properties. It had taken financial assistance from the Canara Bank, Overseas Branch Sanjay Place, Agra to run the factory. The aforesaid property and one other property had been mortgaged by M/s. Wasan Shoes Limited with the Canara Bank as a security for the financial assistance. M/s. Wasan Shoes Limited defaulted in repayment of the loan amount of **Rs.4,57,04,195.24/-.** Consequently, a proceeding under Section 13 and Rules 8 and 9 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as '**SARFAESI Act, 2002**') and the SARFAESI Security Interest (Enforcement) **Rules, 2002** (hereinafter referred to as 'Rules, 2002') was drawn against M/s. Wasan Shoes Limited by the

Canara Bank (hereinafter referred to as 'Bank') for the default in repayment of the loan amount. Accordingly, the Bank took possession of the aforesaid property. The Bank published a notice of possession in two daily newspapers namely, Dainik Jagran and I-Next on 21-12-2008.

6. Before proceeding with the auction of the property, the Bank had obtained a valuation report from a Government Approved Valuer as mandated under Rule 8(5) of the Rules, 2002. Further case of the petitioner is that as per the report of the valuer, the realisable value of the property was ascertained at Rs.1,95,00,000/-. Accordingly, the Bank kept the reserved price of the mortgaged property at Rs.2,00,00,000/- (Rupees Two Crores) in the auction notice.

7. The Bank, thereafter, invited tenders for the sale of the property by publishing notice in two newspapers notifying the date of the auction of the property. It transpires from the record that there was only a single bid by the petitioner. According to the petitioner, the petitioner offered a bid of Rs.2,02,00,000/- which was accepted by the Bank, and after depositing the aforesaid amount, the sale was confirmed in favour of the petitioner. Consequently, a sale certificate was issued to the petitioner by the Bank in the exercise of power under Rule 9 (6) of the Rules, 2002.

8. It appears that an inspection of the property was conducted by the Additional District Magistrate (Finance & Revenue), Agra on 04.08.2009. On inspection, it was found that a factory is being run over the property, and construction over 4000 square meters has been raised on the property. The report further stated that the aforesaid property has been sold out for Rs.**2,02,00,000**/-, and the stamp duty has been paid as per Article 18 of Schedule 1-B of the Stamp Act, 1899. The report further stated that in the said instrument, it is not stated that the aforesaid property had been sold out in public auction, therefore, the said sale did not come within the periphery of Schedule 1-B of Article 18, and said instrument comes within the ambit of Article 23 of Schedule 1-B. Thus, there was a deficiency in payment of stamp duty. The report further stated that about 4000 square meters of the land was constructed and this fact had not been disclosed in the sale certificate, thus, the instrument has been deliberately undervalued and the petitioner has deliberately evaded the payment of correct stamp duty.

9. Consequent to the said report, a notice dated 15.12.2009 was issued by the respondent no.2 to the petitioner on the allegation that the sale deed was executed on 21.07.2009 between the petitioner and the Bank in which the valuation of the property was shown as **Rs.2,02,00,000/-** whereas as per the market rate, the valuation of the property is Rs.39,91,31,180/-. Thus, the instrument had been undervalued to the tune of Rs.37,89,31,180/- and accordingly, there was a deficiency in payment of stamp duty of Rs.2,65,24,240/-. By the said notice, the petitioner was called upon to show cause as to why the deficiency in stamp duty alongwith interest be not recovered from the petitioner and penalty be not imposed upon the petitioner.

10. The petitioner feeling aggrieved by the notice dated 15.12.2009 preferred writ petition bearing Writ-C No.10013 of 2010 which was disposed off

by this Court by judgement and order dated 24.02.2010 observing that the Collector has jurisdiction to consider the issue that since the sale has been made by inviting tenders, therefore, the market value of the property essentially has to be considered in terms of the actual sale consideration.

11. After the order of this Court in the aforesaid writ petition, respondent no.2 passed an order dated 30.05.2011 determining deficiency in stamp duty to the tune of Rs.2,65,24,240/-. Respondent no.2 by the said order imposed interest @ 1.5% per month from the date of execution of the instrument and a penalty of Rs.2,00,000/-.

12. The said order was assailed by the petitioner in statutory appeal under Section 56(1-A) of the Indian Stamp Act, 1899 (hereinafter referred to as 'Act, 1899') registered as Stamp Appeal No.54 of 2011-12. The main ground of attack by the petitioner in the appeal before the Chief Controlling Revenue Authority was that since the property had been sold out in a public sale by inviting tenders from the public under Rule 8(5) (b) of the Rules, 2002, therefore, the instrument is covered under Article 18 of Schedule 1-B and thus, petitioner is liable to pay stamp duty on the sale consideration shown in the sale certificate.

13. The Chief Controlling Revenue Authority by order dated 16.12.2011 remanded the matter to respondent no.2 to consider the three issues formulated by it in para 9 of the order, which reads as under:-

*"01- क्या विवादित सम्पत्ति सार्वजनिक नीलामी द्वारा विक्रय की गयी और निर्गत प्रमाण-पत्र अनुसूची 1ख के अनुच्छेद 18 के अन्तर्गत मान्य विलेख होगा अथवा बाजारू मूल्य पर स्टाम्प शुल्क प्रभार्य होगा?*

*02- क्या विवादित सम्पत्ति औद्योगिक प्रतिष्ठान है ? यदि हॉ तो व्यवसायिक दर पर मूल्यांकन करते हुए स्टाम्प शुल्क क्यों प्रभार्य किया जा सकता है।? जो कि दुकान एवं वाणिज्यिक अधिनियम-1962 की धारा-4 की उपधारा (2) के अन्तर्गत व्यवसायिक प्रतिष्ठान की निम्न परिभाषा के अनुसार नहीं हो सकता है:-*

*"Commercial establishment means any premises, not being the premises of a factory or a shop wherein any trade, business, manufacture or any work in connection with or incidental or ancillary thereto, is carried on for profit and includes a premises wherein journalistic or printing work, or business of banking insurance, stocks and shares brokerage or produce exchange is carried on or which is used as theater, cinema or for any other public amusement or entertainment or where the clerical and other establishment of a factory to whom the provisions of the Factories Act, 1948 do not apply work"*

*03- यदि विवादित स्थल के लिए सर्किल रेट में औद्योगिक दर निर्धारित नहीं है तो किस दर पर मूल्यांकन किस प्रकार किया जाएगा।"*

14. After the remand by the Chief Controlling Revenue Authority to respondent no.2, the case was renumbered as Case No.94 of 2013.

15. It appears that after the remand, a Committee consisting of (i) Executive Engineer, Public Works Department, Agra, (ii) Sub-Registrar-II, (iii) Tehsildar, Sadar Agra, (iv) Assistant Inspector General (Registration), Agra and (v) Additional District Magistrate (Finance & Revenue) was constituted, which conducted a spot inspection of the property

to assess the valuation of the property as per Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as 'Rules, 1997'). Respondent no.2, thereafter, proceeded to decide Case No.94 of 2013-14 (Computerised Case No.D-201301100810) by recording the following finding:-

*''मैंने पत्रावली का अवलोकन तथा पत्रावली पर उपलब्ध समस्त तथ्यों का परिशीलन किया। पत्रावली पर उपलब्ध तथ्यों एवं जिला शासकीय अधिवक्ता (राजस्व) एवं प्रतिपक्षी अधिवक्ता के तर्क सुनने के उपरान्त मैं इस निष्कर्ष पर पहुंचा हूँ कि:-*

*1.बैंक द्वारा प्रश्नगत सम्पत्ति का सार्वजनिक नीलाम न कर, एक ही समाचार पत्र फाइनेंशियल एक्सप्रेस में मुहरबंद निविदायें आमंत्रित किये जाने की सूचना प्रकाशित कराकर टेण्डर की कार्यवाही की गयी है, जिसमें एक ही टेण्डर प्राप्त हुआ है, जिसे बैंक द्वारा स्वीकार कर लिया गया है, जब कि सरफेसी एक्ट के नियम8(2) में दिये गये प्राविधानों के अनुसार दो प्रमुख स्थानीय क्षेत्रीय भाषा के समाचार पत्रों में प्रकाशन किया जाना चाहिये था, स्पष्ट है कि बैंक द्वारा सार्वजनिक नीलामी की निर्धारित प्रक्रिया का पालन नहीं किया है। यहां यह भी उल्लेखनीय है कि प्रश्नगत सम्पत्ति 4,57,04,195/- रूपये में बंधक रखी गयी थी जब कि सम्पत्ति केवल 2,02,00,000/- रूपये में विक्रय कर दी गयी है। बैंक द्वारा एक ही टैण्डर को बिना प्रतिस्पर्धा के स्वीकार कर लिया गया है और न ही शेष धनराशि प्राप्त करने हेतु कोई प्रयास किया गया। स्टाम्प अधिनियम की अनुसूची-1ख के अनुच्छेद-18 में मात्र सार्वजनिक नीलामी को ही उल्लिखित किया गया है। बैंक द्वारा प्रश्नगत सम्पत्ति की नीलामी हेतु सार्वजनिक नीलामी की प्रक्रिया नहीं अपनाई गई है तथा मुहरबंद निविदा में प्राप्त एक ही टैण्डर को स्वीकार किया गया, जो सार्वजनिक नीलामी नहीं मानी जा सकती। बल्कि प्रश्नगत विलेख स्टाम्प अधिनियम की अनुसूची-1ख क अनुच्छेद 23 की परिधि में आता है, ऐसी स्थिति में प्रश्नगत विलेख पर बाजारू मूल्यांकन पर स्टाम्प देय है, जो विलेख पर अदा नहीं किया गया है, इससे स्पष्ट है कि प्रश्नगत विलेख पर स्टाम्प अपवंचना की गयी है।*

*2. पत्रावली पर उपलब्ध यंग स्टाइल ओवरसीज द्वारा अपने पत्र दिनांक 13.6.2009 में स्वयं यह स्वीकार किया है कि प्रश्नगत सम्पत्ति में फैक्ट्री संचालित है, जिसकी पुष्टि संयुक्त जाँच टीम की रिपोर्ट दिनांक 19.3.2012 से भी होती है। उपरोक्त तथ्यों से स्पष्ट है कि प्रश्नगत सम्पत्ति औद्योगिक है। चूंकि संयुक्त जाँच टीम की रिपोर्ट दिनांक 19.3.2012 में प्रश्नगत सम्पत्ति का मूल्याकंन व्यवसायिक एवं आवासीय दर से किया गया है, जो न्यायोचित नहीं है। ऐसी स्थिति में प्रश्नगत सम्पत्ति पर औद्योगिक दर से मूल्याकंन करते हुये स्टाम्प शुल्क लिया जाना उचित एवं न्याय संगत है।*

**आदेश**

*प्रश्नगत सम्पत्ति औद्योगिक की श्रेणी में आती है, ऐसी स्थिति में विलेख संख्या 6017 दिनांक 21.7.2009 द्वारा अन्तरित सम्पत्ति (फैक्ट्री) का सहायक महानिरीक्षक (निबन्धन)/ सहायक आयुक्त स्टाम्प आगरा एवं अपर जिलाधिकारी (वि०रा०) आगरा औद्योगिक दर से मूल्यांकन का आंकलन करके एक सप्ताह में मूल्यांकन आख्या प्रस्तुत करें। मूल्यांकन आख्या प्राप्त होने पर प्रश्नगत विलेख पर स्टाम्प कमी का निर्धारण कर अन्तिम आदेश पारित किया जायेगा तथा यह आदेश अन्तिम आदेश का भाग रहेगा।*

*ह०अप०*

*(गौरव दयाल)*

*जिलाधिकारी/ कलेक्टर स्टाम्प,*

*आगरा*

*02.08.2017''*

16. Respondent no.2 by order dated 02.08.2017 held that the property is situated in the industrial area and accordingly, it directed the Assistant Inspector General (Registration)/Assistant Commissioner (Stamp), Agra and Additional District Magistrate (Finance & Revenue), Agra to submit valuation report of the property as per the rates applicable to the industrial area. Accordingly, he deferred the matter of determination of deficiency in the stamp duty till the report is obtained.

17. Subsequently, respondent no.2 by order dated 06.10.2017 constituted a

Committee of five members to assess the valuation of the property as per the rates applicable to the industrial area. The details of the five members of the Committee are given below:-

> "1. Deputy Inspector General (Registration), Agra Division, Agra (Chairman)
> 2. Additional District Magistrate (Finance & Revenue), Agra (Member)
> 3. Assistant Inspector General (Registration), Agra (Member)
> 4. Tehsildar Sadar, Agra (Member)
> 5. Sub-Registrar (II), Agra (Member)"

18. It transpires from the record that though the five member Committee was constituted in compliance with the order of respondent no.2 dated 02.08.2017 for determining the valuation of the property as per the circle rate applicable to the industrial area, the Committee did not submit any report. Consequently, the Additional District Magistrate (Finance & Revenue) wrote a letter dated 17.01.2022 asking the Assistant Inspector General (Registration), Agra to submit a report with respect to the valuation of the property on the basis of rates applicable to the industrial area. The Assistant Inspector General (Registration), Agra replied to the aforesaid letter by letter dated 29.01.2022 showing its inability to calculate the valuation of the property on the basis of industrial rates inasmuch as no circle rate with regard to industrial area was prescribed in the list of circle rates published in the year 2009 in District Agra.

19. The Additional District Magistrate (Finance & Revenue), Agra again by letter dated 05.02.2022 directed the Assistant Inspector General (Registration), Agra to submit a report in the light of the direction contained in the order dated 02.08.2017 of respondent no.2. Thereafter, the Sub-Registrar-II, Agra submitted a report dated 26.02.2022 stating therein that the Committee constituted by the District Magistrate on 20.01.2012 of which Additional District Magistrate (Finance & Revenue), Agra was Chairman and Executive Engineer, Public Works Department, Sub-Registrar-II Agra, Tehsildar, Agra and Assistant Inspector General (Registration), Agra were members of the Committee assessed the valuation of the property @ 15,000/- square meter.

20. The petitioner, thereafter, submitted an objection on 27.04.2022 contending inter alia that since the sale in the present case is a public sale by inviting tenders from the public under Rule 8(5)(b) of Rules, 2002, therefore, said sale would fall under Article 18 of Schedule 1-B of the Act, 1899, and the petitioner is liable to pay stamp duty on the sale consideration i.e. Rs.2,02,00,000/- mentioned in the sale certificate which was above the reserved price. Accordingly, it prayed that the report of the Committee be rejected.

21. Respondent no.2 held that a detailed order dated 02.08.2017 had been passed by his predecessor in the present case whereby it was directed that the valuation of the property be calculated as per the rates applicable to the industrial area, and the Committee constituted for the said purpose recommended for calculating the valuation of the property by applying the rates of Rs.15,000/- per square meter. Accordingly, respondent no.2 by order dated 17.08.2022 held the deficiency of Rs.1,45,35,270/- and imposed interest @

1.5% per month from 21.07.2009 till the payment of deficient stamp duty and also imposed the penalty of Rs.36,33,818/- under Section 40(b) of the Act, 1899.

22. Challenging the aforesaid orders, Sri Shashi Nandan, learned Senior Counsel for the petitioner submitted that it is not in dispute that the property was mortgaged to the Bank by M/s. Wasan Shoes Limited, and on default in repayment of loan amount by M/s. Wasan Shoes Limited, the possession of the property was taken over by the Bank under Rule 8 (1) of the Rules, 2002, and a possession notice was published by the Bank in two daily newspapers, namely, Dainik Jagran and I-Next. It is submitted that after taking over the possession under Rules 2002, the Authorized Officer of the Bank obtained the valuation of the property from an approved valuer and according to the valuation report of the approved valuer, the valuation of the property was Rs.1,97,00,000/-. Accordingly, the Authorized Officer fixed the reserved price of the property at Rs.2,00,00,000/- and published a notice for sale of the property by inviting tenders from the public as provided under Rule 8(5)(b) of the Rules, 2002. The petitioner offered a bid of Rs. 2,02,00,000/- for the purchase of the property in response to notice published by the Bank for auction of the property, and the Bank accepted the bid of the petitioner being the highest bid, and on complying with the terms and conditions of the payment, the Authorized Officer issued a sale certificate contemplated under Rule 9(6) of the Rules, 2002. It is contended that since it was a public sale, therefore, it was open to the public to participate in the sale proceeding pursuant to the sale notice published in the newspaper, and the bid of the petitioner of Rs. 2,02,00,000/- being the highest bid was maximum price, which in the opinion of the Bank, the property could fetch in the market, therefore, the sale consideration mentioned in the sale certificate is the market value of the property, and petitioner has paid stamp duty on the market value of the property, therefore, there was no deficiency in payment of stamp duty.

23. It is submitted that the aforesaid fact demonstrates that there was no deliberate intention on the part of the petitioner to evade the stamp duty. Thus, it is submitted that there was no material on record based on which respondent no.2 could have formed an opinion that the petitioner has deliberately evaded the payment of correct stamp duty. Consequently, it is submitted that in the absence of any material on record based on which respondent no.2 could form an opinion that evasion of stamp duty by the petitioner was deliberate, the proceeding under Section 47-A of the Act, 1899 could not have been drawn against the petitioner. Thus, it is submitted that the proceeding being without jurisdiction is *void ab initio*, therefore, the orders impugned cannot be sustained in law.

24. He further submits that since it is a public sale, the sale consideration is the market value of the property and there was no jurisdiction with respondent no.2 to reassess the market value of the property inasmuch as in the case of public sale, the market value mentioned in the sale certificate is the market value of the property. In this respect, he has placed reliance upon the judgement of the Apex Court in the case of V.N. Devadoss Vs. Chief Revenue Control Officer-cum-Inspector and Others, (2009) 7 SCC 438 and the judgement of the Calcutta High

Court in the case of Ballyfabs International Limited Vs. The State of West Bengal and Others in W.P.A. No.7006 of 2020 decided on 22.04.2022.

25. In other words, it is contended that the sale conducted by an Authorized Officer under the SARFAESI Act, 2002 is an open market sale and thus excluded from the scrutiny contemplated under Section 47-A of the Act, 1899 (as amended in State of Uttar Pradesh).

26. It is further submitted by Sri Shashi Nandan that if the correct description of the property is not set forth in the instrument of sale and there is loss of revenue to the State, the remedy to the State is to approach Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002, and till any order is passed under Section 17 of the SARFAESI Act, 2002 accepting the contention of the State that the correct description of the property is not set forth in the instrument and the State has suffered loss, the power is not vested with the respondent no.2 to draw any proceeding under Section 47-A of the Act, 1899 and to make any inquiry with respect to sale consideration of the property.

27. He further contends that it is admitted on record that on the date of execution of the sale deed, there was no circle rate for the industrial area, and to determine the value of the property as per industrial area, setting up a Committee is beyond the competence of the respondent no.2. In pith and substance, the argument of Sri Shashi Nandan, learned Senior Counsel is that on the date of execution of the sale deed, there was no circle rate in respect to industrial area in District- Agra and that lacuna cannot be cured by setting up a Committee to determine the circle rate for industrial area.

28. Per contra, Sri M.C. Chaturvedi, learned Additional Advocate General submits that the petitioner has an alternative remedy of statutory appeal under Section 56(1-A) of the Act, 1899, therefore, the writ petition is not maintainable.

29. He further contends that the case of the petitioner right from the initiation of the proceeding under Section 47-A of the Act, 1899 was that the sale deed would fall under Article 18 of Schedule 1-B and the petitioner treating the instrument to be a document falling under Article 18 of Schedule 1-B of the Act, 1899 paid the stamp duty and got it registered, therefore, the petitioner cannot be permitted to take a somersault and urge the ground to assail impugned order that the instrument would fall under Article 23 of Schedule 1-B of the Act, 1899, and since it was a public sale, therefore, the sale consideration mentioned in the sale certificate is the market value of the property, and since there was no concealment and deliberate intention of the petitioner to evade payment of stamp duty, the proceeding under Section 47-A of the Act, 1899 could not be drawn against the petitioner. It is also contended that the sale by tender cannot be equated with sale by auction. He has placed reliance upon the judgement of this Court in the case of ***Vishwanath Agarwal Vs. State of U.P. and Others 2004 (96) RD 635, Secretary of State Vs. Sunderji Shivaji & Company & Others AIR 1938 Privy Council 12*** and judgement of the Apex Court in the case of ***Purushottam Ramanata Quenim Vs. Makan Kalyan Tandel and Others in Civil Appeal No.844 of 1973*** on the point that

there is difference between the sale by inviting tender and by public auction.

30. It is further submitted that had the petitioner treated the said instrument being one falling under Article 23 of Schedule 1-B of the Act, 1899 and submitted the same for registration treating it to be under Article 23 of Schedule 1-B of the Act, 1899, the Sub-Registrar would have exercised the power under Section 33 of the Act, 1899 and would have impounded the instrument.

31. He further submits that the Act, 1899 is a fiscal statute, therefore, the provision of the said Act has to be construed strictly. He further submits that applying the said principle, there can be no fetter to the power of the Collector to invoke power under Section 47-A (3) of the Act, 1899, and if he finds that the correct description of the property has not been set forth in the instrument and there has been deliberate evasion of stamp duty, he can draw proceeding under Section 47-A (3) of the Act, 1899 to determine the correct market value of the property and the stamp duty payable thereon.

32. He submits that in the instant case, the correct details of the property had not been set forth in the instrument, therefore, there was ample material before respondent no.2 to form an opinion that there is deliberate evasion of the stamp duty to draw proceeding under Section 47-A (3) of the Act, 1899. In this respect, he has placed reliance upon Rules 3 & 6 of the Rules, 1997.

33. He submits that it is admitted on record that a factory is established over the property and there was construction over the property, details of which have not been disclosed in the instrument whereas in view of Rules 3 & 6 of Rules, 1997, a duty is cast upon the petitioner to disclose all the details contemplated under the aforesaid Rules in the instrument of sale. It is contended that since the correct description of the property has not been set forth in the instrument affecting the market value of the property, there was adequate material before respondent no.2 to invoke power under Section 47-A (3) of the Act, 1899 and draw proceeding against the petitioner.

34. It is submitted that respondent no.2 under Rule 7 of the Rules 1997 has the power to constitute a Committee to ascertain the correct market value of the property.

35. It is submitted that the powers conferred upon respondent no.2 under the Act, 1899 are independent powers of respondent no.2 and are not circumscribed by SARFAESI Act, 2002, therefore, the submission of the learned counsel for the petitioner that if the correct description of the property is not set forth in the instrument of sale, the remedy of the State is to approach under Section 17 of the SARFAESI Act, 2002 is misconceived.

36. I have considered the rival submissions of learned counsels of parties and perused the record.

37. With respect to the preliminary objection by the learned Additional Advocate General that the petitioner has statutory alternative remedy of appeal, this Court may note that this Court in the case of Sumati Nath Jain Vs. State of U.P and Others (2016) ILR 1 All 132 has held that an increase of eight times over the initial stamp duty which was paid on the instrument is one of the exceptional

circumstances that were envisaged by the Apex Court in Smt. P. Laxmi Devi and Har Devi Asnani as an instance where the petitioner is not liable to be relegated to the alternative remedy of appeal or revision under Section 56 of the Act. Thus, applying the law laid down by this Court in the case of ***Sumati Nath Jain (supra)***, this Court is of the view that the present case also falls in the category of exceptional cases where deficiency in stamp duty has been assessed manifolds than the initial stamp duty paid on the instrument. Accordingly, the argument of the learned Additional Advocate General for relegating the petitioner to alternative remedy is devoid of merits and cannot be sustained.

38. In order to appreciate the submission advanced by Sri Shashi Nandan, learned Senior Counsel for the petitioner, it would be beneficial to have a glance at Section 47-A of the Act, 1899 and a few precedents of this Court elaborating the object behind inducting Section 47-A in the Act, 1899. Section 47-A of the Act, 1899 reads as under:-

> *Section 47-A* ***Under-valuation of the instrument*** *– [(1) (a) If the market value of any property which is the subject of any instrument, on which duty is chargeable on market value of the property as set forth in such instrument, is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908 shall, notwithstanding anything contained in the said Act, immediately after presentation of such instrument and before accepting it for registration and taking any action under Section 52 of the said Act, require the person liable to pay stamp duty under Section 29, to pay the deficit stamp duty as computed on the basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in accordance with Section 23 of the Registration Act, 1908.*
>
> *(b) When the deficit stamp duty required to be paid under clause (a), is paid in respect of any instrument and the instrument is presented again for registration, the registering officer shall certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person paying them and register the same.*
>
> *(c) Notwithstanding anything contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed.*
>
> *(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for registration, the registering officer shall, before registering the instrument, refer the same to the Collector, for determination of the market value of the property and the proper duty payable thereon].*
>
> *(2) On receipt of a reference under sub-section (1) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an*

*inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument and the proper duty payable thereon.*

*(3) The Collector may, suo motu, or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the State Government in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property, not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value, of the property which is the subject for such instrument, and the duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon:*

*Provided that, with the prior permission of the State Government, an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.*

*[Explanation.- The payment of deficit stamp duty by any person under any order of registering officer under sub-section (1) shall not prevent the Collector from initiating proceedings on any instrument under sub-section (3).]*

*(4) If on enquiry under sub-section (2) and examination under sub- section (3), the Collector finds the market value of the property-*

*(i) truly set forth and the instrument duly stamped, he shall certify by endorsement that it is duly stamped and return it to the person who made the reference;*

*(ii) not truly set forth and the instrument not duly stamped, he shall require the payment of proper duty or the amount required to make up the deficiency in the same, together with a penalty of an amount not exceeding four times the amount of the proper duty or the deficient portion thereof.*

*[(4-A)...*
*(4-B)...*
*(4-C)...*
*(4-D)...*
*(5)...*
*(6)...”*

39. In the case of Kaka Singh Vs. The Additional Collector and District Magistrate (Finance & Revenue), Bulandshahr AIR 1986 All 107 the vires of Rule 341 of the Rules framed by the State of U.P. under Section 75 of the Stamp Act, 1899 was challenged. This Court while answering the said question elaborated the object and reason for inserting Section 47-A in the Act, 1899 by means of an amendment. In this respect, paragraphs 6 & 7 of the judgement are reproduced herein below:-

*“6. Section 47-A was inserted by means of an amendment. The scheme of Section*

*47-A of the Act is to deal with those cases where private parties by arrangement clandestinely or fraudulently undervalued the property which is the subject matter of transfer with a view to deprive the government of legitimate revenue by way of Stamp duty. Before addition of Section 47-A, there was no provision in the Stamp Act empowering the revenue authorities to make an enquiry of the value of the property conveyed for determining the duty chargeable. Section 27 of the Stamp Act laid down that the consideration if any and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein. In case a person did not set forth true amount for which the transaction had taken place, the revenue authorities had no power to proceed with the defaulter, Himalaya House Co. Ltd. v. The Chief Controlling Revenue Authority, AIR 1972 SC 899. The Supreme Court held that for the purpose of Article 23, the value of consideration must be taken to be one as set forth in the conveyance deed. The question whether the purpose of determining the value of the consideration to revenue must have regard to what the parties to the instrument have elected to state the consideration to be.*

*7. In order to meet such a difficulty and to empower the revenue authority to determine the market value of the property, which is the subject of the conveyance, exchange, gift, settlement, award, or trust, and the duty as payable by the person liable to pay the same that Section 47-A was inserted."*

40. Under the scheme of the Act, 1899, Section 47-A is in two parts. Section 47-A(1) envisages a case where reference is made by the registering officer before registration if the market value of the property as set forth in the instrument is less than even the minimum value determined in accordance with rules made under the Act, 1899.

41. The other part of Section 47-A viz Section 47-A (3) contemplates a situation where the Collector suo moto or on a reference by a Court or by the authorities on examination of the instrument has reason to believe that the market value of the property has not been truly set forth in the instrument, he may determine the correct market value of the property and duty payable thereon. The expression 'reason to believe' has been elaborated by this Court in the case of ***Hajari Lal Sahu Vs. State of U.P. and Others 2004 (1) AWC 899*** wherein this Court in considering the expression 'reason to believe' held that it has to be an honest belief based upon the constructive material on record and should not be based upon conjectures or on flimsy grounds.

42. In the case of ***Vijay Kumar and Another Vs. Commissioner, Meerut Division, Meerut and Another 2008 (7) ADJ 293*** this Court explained the expression 'belief'. Paragraphs no.7 to 9 of the said judgement are reproduced herein below:-

*"7. The Stamp Act is a fiscal statute and it has to be*

*interpreted strictly and construction of hardship or equity has no role to play in its construction. It is a taxing statute and has to be read as it is. In other words, the literal rule of interpretation applies to it. See— State of Rajasthan v. Khandaka Jain Jewellers, AIR 2008 SC 509. In this case the Supreme Court has referred its earlier judgment in the case of A.V. Fernandez v. State of Kerala, AIR 1957 SC 657. Also Government of A.P. and others v. Smt. P. Laxmi Devi, 2008 AIR SCW 1826.*

*8. In the above background the phrase 'reason to believe' occurring in sub-section (3) of Section 47-A has to be considered. Identical phrases have been placed in almost every fiscal statutes such as Income Tax Act, Sales Tax Act etc. With reference to the expression 'reason to believe' used in Section 34 of the Old Income Tax Act it has been held that they do not mean purely subjective satisfaction on the part of the Income Tax Officer. The 'belief' must have been held in good faith, it cannot be merely a pretence. To put it differently it is open to Court to examine the question whether the reasons to believe have a rational connection or a relevant bearing to the formation of belief and are not extraneous or irrelevant to the purpose of Section, as held in S. Narayanappa and others v. CIT Bangalore, AIR 1967 SC 523. The words 'reason to believe' are stronger than the expression 'for satisfaction' Belief must not be arbitrary or irrational. It must be reasonable or must be based on reasons which are relevant and material.*

*9. In view of the fact that expression 'reason to believe' has been used in sub-section (3) of Section 47-A of the Act, the power conferred under this Section though is wide but they are not plenary. The power cannot be exercised when the Collector has reason to suspect that there is evasion of proper stamp duty."*

43. So, the sine qua non for invoking the power under Section 47-A(3) is that if the Collector on the basis of material on record forms an opinion that "he has reason to believe" that true market value has not been set forth by the party in the instrument, he can determine the correct market value of said property and stamp duty payable thereon. The belief of the Collector must not be arbitrary or irrational and the formation of such belief must reflect that it is based on material on record and has been held in good faith.

44. At this stage, it would be apposite to refer to the relevant paragraphs of the judgment of Apex court in the case of ***V.N. Devadoss (supra)*** relied upon by Sri Shashi Nandan, learned Senior Counsel for the petitioner to contend that the sale contemplated under Rule 8 (5) (b) by tender is a public sale and consideration set forth in the sale certificate and in the instrument of sale is excluded from the jurisdiction of the Collector to draw any proceeding under Section 47-A (3) since there is no fraudulent intention to evade the proper stamp duty.

45. In the V.N. Devadoss case, the Apex court was considering a fact situation

where the appellant V.N. Devadoss in order to rehabilitate the sick company decided to dispose of the land by statutory authority such as the Board for Industrial and Financial Reconstruction (BIFR) and Appellate Authority for Industrial and Financial Reconstruction (AIFR) under the Sick Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'Act, 1985') by forming an Asset Sales Committee (ASC) consisting of members such as representatives of IDBI, Debenture Holders, Government of West Bengal and Special Director of BIFR. The ASC in compliance with the guidelines issued by the statutory authorities (BIFR & AIFR), published in the newspaper about its proposal to sell the land and invited tenders in sealed covers from interested persons. In the said sale, the appellant submitted his tender along with others and the appellant's offer of Rs.24,34,40,000/- being the highest was accepted by the ASC as well as by the statutory authorities. Consequently, the company was granted permission to execute the sale deed in favour of the appellant.

46. A reference was made by Sub-Registrar, Ambattur to the second respondent District Revenue Officer (DRO) in respect to the sale transaction. The second respondent based on the said reference initiated proceeding under Section 47-A of the Act, 1899 applicable in the State of Tamil Nadu.

47. It appears that the Collector without giving any opportunity of hearing determined the market value of the land and called upon the appellant to pay additional stamp duty. The appellant being aggrieved by the order of Collector preferred an appeal which was also dismissed by the Appellate Authority. Thereafter, the appellant took the matter to the High Court contending inter alia that the sale was not between two private individuals, but it was a sale in consonance with the conditions laid down under the Act, 1985, therefore, there could not be any possibility of undervaluation of the property warranting proceeding under Section 47-A of the Act, 1899. The High Court did not agree with the aforesaid contention and held that it was not a sale by Government or a transaction between Government organisations/bodies. It further held that statutory authorities like BIFR and AIFR acted as facilitator and thus, there was scope for taking a different view regarding the market value.

48. The appellant being aggrieved by the aforesaid order preferred an appeal before the Apex Court. The Apex Court in paragraphs 12, 13 and 16 detailed the reasons for allowing the appeal. Paragraphs 12 ,13 and 16 of the aforesaid judgement are reproduced herein below:-

> *"12....A bare perusal of the Rules make the position clear that sub-rule (4) enumerates "procedure on receipt of reference under Section 47-A". Rule 5 speaks about the "principles for determination of market value". Sub-clause (a) refers to land; (b) house sites; (c) buildings, and (d) properties other than lands, house sites and buildings.*
>
> *13. Sub-sections (1) and (3) of Section 47-A clearly reveal the intention of the legislature that there must be a reason to believe that the market value of the property which is the subject matter of the conveyance has not been truly set out in the instrument. It is*

*not a routine procedure to be followed in respect of each and every document of conveyance presented for registration without any evidence to show lack of bona fides of the parties to the document by attempting fraudulently to undervalue the subject of conveyance with a view to evade payment of proper stamp duty and thereby cause loss to the revenue. Therefore, the basis for exercise of power under Section 47-A of the Act is wilful undervaluation of the subject of transfer with fraudulent intention to evade payment of proper stamp duty.*

*16. Market value is a changing concept. The Explanation to sub-rule (5) makes the position clear that (sic market) value would be such as would have fetched or would fetch if sold in the open market on the date of execution of the instrument of conveyance. Here, the property was offered for sale in the open market and bids were invited. That being so, there is no question of any intention to defraud the revenue or non-disclosure of the correct price. The factual scenario as indicated above goes to show that the properties were disposed of by the orders of BIFR and AAIFR and that too on the basis of value fixed by Assets Sales Committee. The view was expressed by the Assets Sales Committee which consisted of members such as representatives of IDBI, debenture-holders, Government of West Bengal and Special Director of BIFR. That being so, there is no possibility of any undervaluation and therefore, Section 47-A of the Act has no application. It is not correct as observed by the High Court that BIFR was only a mediator."*

49. The Calcutta High Court also in the case of ***Ballyfabs (supra)*** applying the principles laid down by the Apex Court held that a sale conducted by the Authorized Officer under the SARFAESI Act, 2002 is an open market sale and thus, is excluded from the scrutiny under Section 47-A of the Act, 1899 subject to conditions laid down in paragraph 16 (1) & (2) of the said judgement.

50. In the light of the aforesaid principle, this Court proceeds to analyse the facts of the present case to ascertain whether the aforesaid two judgements i.e. judgement of Apex Court in the case of ***V.N. Devadoss (supra)*** & judgement of Calcutta High Court in the case of ***Ballyfabs (supra)*** relied upon by the learned Senior Counsel for the petitioner would come to the aid of the petitioner.

51. In the instant case, the facts as emanate from the record are that the property was mortgaged by M/s. Wasan Shoes Limited to the Bank on account of default of repayment of loan. The bank took possession of the property and published notice of possession in two newspapers namely, Dainik Jagaran and I-Next on 21.12.2008. The contents of the possession notice as published by the bank are reproduced herein below:-

*"कब्जा सूचना (अचल संपत्ति)*

*जबकि, अधोहस्ताक्षरी ने केनरा बैंक, ओवरसीज शाखा, आगरा का प्राधिकृत अधिकारी होते हुए वित्तीय़ आस्तियों को प्रतिभूतिकरण एवं पुनर्गठन और प्रतिभूति हित प्रवर्तन अधिनियम- 2002 (संक्षिप्त*

*में, सारफेसी अधिनियम) की धारा 13(12) और प्रतिभूतिहित (प्रवर्तन) नियम 2002 का सपठित नियम 3 के तहत प्रदत्त शक्तियों के अनुप्रयोग में ऋणगृहिता मैं वासन शूज लिमिटेड पार्टनर्स श्री प्रदीप वासन, श्री जितेन्द्र वासन से मांग करते हुए मांग सूचना पत्र दिनांकित 30.09.2005 उक्त सूचना पत्र की उक्त दिनांक से 60 दिनों के भीतर रू० 45704195.24/- (चार करोड सत्तावन लाख चार हजार एक सौ पिचानवे और चौबीस पैसे मात्र) एवं 1.4.1998 से ब्याज और पिनल ब्याज तथा विधियक शुल्क, सूचना पत्र में उल्लिखित राशि को लौटाने के लिए निर्गमित किया।*

*ऋणगृहिता के यह राशि लौटाने में विफल होने पर ऋणगृहिता/बंधककर्ता और सर्वसाधारण को एतद्द्वारा सूचना दी जाती है कि अधोहस्ताक्षरकर्ता ने उक्त अधिनियम की धारा 13(4) सपठित उक्त नियम के नियम 8 एवं 9 के तहत उसको प्रदत्त शक्तियों के अनुप्रयोग में एतद्द्वारा नीचे वर्णित संपत्ति का आधिपत्य दिनांक 16.12.08 को ग्रहण कर लिया है। ऋणगृहिता को विशिष्ट रूप से और सर्वसाधारण को सामान्य रूप से एतद्द्वारा संपत्ति के साथ व्यवहार (क्रय-विक्रय) न करने की चेतावनी दी जाती है और उक्त सम्पत्ति का किसी भी प्रकार से क्रय-विक्रय केनरा बैंक ओवरसीज शाखा, संजय प्लेस, आगरा के प्रभार के तहत रू० 45704195.24/- और उस पर ब्याज के अध्यधीन होगा।*

***अचल सम्पत्ति का विवरणः-***

फैक्ट्री, जमीन व भवन जोकि वासन शूज लिमिटेड के नाम पर है तथा खसरा नं-191 एण्ड 192 मौजा मंगटई, बोदला बिचपुरी रोड, आगरा पर स्थित है।

चौहद्दीः पूरब में: दूसरे की सम्पत्ति, पश्चिम में: खट्टर कोल्ड स्टोरेज

उत्तर में: रोड़ दक्षिण में:दूसरे की सम्पत्ति

स्थानः आगरा, दिनांक 16.12.2008

***प्राधिकृत अधिकारी"***

52. Thereafter, a valuation report with respect to the property was obtained by the Bank. The valuation report enclosed with the writ petition discloses that the property consisted of land and buildings. The summary of the valuation of the property as stated in the valuation report is reproduced below:

***"Summary of Valuation-***

*Part I Land : Rs.2,05,72,500/-*
*Part II Building : Rs.21,49,544/-*
*Part III Proposed Construction : Nil*
*Total : Rs.2,27,22,044/-*

*The overall fair market value of the property is Rs.227.00 Lacs.*

*The realisable sale value of property may reduce to Rs.195.00 Lacs.*

*I certify that:*

*The right property has been inspected by me personally.*

*There is no direct/indirect interest in the property valued.*

*I have not been found guilty of misconduct in my professional capacity.*

*The information furnished in my report is correct to the best of my knowledge and belief.*

*The facts mentioned in the above report are based on the photocopies of the original documents made available to me by the bank.*

*Genuineness of the title, Chains of title as well as agreement, Sell, mortgage etc. if any should be confirmed by the legal advisers of the bank.*

*The extent of boundaries of the property under subject are considered on the basis of the local enquiry made on the site and as per owner indication.*

*The value arrived above is based on market enquiries however*

*further change of circumstances, government policies and market trend may effect the said fair market value."*

53. The valuer certified certain facts, and one of facts under the heading "I certify" in the valuation report stated "the value arrived above is based on market enquiries, however, further change of circumstances, government policies and market trend may effect the said fair market value.

54. The valuation certificate alongwith the valuation report dated 16.12.2008 enclosed with the writ petition is also relevant in the facts of the present case which is being reproduced herein-below:-

***"VALUATION CERTIFICATE***

***Property in name of M/s. Wasan Shoes (Pvt) Ltd.***

***Located at-Plot No. 91 & 192, Village Maghtai, Bichpuri Road Tehsil Agra.***

*The undersigned being an Approved & Charter Valuer does hereby states & certify as under:*

*On invitation by Bank the said property located as above was inspected. The premises belongs to above owners. Based on information gathered by me and fed by the owners in my most unbiased opinion the value of the property is Rs.227.00 Lacs only. The Realizable Sale-Value may reduce to Rs.195.00 Lacs.*

*(Rupees: Two Crore Twenty-Seven Lacs only).*

*It is further certified that the undersigned is no way is connected with any of the parties interested for valuation. This certificate is being issued by me in capacity as a Charter Valuer having Regn. No.F-3101.*

*Date of Valuation : 16/12/2008.*

55. Now, based upon the said valuation report, the Authorized Officer under Rule, 2002 fixed the reserved price of Rs.2,00,00,000/- (Two Crores) for affecting the sale of the property and published a notice in the newspaper for the sale of the property by inviting tender from the public as provided under Rule 8 (5) (b) of the Rules, 2002. The tender notice published by the Bank is reproduced below:-

***"अचल सम्पत्ति की नीलामी***

*वित्तीय आस्तियॉ का प्रतिभूतिकरण व पुर्ननिर्माण तथा प्रतिभूति हित का प्रवर्तन अधिनियम, 2002 की धारा 13(4) (क) तथा सपठित प्रतिभूति हित (प्रवर्तन) नियम के नियम 9 के अधीन निहित अधिकारों का प्रयोग करते हुए निम्नांकित अचल सम्पत्ति को सर्वसाधारण से मुहरबंद निविदाओं द्वारा निम्न अनुसूची अनुसार विक्रय किया जायेगा।*

| उधारकर्ता का पुरा नाम व पता | वसूली के लिए प्रतिभूति ऋण राशि | सम्पत्ति का पूरा विवरण | आरक्षित मूल्य | अग्रिम धनराशि | निविदा की अंतिम तिथि | सार्वजनिक नीलामी की तिथि समय एवं स्थान |
|---|---|---|---|---|---|---|
| मै० वासन शूलिमिटेड | रू० 4,57,04,195.24 + दि० 1.04.98 से ब्याज | 1. प्लाट नं० 191 व 192 मॉ | रू० 2.00 करोड़ | रू० 20.00 लाख | 16.06.09 सांय 5 बजे तक | 16.06.09 सांय 4 बजे कैनरा बैंक, ओवर |

| | | | | | | |
|---|---|---|---|---|---|---|
| | व अन्य खर्चे | मंघटई बिचपुरी रोड आगरा । पूर्व- कृषि भूमि, पश्चिम -कृषि उत्तर- नाला/ बिचपुरी रोड़, दक्षिण -कृषि भूमि 2..... ..... | | | | सीज शाखा संजय प्लेस, एल० आई० सी बिल्डिंग आगरा । |

टिप्पणीः- 1. अचल सम्पत्ति 'जहां है जैसी है'(As is where is basis) की पद्दति के आधार पर विक्रय की जाएगी। 2. सबसे पहले प्राधिकृत अधिकारी द्वारा सार्वजनिक रूप से मुहरबंद निविदायें निर्धारित समय तक प्राप्त की जायेगी। प्राप्त मुहरबंद निविदायें केनरा बैंक की ओवरसीज शाखा, संजय प्लेस, एल०आई०सी० बिल्डिंग, आगरा में दिनांक 16.06.09 सायं 3 बजे खोली जायेगी। यदि आरक्षित धनराशि से कम धनराशि की निविदायें प्राप्त होती है या कोई भी निविदा प्राप्त नहीं होती है तो उपरोक्त अचल सम्पत्ति का विक्रय सार्वजनिक नीलामी द्वारा निर्धारित तिथि को किया जायेगा। अन्य नियम एवं शर्तें कैनरा बैंक की ओवरसीज शाखा, संजय प्लेस, एल०आई०सी० बिल्डिंग, आगरा से प्राप्त की जा सकती है।

स्थान- आगरा, दिनांक 15.05.09
प्राधिकृत अधिकारी''

56. After the publication of the notice for the sale of the property, the petitioner submitted a tender offering the purchase of the property for a sale consideration of Rs. 2,02,00,000/-. It is also admitted on record that the petitioner alone had submitted his tender and except the petitioner no party had submitted tender, so the tender of the petitioner being the single tender was accepted by the Authorized Officer. On receiving the sale consideration, he issued a sale certificate on 16.07.2009. The sale certificate issued by the Bank is reproduced herein-below:-.

***Canara Bank***
***SALE CERTIFICATE***
***(For Immovable Property)***

*Where as,*

*The undersigned being the Authorized Officer of Canara Bank, under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, (Act 54 of 2002) and in exercise of the Powers conferred under Section 13(12) read with Rule 9 (6) of the Security Interest (Enforcement) Rules 2002, has in consideration of the payment of Rs.2,02,00,000.00 (Rs. Two Crores, two lacs only), sold on behalf of Canara Bank, Overseas, Branch, Agra, in favour of M/s. Young Style Overseas, C-2/52, Beside Shree Ram Mandir Cinema, Kamla Nagar, Agra. (Purchaser), the Immovable Property shown in the Schedule below secured in favour of the Canara Bank, Overseas Branch, Agra, by M/s. Wasan Shoes Ltd, Factory at No.191-192, Village Mangtai, Old Bodla- Bichpuri Road, Agra towards the financial facilities, Packing Credit, FDB/FBE, FLC/ILC, over drawings in current account, offered by Canara Bank, Overseas Branch, Agra, to M/s. Wasan Shoes Ltd.*

*The undersigned acknowledges the receipt of the Sale Price in full and handed over the delivery and possession of the Schedule Property to M/s. Young Style Overseas, C-2/52, Beside Shree Ram*

*Mandir Cinema, Kamla Nagar, Agra. The Sale of the Scheduled Property was made free from all encumbrances known to the Secured Creditor, on deposit of the money demanded by the undersigned.*

***SCHEDULE***

***Description of the Property***

*All that part the parcel of the property consisting of Plot No.... in Sy. No/City or Town Survey No. Khasra No. (old) 191, area 2, Bigha, 5 Biswa, 16 Biswansi, and Khasra No (Old) 192 area 3 Bigha, 11 Biswa, 8 Biswansi, at Mauza Mangtai, Bodhla, Bichpuri Road, Agra within the Sub District/Tehsil, Agra and District Agra.*

*Bounded by:*

*On the North by: Nala/Bichpuri Road, South: Agricultural Land,*

*On the East: Agricultural Land, West: Agricultural Land.*

*Place: Agra*

*Date: 16th July 2009 Sd./illegible*

*(AUTHORIZED OFFICER)*

*CANARA BANK, OVERSEAS, BRANCH AGRA (U.P.)"*

57. After issuance of the sale certificate, the sale deed was presented for registration before the office of Sub-Registrar II, Agra, executed between the secured creditor i.e. the Bank and M/s. Shahroo Monsin which was registered on 21.07.2009.

58. To appreciate the controversy, it would be necessary to appreciate the scheme of the Stamp Act, 1899. The Stamp Act is a fiscal statute and being a fiscal statute the provisions therein have to be construed strictly by giving literal meaning to the expression employed by the legislature. The Apex Court in the case of ***Shanti Bhushan (D) Thr. Lr. and Others Vs. State of U.P. & Others 2023 SCC Online SC 489*** in paragraph 20 observed as under:

> *"20. At this stage, we may note that the Stamp Act is a taxing statute. In interpreting such a statute, equitable considerations cannot be applied. A taxing statute has to be interpreted in accordance with what is clearly expressed therein. While interpreting such a statute and determining the liability to pay tax, the provisions are required to be construed strictly. In other words, the rule of literal construction must be applied while interpreting a taxing statute. It must be interpreted in terms of the natural construction of the words used. There is no scope to imply anything which is not expressly provided."*

59. Similar proposition was laid down by the Apex court in the case of ***State of Rajasthan and Others Vs. Khandaka Jain Jewellers (2007) 14 SCC 339*** wherein the Apex Court was invited to consider a controversy whether the valuation should be assessed on the market rate prevailing at the time of registration of the sale deed or when the parties entered into an agreement to sell. The Apex Court while dealing with the aforesaid issue held that the taxing statute has to be construed strictly and consideration of hardship or equity has no role in interpreting the taxing statute. Paragraphs 20 to 23 are reproduced herein-below:-

> *"20. The expression "execution" read with Section 17 leaves no manner of doubt that the current valuation is to be seen when the instrument is sought to be*

*registered. The Stamp Act is in the nature of a taxing statute, and a taxing statute is not dependant on any contingency. Since the word "execution" read with Section 17 clearly says that the instrument has to be seen at the time when it is sought to be registered and in that if it is found that the instrument has been undervalued then it is open for the registering authority to enquire into its correct market value. The learned Single Judge as well as the Division Bench in the present case had taken into consideration that the agreement to sell was entered into but it was not executed. Therefore, the incumbent had to file a suit for seeking a decree for execution of the agreement and that took a long time. Therefore, the courts below concluded that the valuation which was in the instrument should be taken into account. In our opinion this is not a correct approach. Even the valuation at the time of the decree is also not relevant. What is relevant in fact is the actual valuation of the property at the time of the sale. The crucial expression used in Section 17 is "at the time of execution". Therefore, the market value of the instrument has to be seen at the time of the execution of the sale deed, and not at the time when agreement to sale was entered into. An agreement to sell is not a sale. An agreement to sell becomes a sale after both the parties signed the sale deed. A taxing statute is not contingent on the inconvenience of the parties. It is needless to emphasize that a taxing statute has to be construed strictly and considerations of hardship or equity have no role to play in its construction. Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words:*

*" In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

*21. The same view was expressed by Hon'ble Bhagwati, J. in the case of A.V. Fernandez v. State of Kerala AIR 1957 SC 657. The principle is as follows:*

*"29...in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statue or the substance of the law. If the Revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."*

*Hon'ble Shah, J. has formulated the principle thus:*

*"11...In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be*

*interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."*

*Therefore, a taxing statute has to be read as it is. In other words, the literal rule of interpretation applies to it.*

*22. In this background, if we construe Section 17 read with Section 2(12) then there is no manner of doubt that at the time of registration, the registering authority is under an obligation to ascertain the correct market value at that time, and should not go by the value mentioned in the instrument.*

*23. Learned counsel for the respondent submitted that if we construe Section 3 read with Section 27 of the Act then the registering authority is under an obligation to only see the value mentioned in the instrument. In our opinion Section 3 which is the charging section cannot be read in isolation but has to be read along with Section 17 of the Act. From a composite reading of Sections 3, 17 and 27, it becomes abundantly clear that the valuation given in an instrument is not conclusive. If any doubt arises in the mind of the registering authority that the instrument is undervalued then as per Section 47-A of the Rajasthan (Amendment) Act the instrument can be sent to the Collector for determination of the correct market value. Under Section 47-A read with Sections 3, 17 and 27, it becomes clear that the registering authority has to ascertain the correct valuation given in the instrument regarding market value of the property at the time of the sale."*

60. It is pertinent to note that the object of the two Acts i.e. Stamp Act, 1899 and object of SARFAESI Act, 2002 are different and they operate in different domain inasmuch as the Stamp Act, 1899 is a fiscal statute laying down the law relating to the tax levied in the form of stamp duty on instruments recording transactions whereas SARFAESI Act, 2002 has been enacted to arm the banks to recover loans from defaulting borrowers by auctioning their residential or commercial properties that were used as collateral (security) during the loan process.

61. In the case of ***M/s. Saya Traders Vs. State of U.P. in Writ-C No.31061 of 2010*** decided on 16.09.2010, this Court has succinctly explained the difference between the auction held under Companies Act and the levy of stamp under the Stamp Act. In the said case, the Court was called upon to consider whether in a sale by the Official Liquidator of a Company property in a winding-up proceeding after permission of sale by the Court, the sale consideration is treated to be the market value and the Registering Authority under Section 47-A (1) of the Act is not empowered to determine the market value of the property. This Court held that the two Acts i.e. the Companies Act and the Stamp Act operate in different spheres and what may be good under one Act may not be true/correct for the purposes of other

Act. In the said judgement, the Court has also noted the distinction between the value of the property and the upset price or the reserved price. Paragraphs 27, 28, 36, 37, 38, 39, 40 and 41 of the aforesaid judgement are reproduced herein-below:

> *27. This brings me to the next point as to whether the authorities under the Act are empowered to determine market value of the property and the stamp duty payable thereon when the sale took place under the authority of the Court at a price approved by it.*
>
> *28. There is no dispute to the fact that the deed in question is an instrument of conveyance as defined under Section 2 (14) read with Section 2(10) of the Act and is chargeable to stamp duty under Section 3 of the Act. The levy of stamp duty is not dependant upon the parties to the deed so long as the instrument is not exempt from the payment of stamp duty. In such a situation every instrument chargeable to stamp duty is required to be dealt with in accordance with the provisions of Section 47-A of the Act so that the Government is not deprived of its legitimate revenue by way of stamp duty. Thus the question as to on whose behalf or under whose direction the transfer is made is of no significance.*
>
> *36. It may be worth noting that the "value of the property" and the "reserve price" of a property may vary and may not be the same. In State of U.P. Vs. Shiv Charan Sharma AIR 1981 SC 1722 the Supreme Court explaining the meaning of reserve price observed that it is a price with which the public auction starts and below which the bidders are not permitted to give bid. In other words, the true market value can always be on the higher side than the reserved price. The Apex Court in the case of Anil Kumar Srivastava Vs. State of U.P. AIR 2004 SC 4299 as such observed that the concept of reserve price is different from the valuation of the property and the two are not synonymous. The two terms operate in different spheres.*
>
> *37. In the end, it may also be noted that even though the Court while making a sale of any property ensures to fetch the best possible price but that may not necessarily be the prevailing market price.*
>
> *38. The Apex Court in Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd., AIR 1974 SC 1331 has observed as under:*
>
> *"Court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not often forthcoming."*
>
> *39. In Anil Kumar Srivastava (supra) the Supreme Court while dealing with the tender price has examined the concept of valuation and upset/reserved price and held as under:*
>
> *"In the case of McManus Vs. Fortescue (1907) 2 KB 1, it has been held by Court of Appeal that in a sale by auction, subject to reserve, every offer/bid and its acceptance is conditional. That the public is informed by the fact, that the sale is subject to a reserve that the auctioneer has agreed to sell for the amount which the bidder is*

*prepared to give only in case that amount is equal to or higher than the reserve. That the reserve puts a limit on the authority of the auctioneer. He cannot accept a price below the upset/reserve price . . . The concept of reserve price is not synonyms with 'valuation of the property'. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. (see : Pollock and Mulla on Indian Contract and Specific Relief Acts (2001) 12th edition, page 50).*

*Valuation is a question of fact. That court is reluctant to interfere where valuation is based on relevant material (see : Duncans Industries Ltd. v. State of U.P. [1999] 9 JT SC 421. The difference between valuation and upset price has been explained in the case of B. Susila v. Saraswathi Ammal, AIR 1970 Mad 357, in which it has been held that fixation of an upset price may be an indication of the probable price which the land may fetch from the point of view of intending bidders. However, notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside. That the fixation of the reserve price does not affect the rights of the parties. Similarly, in the case of Dr. A.U. Natarajan v. Indian Bank, AIR 1981 Mad 151, it has been held that the expressions 'value of a property' and 'upset price' are not synonymous but have different meanings. That the term 'upset price' means lowest selling price or reserve price. That unfortunately in many cases the word 'value' has been used with reference to upset price. That the sale has to commence at the higher price and in the absence of bidders, the price will have to be progressively brought down till it reaches the upset price . . ."*

*40. In view of above legal position, it is clear that the upset price or the reserve price of any property fixed by the Court may not be the true market value of the property. The market value of the property is generally higher and at times lessor than the reserve price so fixed and as such it can always be subject to determination.*

*41. Moreover the fixation of reserve price/upset price by the Court while granting permission to sell the property on that price under the Companies Act is to safeguard the interest of the person to whom the property belongs and the creditors. It is not determined or fixed considering the interest of the revenue. The two Acts i.e. the Companies Act and the Stamp Act operate in different spheres and what may be good under the one Act may not be true/correct for the purposes of the other Act. Therefore, also from the angle of protecting the revenue it is necessary that the market value of any property which is subject matter of transfer under an instrument chargeable to stamp*

*duty ought to be determined in accordance with the provisions of the Act."*

62. Thus, it is evident that applying the aforesaid principles propounded by the Apex Court as well as by this Court, the powers conferred upon the Collector under Section 47-A(3) are independent and cannot be curtailed or restricted on the pretext that since the sale is a public sale by inviting tender, and it is open to the public to participate in the said sale, therefore, the sale consideration on which the property is sold is final and excludes the domain of the Collector to invoke its power under Section 47-A(3) of the Act, 1899 even in those cases where he has reason to believe based on the tangible material on record that the true market value has not been set forth in the instrument.

63. At this stage, it would also be relevant to refer to the judgements relied upon by Sri M.C. Chauturvedi, learned Additional Advocate General laying down a distinction between a sale by tender and by public auction.

64. In the case of Vishwanath Agarwal (supra), the issue before the Court was whether a sale by the Official Liquidator under the Companies Act by inviting tender is a sale by public auction, and thus, is covered under Article 18 of Schedule 1-B of the Act, 1899. This Court held that the sale by inviting tender is not a sale by public auction. Paragraphs 10, 14, 15, 16, 17 of the said judgement are reproduced herein-below:-

*"10. There is one more aspect of the matter, Article 18 would apply only if the sale is made by public auction. Section 457 of the Companies Act gives power to the official liquidator to sell the property by public auction or by private sale. It is not in dispute between counsel for the parties that the mode adopted in the present case was a sale by inviting tenders and the only submission of Sri. R. N. Singh, learned counsel for the petitioner on this point is that a sale by inviting tenders is a sale by public auction, I do not agree with the contention advanced.*

*14. The question was considered by the Bombay High Court in Gulabsingh v. Chandrapal Singh and Ors., AIR 1987 Bombay 90. In that case distinction between sale by public auction and sale by tender has been noticed. It was held that (18) "I may usefully refer in this regard to the Halsbury's Laws of England Volume 2 Fourth Edition for what an auction means. Para 701 on page 360 is relevant. According to Halsbury's Laws of England, "the auction is a manner of selling or letting property by bids, usually to the highest bidder by public competition. The prices which the public was asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition." It is thus clear that an auction is held by public competition wherein every bidder has right to raise his own bid. It is also clear that in public auction; the atmosphere herein created by open bidding can tempt the bidder to raise his bid and thus enhanced price can be fetched by the said mode. (19) "In a*

*sale by tender, however, no such opportunity is available to the tenderer. Once he gives his offer that is final and cannot be raised, whereas in public auction each bidder knows the bid of the other person. In the mode of sale by calling for offers or tenders, none of the persons or tenderers know the price offered by the other. In regard to the tenders, it is observed in Halsbury's Laws of England, Volume 9, Fourth Edition para 230 on page 101 that an advertisement that good or services are to be bought or said by tender is not, prima facie, an offer to sell to the person making the highest tender". It is, therefore, clear that by sale by tender or by calling for offers, the highest bid need not be accepted."*

*15. The dictionary meaning of public auction given in Black's Law Dictionary, revised Fourth Edition is:*

*"**Auction**. - A public sale of land or goods, at public outcry to the highest bidder. **Perry Trading Co. v. City of Tallahassee 128 Fla 424, I11 ALR 463.***

*A sale by auction is a sale by public outcry to the highest bidder on the post. **Barber Lumber Co. v. Gifford, 25 Ildaho, 645, 1396P. 557, 560.***

*While auction is very generally defined as a sale to the higher bidder, and this is the usual meaning, there may be a sale to the lowest bidder, as where land is sold for non-payment of taxes to whomsoever will take it for the shortest term; or where a contract is offered to the one who will perform it at the lowest price. And these appear fairly included in the term "auction" Abbott.*

*Dutch Auction-*

*A method of sale by auction which consists in the public offer of the property at a price beyond its value and when gradually lowering the price until some one becomes the purchaser. Crandall v. State 28 Ohio 482.*

*Public Auction-*

*A sale of property at auction, where any and all persons who choose are permitted to attend and offer bids. The phrase imports a sale to the highest and best bidder with absolute freedom for competitive bidding. **State v. Millider 52 Mont 515.***

*16. Though this phrase is frequently used, it is doubtful whether the word "public" adds anything to the force of the expression, since "auction" itself imports publicity. If there can be such a thing as a private auction, it must be one where the property is sold to the highest bidder, but only certain persons, or a certain class of persons, are permitted to be present or to offer bids.*

*17. For what has already been discussed I am of the view that in this case there was no sale by public auction and the instrument is not covered by Article 18 of Schedule IB but is a conveyance under Article 23."*

65. Though, it is not disputed by Sri Shashi Nandan, learned Senior Counsel that the sale by tender is not covered under Article 18 of Schedule 1-B, the aforesaid judgement is referred only for the purpose that the legislature considering the

difference between the public auction and a sale by tender did not think it appropriate to include the sale by tender by an Authorized Officer in Article 18 of Schedule 1-B under the Stamp Act, 1899 entitling the party to pay the stamp duty on sale consideration in the sale certificate.

66. It is true that the Courts have elaborated that the market value is a changing concept depending upon various factors, but it cannot be lost sight of the fact that the reserved price/upset price fixed by the authority for inviting tender under SARFAESI Act, 2002 is to safeguard the interest of the secured creditors but it is not fixed considering the interest of the revenue.

67. At this stage, it would be relevant to reproduce Articles 18 and 23 of Schedule 1-B of the Act, 1899:-

| Description of Instrument | Proper Stamp-duty |
|---|---|
| ***[18. Certificate of sale*** *(in respect of each property put up as a separate lot and sold), granted to the purchaser of any property sold by public auction by a Court or by an officer, authority or body empowered under any law for the time being in force to sell such property by public auction and to grant such certificate.]* | *[The same duty as a Conveyance [(No.23 clause (a)], for a consideration equal to the amount of the purchase money only]* |
| | *Sixty rupees* |
| *23**. Conveyance*** *[as defined by Section 2 (10) not being a Transfer charged or exempted under No.62-* | *One hundred and twenty-five rupees.* |
| *(a) if relating to immovable property where the amount or value of the consideration of such conveyance as set forth therein or the market value of the immovable property which is the subject of such conveyance, whichever is greater does not exceed Rs.500,* | *One hundred and twenty-five rupees: Provided that the duty payable shall be rounded off to the next multiple of ten rupees.* |
| | *Twenty rupees* |
| *where it exceeds Rs.500 but does not exceed Rs.1,000.* | *Twenty rupees* |
| *and for every Rs.1,000 or part thereof in excess of Rs.1,000* | |
| *(b) if relating to movable property where the amount or value of the consideration of such conveyance as set forth therein does not exceed Rs.1,000* | |
| *and for every Rs.1,000 or part thereof in excess of Rs.1,000* | |

| | |
|---|---|
| *Exemption*<br>*Assignment of copyright in musical works by resident of, or first published in India.*<br>*Explanation*<br>*For the purposes of this Article, in the case of an agreement to sell an immovable property, where possession is delivered before the execution or at the time of execution, or is agreed to be delivered without executing the conveyance, the agreement shall be deemed to be a conveyance and stamp duty thereon shall be payable accordingly:*<br>*Provided that the provisions of Section 47-A shall mutatis mutandis apply to such agreement:*<br>*Provided further that when conveyance in pursuance of such agreement is executed, the stamp duty paid on the agreement shall be adjusted towards the total duty payable on the conveyance.]* | |

68. Under Article 18 of Schedule 1-B, a party is liable to pay stamp duty for a consideration equal to the amount of purchase money only in a case where the certificate of sale is granted to the purchaser of any property sold by public auction by a Court or by any officer, authority or body empowered under any law to sell such property by auction and to grant such certificate.

69. The Courts have held the distinction between public auction and sale by inviting tenders from the public. In a sale by public auction, each bidder offers an increase upon the price offered by the preceding bidder, the article put up for auction being sold to the highest bidder. This process involves the auction being held in public and open to all members of the public having a right to attain and participate in the auction and the valuable element being the competition between the persons who are openly bidding for the subject matter of the sale.

70. The market value of the property would always be on the higher side than the upset price/reserved price in a sale by tender, the reason for saying so is that the Courts have laid a distinction between a sale by tender and a sale by public auction. In a case of sale by public auction, the bidder can tempt to or can be tempted to increase the offer because of the atmosphere created by open bidding, thus, the property may fetch the maximum price which may not be possible in the case of a sale by tender inasmuch as the bidder in a sale by tender does not know the bid of the other bidder participating in the tender and he does not have opportunity to enhance the bid late. Perhaps keeping in view the said distinction between a sale by public auction and a sale by tender, the Legislature

did not think it appropriate to include sale by tender under Article 18 of Schedule 1-B while bringing a sale by public auction under Article 18 of Schedule 1-B.

71. So to say that the sale by tender by inviting offers from public is a public sale, and sale consideration would be the market value of the property, and the Collector is denuded of its power under Section 47-A (3) of the Act, 1899 to invoke such power to draw a proceeding against a party despite there being constructive material on record based on which he has reason to believe that true description of the property has not been set forth in the instrument would render the object of inducting Section 47-A(3) by amendment in the Act, 1899 otiose. Thus, to say that sale consideration in a sale by tender is the market price of the property does not appeal to the logic.

72. A glance at Section 17 of the Act reflects that the market value of the property in relation to an instrument chargeable to stamp duty is determinable on the date of 'execution' irrespective of the date of its registration, if any.

73. A glance at Section 27 of the Act, 1899 is also relevant in the facts of the present case. Section 27 of the Act cast a duty upon the party to disclose all the facts and circumstances affecting the chargeability of the instrument with duty. Section 27 (1) & (2) are reproduce herein-below:-

> *"27.* ***Facts affecting duty to be set forth in instrument****.- (1) The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.*
>
> *(2) In the case of instruments relating to immovable property chargeable with an ad valorem duty on the value of the property, and not on the value set forth, the instrument shall fully and truly set forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, Municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act."*

74. Rule 3 of the Rules, 1997 prescribes 'Facts' which are to be set forth in an instrument. The present is a case relating to a building as the factory is established on the property, therefore, Rule 3 (3) of the Rules 1997 being relevant in the context of the present case is reproduced herein-below:-

> *"****Rule 3. Facts to be set forth in an instrument****.- In case of an instrument relating to immovable property chargeable with an ad valorem duty, the following particulars shall also be fully and truly stated in the instrument in addition to the market value of the property-*
>
> *(3) in case of buildings-*
>
> *(a) total covered area and open land, if any, in square metres;*
>
> *(b) number of storeys, area and covered area of each storey in square metres;*

*(c) whether pucca or katchha construction;*

*(d) year of construction;*

*(e) actual annual rent;*

*(f) annual value assessed by any local body and the amount of house tax payable thereon,*

*if any;*

*(g) nature of building, whether non-commercial or commercial; and*

*(i) in case the building is non-commercial, its minimum value of construction as fixed by the Collector of the district; and*

*(ii) in case of single unit ship and commercial establishment, its minimum land rate per square metre and minimum construction rate per square metre of single unit shop and commercial building as fixed by the Collector of the district. In case of shops and commercial establishments situated in buildings, other than single unit commercial building, carpet area rate per square metre as fixed by the Collector of the district, and,*

*(h) location (whether lies in urban area, semi-urban area or country side).”*

75. It is also relevant to have a glance at Rule 6 (1) of Rules, 1997 which states that the party is under obligation to submit along with the instrument a statement in duplicate in the Form appended to these Rules where the instrument is in relation to an immovable property chargeable with an ad valorem duty. The form prescribed under Rule 6 envisages various information which is to be supplied by the party at the time of submitting the instrument for registration and below the form, a verification clause is also given which is to be signed by the transferor.

76. In the context of the present case, the information required to be submitted by the party at serial nos.6, 7, 8, 11 & 12 in the Form under Rule 6 (1) of Rules, 1997 contemplated in the Rules, 1997, and the declaration in the form of verification is being reproduced herein-below:-

*6. Approximate distance (in kilometres of natures) of property from railway station, bus-station, public offices, hospitals, factories and educational institution, etc. Mention any one which is nearest to the property under transfer....*

*7. Nature of economic, industrial, developmental activity, if any, prevailing in the locality in which property is situate.....*

*8. Any other special feature affecting the value of the property....*

*11. Fair market value of the property:*

*12. Other information-*

*In case of Agricultural land-...*

*Non-agricultural land-...*

*In case of grove of garden-...*

*In case of non-commercial building-*

*(i) type of building, i.e., whether tiled, R.C.C., R.B.C. or otherwise;*

*(ii) total covered and open area (in square metres);*

*(iii) the number of storeys in the building;*

*(iv) the covered and open area of each floor or storey in the building:*

*(v) whether the walls of the building have been built in brick and cement, brick time, mortar or otherwise;*

*(vi) the year of construction of the building;*

*(vii) brief description of the quality of the sanitary wares, woodworks, electrical and other fittings and their respective quantities (with brand names if possible);*

*(viii) the size and the depth of the well, if any, in the property;*

*(ix) minimum value of land per acre/per square metre and fixed by the Collector of the district."*

77. A combined reading of Section 27 of the Act, 1899, and Rule 6(1) of Rules, 1997 and the perusal of the form prescribed under Rule 6 suggest that a duty is cast upon the parties to furnish all the information fully and correctly affecting the chargeability of the instrument, and the details of the information sought in the form should be duly verified by the transferee and transferor and are also to be enclosed along with the instrument of transfer.

78. In the light of the various provisions referred to above, it can safely be said that if there is violation of Section 27 of the Act by not disclosing all the facts fully and correctly affecting the chargeability of the instrument, it is obvious that the correct market value has not been set forth in the instrument, and if the Collector finds that there is violation of Section 27 of the Act and all the facts affecting the chargeability of the instrument have not been set forth in the instrument, in such case, belief of the Collector contemplated under Section 47-A of the Act, 1899 is based upon the material on record, and the scrutiny of such instrument cannot be excluded on the pretext that it was a public sale and there was no deliberate intention to evade the payment of proper stamp duty so as to exclude such sale from the domain of Section 47-A of the Act, 1899. Any other interpretation of Section 47-A (3) in reference to a public sale by tender where it does not conform to the requirements of Act, 1899 and does not set forth all the details in the instrument affecting the chargeability of the instrument would be against the principles of interpretation of taxing statute and would render the object of inducting Section 47-A by the amendment in the Act, 1899 otiose.

79. Therefore, if a presumption is raised that the price on which the property has been sold in a sale by tender is the market value of the property which the property would have fetched and the party is liable to pay the stamp duty on the sale consideration mentioned in the sale certificate issued by the Authorized Officer on receiving the amount that would be against the spirit of the Stamp Act and the various Rules casting a duty upon the party to disclose fully and correctly the description of the properties.

80. Now coming to the facts of the present case, after the execution of the sale deed, a spot inspection was conducted by the Additional District Magistrate (Finance & Revenue), Agra on 04.08.2009. He submitted a report that the instrument was presented for registration treating it to be under Article 18 of Schedule 1-B whereas the said instrument does not fall within the purview of Article 18 of Schedule 1-B.

81. The report further states that 4000 Sq. Meters is constructed area which has not been disclosed in the sale certificate and it has been undervalued as it was assessed treating it to be agricultural land. On the said report, a proceeding under Section 47-A (3) was drawn against the petitioner and a notice was issued, which came to be challenged by the petitioner by filing writ petition bearing Writ-C No. 10013 of 2010 which was disposed of by this Court relegating the petitioner to the respondent no.2.

82. Respondent no.2, thereafter, passed an order dated 30.05.2011 holding the deficiency of Rs.2,65,24,240/- in payment of stamp duty and also imposed the penalty of Rs. 2,00,000/-under Section 40 (b) of the Act, 1899.

83. The petitioner preferred an appeal which was allowed and the order of respondent no.2 was set aside and the matter was remanded by the Chief Revenue Authority to the Collector by formulating three issues which have already been extracted above.

84. The Collector again by order dated 02.08.2017 held that the instrument is not covered under Article 18 of Schedule 1-B. He further held that since a factory is being run over the property, therefore, the circle rate applicable to the industrial area be applied, accordingly, he constituted a Committee to determine the circle rate with respect to the industrial area. The Committee submitted a report, and on the basis of the said report, the Collector calculated the market value of the property by applying the circle rate of Rs.15,000/- in reference to the land and also calculated the value of the constructed area. Thereafter, he determined the market value of the property and held deficiency of Rs.1,45,35,270/- on which interest @ 1.5% per month was also imposed. He also imposed the penalty of Rs.36,33,818/- under Section 40(b) of the Act, 1899.

85. In view of the law discussed above, the question which invites the attention of the Court in the facts of the present case is ‘whether the sale by tender in the facts of the present case is a public sale and the sale consideration mentioned in the sale certificate shall be treated to be a market value in reference to the Act, 1899 for payment of stamp duty.'

86. It is admitted that the factory is established on the property and as per the valuation report of the valuer, the fair market value of the land is assessed to Rs.2,05,72,500/- and the value of the building standing on the land is assessed as Rs.21,49,545/-. The valuer also stated in the report that the fair market value arrived at is based on market enquiries but the further change of circumstances, Government policies, and market trends may affect the said fair market value. So, the valuation report of the authorised valuer giving the fair market value of the property is only an assessment of the valuation of the property based upon the market enquiries, but it is not conclusive and may vary depending upon the market policies and market trends. The Valuer in his report has stated that the reliasable sale value of the property may reduce to Rs.1,95,00,000/-. The Valuer has not given any reason or basis in the report for the reduction of realisable value of a property to Rs.1,95,00,000/- whereas the fair market value assessed by him is Rs.2,27,00,000/-.

87. The Authorised Officer under the SARFAESI Act, 2002 is only an

independent person. It appears that treating the realisable sale value of the property to be Rs.1,95,00,000/- though the fair market value of the property as per the valuation report is Rs.2,27,00,000/-, the Authorised Officer fixed the upset price or reserved price Rs.2,00,000,00/- and published tender inviting offers from the public for the sale of the property.

88. Perusal of the tender notice published in the newspaper on 15.05.2009 discloses the details of the property which are as follows:-

| ***संपत्ति का पूरा विवरण*** |
|---|
| *1. प्लाट नं० 191 व 192 मॉ मंघटई बिचपुरी रोड आगरा। पूर्व-कृषि भूमि, पश्चिम-कृषि उत्तर-नाला/ बिचपुरी रोड़, दक्षिण-कृषि भूमि* |

89. From the aforesaid facts, it is evident that only the number of plots has been given, but no further details regarding the area of the plot and details of the building standing thereon were given. Even the boundaries of the property have not been properly described inasmuch as vague description of the boundaries has been given by stating that East agricultural land, West agricultural land, North Nala/Bicchpuri Road and South agricultural land. The reserved price of the land was Rs.2,00,00,000/-.

90. The tender notice enclosed with the writ petition on page 71 does not disclose that there is any mention in the notice that anybody willing to submit a tender pursuant to public notice may enquire from the bank with regard to property under sale by the tender notice.

91. In view of the aforesaid facts, it is manifest that details of the property under sale were not mentioned in the tender. At this stage, it is also relevant to point out that in the possession notice published in the newspaper, the boundaries of the properties are different than what has been shown in the tender. A table showing the boundaries in the possession memo and auction notice is as follows:-

| | ***Possession Memo*** | ***Auction Notice*** |
|---|---|---|
| ***North*** | *Road* | *Nala/Bijpuri Road* |
| ***South*** | *Property of other* | *Agricultural Land* |
| ***East*** | *Property of other* | *Agricultural Land* |
| ***West*** | *Khattar Cold Storage* | *Agricultural Land* |

92. A man of normal prudence would not like to go for a purchase of a property details of which are not disclosed in the tender notice, since, it cannot be gathered from the tender notice what property is put to sale. In other words, unless the description of the property is detailed correctly and with clarity, one cannot expect that a man of reasonable prudence would take the risk to invest huge amount to purchase a property worth crores. It is human behaviour that to purchase a property, the purchaser would like to have all the details of the property viz location of the property, area of the land, any structure or any building standing on the property etc. so that he is confident that his investment in the purchase of such property is worth and such purchase would not be a disadvantage to him or loss to him.

93. It is undisputed that the shoe factory was running over the property, but in the tender notice, no description of the activity which is being run over the

property has been mentioned. Though in literal meaning, it is a public sale by inviting tender, but it cannot be termed as public sale in the true sense for the discrepancies pointed out above in the publication of the tender notice. Even in the sale certificate, one more interesting fact can be pointed out that in the tender notice, the area of the plot which was put to auction has not been mentioned whereas in the sale certificate, under the heading 'description of property' the area of both khasra numbers i.e. Khasra no.191 and 192 has been mentioned.

94. It is also admitted on record that building has been constructed over about 4000 square meters of land, but no details of the building have been mentioned in the sale certificate. The sale certificate indicates that the property under sale was an immovable property. Therefore, the building standing on the property was also part of the property and was sold.

95. In this respect, it would be useful to refer to the judgement of this Court in the case of ***Ashok Kumar and Others Vs. Chief Controlling Revenue Authority and Others AIR 2011 All 142***. This Court after noticing the definition of 'Sale' defined in Section 54 of the Transfer of Property Act, 1882 and Section 3(26) of the General Clauses Act, 1897 in paragraph 24 held as under:-

> *"24. Thus, ordinarily immovable property in the nature of land includes within its fold the building standing over it. Therefore, where a land is transferred any building standing on it normally forms part of such transfer unless a different intention is expressed or necessarily implied. Transfer of land, thus carries with it the structure existing over it unless excluded expressly or impliedly."*

96. The construction over 4000 square meters of the property has not been disputed by the petitioner before the authorities and even before this Court in writ petition. Non- disclosure of details of the construction over 4000 square meters standing on the property in the sale certificate as well as sale deed definitely affects the chargeability of the instrument, thus, amounts to non-compliance with the requirement of Section 27 of the Act, 1899 which cast a duty upon the parties to disclose all the details in the sale deed.

97. In the present case, details of the property put to auction was not mentioned in the tender notice and the boundaries have not been correctly mentioned in the tender notice, and further, the sale certificate as well as the sale deed do not detail the description of the property as contemplated under the Stamp Act, 1899, therefore, this Court is of the view that the facts of the present case are distinguishable from the facts of the cases of V.N. Devadoss (supra) and Ballyfabs (supra), therefore, this Court believes that the aforesaid two judgements relied upon by the learned counsel for the petitioner are of no help to the petitioner in the present case.

98. The Collector is conferred with the power under Section 47-A (3) of the Act, 1899 to examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is subject to such instrument and duty payable thereon, and if on examination, he has reason to believe on

the basis of constructive material on record that the true market value has not been set forth in the instrument, he may determine the market value of the property and the duty payable thereon. The examination made by the Collector under Section 47-A (3) of the Act, 1899 is only limited to the exercise of power under the Act, 1899 to find out whether the true market value of the property has been set out in the instrument and such investigation has no relation with the legality of the sale by the tender which can only be looked into by the competent authority or Tribunal vested with the jurisdiction to try the legality of the sale by inviting a tender and the investigation made by the Collector in the exercise of power under Section 47-A (3) of the Act, 1899 cannot be used to challenge the public auction as the domain of two Acts i.e. Stamp Act and the Act under which the sale is affected by inviting tenders from public.

99. At this stage, it is also pertinent to mention that the learned Additional Advocate General has objected to the contention advanced by the learned counsel for the petitioner by contending that it was never the case of the petitioner before the authority and even in the writ petition that the sale by inviting tender from the public in the present case falls within the ambit of Article 23 of Schedule 1-B, therefore, it is not open to the petitioner to set up a new ground which is neither pleaded in writ petition nor was raised before the authority.

100. However, the said submission was countered by Sri Shashi Nandan, learned Senior Counsel by placing reliance upon the argument raised by him in Writ C No.10013 of 2010 to submit that right from the inception when the notice under Section 47-A (3) of the Act, 1899 was challenged by the petitioner in the writ petition, the stand of the petitioner was that the sale consideration mentioned in the sale certificate is the market value of the property, and there is no deliberate intention to evade the payment of stamp duty, therefore, the sine qua non to invoke power under Section 47-A (3) of the Act, 1899 was not present, therefore, the proceeding under Section 47-A (3) of the Act, 1899 was bad in the eye of law.

101. Sri Shashi Nandan, learned Senior Counsel for the petitioner has fairly conceded that the sale by inviting tender from the public does not come within the periphery of Article 18 of Schedule 1-B. This Court has summoned the copy of the Writ-C No. 10013 of 2010 and perusal of the aforesaid writ petition reveals that the petitioner has placed reliance upon Article 18 of Schedule 1-B which is evident from perusal of paragraphs 6, 7, & 8 of the said writ petition.

102. However, since Sri Shashi Nandan, learned Senior Counsel has fairly conceded that Article 18 of Schedule 1-B has no application in the present case and the question raised by Sri Shashi Nandan herein above is a pure question of law considering the fact that the facts on record are not disputed, therefore, this Court has proceeded to consider the said question and does not agree with the submission of learned Additional Advocate General that the petitioner cannot be allowed to raise the aforesaid issue for the first time in the writ petition.

103. At this juncture, it is also relevant to point out that Sri Shashi Nandan, learned Senior Counsel has submitted that if the correct description of the property has not been disclosed in the sale certificate and the sale deed, the

remedy of the State Government to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 for correction in the sale certificate based on which the sale deed was executed since the State Government is an aggrieved person by non-disclosure of the correct description of the property and till the same is done, the Collector lacks jurisdiction to invoke Section 47-A of the Act, 1899 is concerned, this Court is of the view that the submission of the learned Senior Counsel for the petitioner is devoid of merits for the reason that the scope and enquiry and the issues to be considered under Section 17 of the SARFAESI Act, 2002 are different and do not contemplate a situation like in the present case whereas the power conferred upon the Collector under Section 47-A (3) of the Act, 1899 is independent power and is conferred upon the Collector with a purpose to carry out the object of the Stamp Act, 1899 and to safeguard the revenue interest of the State so that the State may not suffer loss of revenue.

104 . Now, coming to the last limb of the argument of Sri Shashi Nandan, learned Senior Counsel that the Collector has no power to constitute a Committee to enquire about the market value of the property. The said argument is also devoid of merits in view of the judgement of the Apex court in the case of ***Duncans Industries Ltd. Vs. State of U.P. & Others AIR 2000 (1) SCC 633***. Paragraph 15 of the said judgement is reproduced herein-below:-

> *"15. The question of valuation is basically a question of fact and this Court in normally reluctant to interfere with the finding on such a question of fact if it is based on relevant material on record. The main objection of the appellant in regard to the valuation arrived at by the authorities is that the Collector originally constituted an Enquiry Committee consisting of the Assistant Inspector General (Registration), General Manager, District Industries Centre, Sub-Registrar and the Tehsildar. After the report was submitted by the Sub-Committee for the reasons of its own, the Collector reconstituted the said Enquiry Committee by substituting the Additional City Magistrate in place of Sub-Registrar. This substitution of the Enquiry Committee, according to the appellant, is without authority of law. We are unable to accept this contention. Constitution of an Enquiry Committee by the Collector is for the purpose of finding out the true market value of the property conveyed under the deed. In this process, the Collector has every authority in law to take assistance from such source as is available, even if it amounts to constituting or reconstituting more than one Committee. That apart, the appellant has not been able to establish any prejudice that is caused to it by reconstitution of the Expert/Enquiry Committee. We have perused that part of the report of the Collector in which he has discussed in extenso the various materials that were available before the Committee and also the report of the valuers appointed for the purpose of finding out the value of the plant and machinery. These valuers are technical persons who have while valuing the plant and machinery taken into consideration*

*all aspects of valuation including the life of the plant and machinery. The valuations made both by the Enquiry Committee as well as the valuers are mostly based on the documents produced by the appellant itself. Hence, we cannot accept the argument that the valuation accepted by the Collector and confirmed by the revisional authority is either not based on any material or a finding arrived at arbitrarily. Once we are convinced that the method adopted by the authorities for the purpose of valuation is based on relevant materials then this Court will not interfere with such a finding of fact. That apart, as observed above, even the counsel for the appellant before the High Court did not seriously challenge the valuation and as emphasised by the High Court, rightly so. Therefore, we do not find any force in the last contention of the appellant also."*

105. Now, coming to the facts of the present case, the Collector by order dated 02.08.2017 held that the rates applicable to the industrial area are applicable as the property is an industrial unit, and thereafter, he constituted a Committee for the purpose of finding out the rate applicable to industrial plots. The Collector by order dated 02.08.2017 did not record any reason as to how he came to the conclusion that the property comes within the industrial area, therefore, the rates applicable to the industrial area be applied. The Committee constituted for the purpose showed its inability to find out the rates applicable to the industrial area as the circle rate at the relevant time did not provide the rate applicable to the industrial area as in the circle rate. The rates are provided with respect to non-agricultural land and commercial land, and accordingly, it applied the rates applicable to the non-agricultural land on the basis of a recommendation dated 26.02.2022 of the Sub Registrar II, Sadar, Agra. The order of the Collector dated 02.08.2017 is bad for the reason that the Collector in concluding that the rates corresponding to the industrial area would be applicable is not supported by any reason.

106. The order of the Collector reveals that the detailed objection had been raised by the petitioner enclosed as Annexure-19 to the writ petition, but the objection of the petitioner was not considered by the Collector. In such view of the fact, the order of the Collector cannot be sustained being non-speaking. Accordingly, both the orders i.e. order dated 17.08.2022 and 02.08.2017 are hereby set aside and the matter is remanded to the Collector to decide the matter afresh after giving due notice and opportunity of hearing to the petitioner.

107. However, the Collector in order to ascertain the correct market value of the property, may constitute a Committee chaired by the Collector within one month who may make such enquiry as it may deem fit and

proper and shall submit its report to the Collector expeditiously within two months from the date of its constitution. The Collector after obtaining report from the Committee determining the market value of the property shall supply a copy of the same to the petitioner, and shall give opportunity of hearing to the petitioner, and thereafter, shall proceed to determine the stamp duty payable on the instrument in accordance with law under Section 47-A of the Stamp Act, 1899 expeditiously, preferably within a period of six months from the date he received the report of Committee.

108. Thus, for the reasons given above, the writ petition is ***disposed off*** subject to the observations made above. There shall be no order as to costs.

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**(2024) 10 ILRA 707**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE SHEKHAR B. SARAF, J.**
**THE HON'BLE VIPIN CHANDRA DIXIT, J.**

Writ Tax No. 1532 of 2024

**M/s Pitambra Books Pvt. Ltd. ...Petitioner**
**Versus**
**U.O.I. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Tarun Gulati (Sr. Advocate), Sri Nishant Mishra, Sri Kishore Kunal, Ms. Ankita Prakash, Ms. Vedika Nath

**Counsel for the Respondents:**
Sri Gopal Verma, Sri Dhananjai Awasthi, Sri Gopi Krishna Sood

**Civil Law-Constitution of India, 1950-Article 226 - Uttar Pradesh Goods & Service Tax, Act-2017-Section 74-** Petitioner is aggrieved by show cause notice in relation to GST tax payable under Section 74 "on printing services"-It is patently clear that there is no allegation with regard to wrongful availment of credit or short payment of tax by reason of fraud or any willful misSt.ment or suppression of facts to evade tax by the petitioner. The show cause notice is absolutely silent on the same. Furthermore, the respondent authorities have not taken note of the finality of the judgment passed by three Advance Ruling Authorities dealing with the exact same issue. Impugned show cause notice is stayed till the disposal of this writ petition. **(Para 8)** (E-15)

**List of Cases cited:**

1. HCL Infotech Ltd. Vs Commissioner, Commercial Tax reported in (2024) 23 Centax 71 (All.)

2. U.O.I. & anr.v. Gauhati Carban Ltd., 2012 (278) ELT 26 (SC)

3. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors.(1998) 8 SCC 1

(Delivered by Hon'ble Shekhar B. Saraf, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Mr. Tarun Gulati, learned Senior Advocate assisted by Mr. Nishant Mishra, Mr. Kishore Kunal and Ms. Ankita Prakash, learned counsel appearing on behalf of the petitioner, Mr. Gopal Verma and Mr. Dhananjai Awasthi, learned counsel appearing on behalf of Union of India and Mr. Gopi Krishna Sood, learned Standing Counsel appearing on behalf of the State.

2. This is a writ petition under Article 226 of the Constitution of India

wherein the writ petitioner is aggrieved by the show cause notice dated August 5, 2024 passed by the Additional Commissioner, CGST & CE, Kanpur in relation to GST tax payable under Section 74 "on printing services". It is to be noted that the petitioner is an entity that obtains tenders issued by the Government, pays royalty to the National Council of Educational Research and Training, and in certain cases, to the Governor. Upon payment of such royalty, the petitioner prints educational books and supplies the same to Government schools and also sell the same to retailers. It is to be noted that on the royalty paid by the petitioner GST is applicable @ 12% and the same has been paid by the petitioner for the past 8 years. Till date, no action has been taken against the petitioner in relation to such payments.

3. It appears that the Principal Chief Commissioner, CGST and Central Excise, Lucknow Zone vide letter dated April 16, 2024 raised an issue with regard to printing of text books that was supplied to the Education Department of U.P. and stated that the supply of these books were being granted exemption on the ground that they were educational books. The Principal Chief Commissioner was of the view that the publishers of the text books do not have the right to use the contents, hence the activity is not that of supply of goods but would actually fall under the category of supply of service attracting GST @ 12%. Upon such re-categorization being done by the Principal Chief Commissioner, direction was given by the Principal Chief Commissioner to take action against all such book sellers, the petitioner being one of them. The impugned show cause notice is in pursuance to the above letter.

4. Upon perusal of the show cause notice, one factor immediately strikes in our mind that there is no specific allegation with regard to wrongful availment or short payment of tax "by reason of fraud, or any wilful misstatement or suppression of facts to evade tax".

5. As held in several judgments of the Supreme Court and also by this Court in **HCL Infotech Ltd. Vs. Commissioner, Commercial Tax** reported in **(2024) 23 Centax 71 (All.)**. We may refer to paras 21 and 22 of the above judgment to understand the principle difference between Section 73 and Section 74 of the UPGST Act, 2017. The same is delineated below:-

> *"21. We take note of the fact that Section 73 of the CGST Act gives power to the adjudicating authority to initiate proceedings for recovery of wrongly availed or utilized Input Tax Credit along with interest and penalty for any reason other than the reason of fraud or any wilful mis-statement or suppression of facts to evade tax. It is to be taken note of that Section 73 comes into play in all other circumstances except the cases where Input Tax Credit has been wrongly availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax. Thus from bare reading of Section 73 of the CGST Act, it becomes crystal clear that if the proceedings under Section 73 of the CSGT Act have been finalized, they cannot be reopened except the case where the Input Tax Credit has wrongly been availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax.*
>
> *22. We find that proceedings initiated against the*

*petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-statement or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-statement or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-statement or suppression of facts. Thus it is patently manifest that for deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-statement or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings becomes without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present."*

6. It is to be further noted that advance ruling authorities in the State of Karnataka, West Bengal and Chhattisgarh have also held that the activity of printing of books by publishers wherein the content is provided by NCERT or any similar educational board would amount to supply of goods and the fact that royalty is paid by such publishers would amount to the publishers playing the role of copy right holder as well as printer. We have been informed that none of the advance ruling authority orders have been challenged by the Government, and accordingly, there appears to be a finality to the said advance ruling authority judgments.

7. The only other ground of challenge from the side of the respondents is that this writ petition is not maintainable as the petitioner is challenging the show cause notice. Counsel appearing on behalf of the respondents submitted that the petitioner should reply to the show cause notice and proceed with the alternative remedy available with the petitioner. Per contra, Sri Gulati, Senior Advocate appearing on behalf of the petitioner submitted that the writ petition is maintainable even at the show cause notice stage if the action taken by the respondent authorities is arbitrary and without jurisdiction. Sri Gulati submitted that in the present case, the re-categorisation by the Principal Chief Commissioner has led to issue of the show cause notice and not because of any reason of fraud, wilful misstatement or suppression of facts by the petitioner.

8. It is to be noted that the Supreme Court in a catena of judgements has stated that interference at the show cause notice stage and/or when an alternative remedy is available to the petitioner, specially in cases of fiscal statutes that are self contained in nature is to be avoided by the High Courts. The Supreme Court in the case of **Union of India and another v. Gauhati Carban Limited, 2012 (278) ELT 26 (SC)** held that the power under Article 226 of the Constitution of India is an extraordinary power and should be exercised by the High Court only in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or where an order has been passed in total violation of the principles of natural justice causing prejudice to the petitioner. Landmark judgement of the **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1** stated that non maintainability of a writ petition because of alternative remedy is a self imposed restriction by the High Court wherein the Supreme Court would normally not exercise its jurisdiction when there is an efficacious and alternative remedy. However, certain exceptions were laid down in the said judgment, one of the same being patent illegality and the authority acting without jurisdiction of law. In the present case, we find that the raison d'être of the present show cause notice is the letter dated April 16, 2024 issued by the Principal Chief Commissioner who appears to have had a change of opinion with regard to taxability of text books that have been printed and supplied by the printers such as the petitioner. It is patently clear that there is no allegation with regard to wrongful availment of credit or short payment of tax by reason of fraud or any wilful misstatement or suppression of facts to evade tax by the petitioner. The show cause notice is absolutely silent on the same. Furthermore, the respondent authorities have not taken note of the finality of the judgement passed by three Advance Ruling Authorities dealing with the exact same issue. In fact, the fact that no challenge to the said judgement has been made by the Government only goes to buttress the argument placed by the petitioner.

9. At this stage, we are of the view that the petitioner has established a prima facie case in its favour and the balance of convenience and inconvenience lies in favour of the petitioner for obtaining an order of injunction.

10. Let counter affidavit be filed within a period of four weeks; Rejoinder affidavit, if any, within two weeks thereafter.

11. List this matter on December 17, 2024.

12. The impugned show cause notice dated August 5, 2024 is stayed till the disposal of this writ petition.

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**(2024) 10 ILRA 710**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

**THE HON'BLE ARVIND SINGH SANGWAN, J.**
**THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.**

Capital Cases No. 6 of 2021
With
Capital Case No. 8 of 2021 and 10 of 2021

**Zulfikar Abbasi ...Appellant**
**Versus**
**State of U.P. & Anr. ...Respondent**

**Counsel for the Appellant:**
Abhas Sharma, Rajesh Kumar Sharma, Sayyed Kashif Abbas Rizvi

**Counsel for the Respondent:**
G.A., Ganesh Shanker Srivastava, Saurabh Gour

**Criminal Law - Criminal Procedure Code, 1973 - Sections 313 & 325(2) - Indian Penal Code, 1860 - Sections 34, 201, 302, 364, 376-D & 404 - Protection of Children From Sexual Offences Act, 2012 – Sections 5-G & 6** - Refence – for confirmation of Capital punishment – offence of kidnapping, Gang rape and murder of a minor girl – Evaluation of evidence – court finds that, appellants were convicted with evidence including eyewitness accounts and forensic reports supporting the prosecution's case – the sentence of capital punishment be commuted to life imprisonment as the trial court while awarding death sentence has not recorded any mitigating circumstances in case – trial court has not recorded any specific finding that it is an exceptional case to award death sentence - court uphold the conviction based on strong circumstantial evidence and confession made by the accused – however, death penalty unwarranted due to lack of aggravating circumstances – court ruled that while the evidence was compelling, the absence of prior criminal history and potential for rehabilitation of the accused warranted a commutation of the death sentence to life imprisonment – consequently, appeals qua conviction are dismissed – however, appeals qua sentence are partly allowed and the sentence is modified to life imprisonment without remission. (Para – 79, 80, 81, 87, 93, 94, 95, 96)

**Appeals Partly Allowed**. (E-11)

**List of Cases cited:**

1. Navas alias Mulanavas Vs St. of Kerala, 2024 SCC OnLine SC 315,

2. St. of Mah. Vs Nisar Ramzan Sayyed, 2017(2) R.C.R. (Criminal) 564,

3. St. of U.P. Vs Ram Kumar & ors., 2017(5) R.C.R. (Criminal)785,

4. Chhannu Lal Verma Vs St. of Chhattisgarh, 2019(5) R.C.R. (Criminal) 192,

5. Dnyaneshwar Suresh Borkar Vs St. of Mah., 2019(2) R.C.R. (Criminal) 302,

6. Manoharan Vs St. by Inspector of Police, Coimbatore – 2019 AIR (SC) 3746,

7. Veerendra Vs St. of M.P., 2022(3) R.C.R. (Criminal) 254,

8. The St. of Haryana Vs Anand Kindo & anr. etc., 2022(4) R.C.R. (Criminal)735,

9. Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R. (Criminal) 571.

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Heard Sri Anil Kumar Singh, Sri Dharmendra Singh, Sri Rahul Shrivastva and Sri Sikandar Khan, learned counsel for the appellants, learned AGA for State, Sri Ganesh Shanker Srivastava and Sri Saurabh Gaur, learned counsel for the informant and perused the material available on record.

2. Reference No. 5 of 2021 has been made by the court of Additional Sessions Judge (Rape Case) POCSO Act, Court No. 2, Bulandshahr for confirmation of capital punishment awarded to appellants Zulfikar Abbasi, Israil @ Malani and Dilshad Abbasee in Special Case No. 1844 of 2018 (State Vs. Zullfikarl and others). The jail appeals being Capital Case No. 6 of 2021, 8 of 2021 and 10 of 2021 have been filed by the appellants challenging the judgment of conviction dated 24.3.2021 (as corrected on 26.3.2021), holding them guilty of offence, arising out of Case Crime No. 04/2018, Police Station – Kotwali Nagar, District–Bulandshahr under Section 364, 376D, 302/34, 201, 404 IPC & Section

5G/6 POCSO Act. The trial court has awarded death sentence to the appellants with fine of Rs. 01 lakh each, In case of non-payment of the fine further undergo two years additional rigorous imprisonment. They were also awarded life imprisonment under section 376-D of IPC and Section 5G/6 of POCSO Act with fine of Rs. 50,000/- each and in case of default of payment of fine further undergo one year additional imprisonment, and further under Section 364 IPC were awarded 10 years imprisonment with fine of Rs. 25,000/- and in default of payment of fine, 6 months further imprisonment, under Section 201 IPC, 7 years imprisonment with fine of Rs. 25,000/- and in default of payment of fine to undergo six months further imprisonment, under Section 404 IPC, 3 years imprisonment with fine of Rs. 10,000/-. In default of payment of fine to go further three months imprisonment and it was observed that all the sentences will run concurrently.

3. Brief facts of the case are that the informant Babita Sharma, gave a complaint to the police as Ex-Ka-1 which reads as under:-

"सेवा में

श्रीमान थाना प्रभारी महोदय।
कोतवाली नगर बुलन्दशहर

महोदय

मेरी लड़की आयुषी शर्मा 6 पी०एम० बजे टयुशन पड़ने जाती थी और लगभग 7.30 बजे शाम तक वापस आ जाती थी लेकिन आज लड़की जब टाइम से वापिस नहीं आयी आयी तो मैने घर से बाहर जाकर देखना चाहा तो मेरी लड़की की साइकिल मेरे घर से लगभग 50 मीटर दूर गिरी मिली उसका बैग भी उसके पास पड़ा मिला उसकी एक चप्पल साइकिल से थोड़ी दूर पड़ी मिली तभी मेरे आस पास के लोग भी मेरे पास आ गये और उन्होंने ही पुलिस को फोन किया।

लेखक- ववविता शर्मा
पुष्कर सिंह एस/ओ श्री नरेश पाल सिंह चॉदपुर नियर G.T. Road
गां० चांदपुर
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डा०- कृषि विद्यालय
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9897795555"

4. The police recorded chik FIR (Ex-Ka-4) on 2.1.2018 at about 11 pm and started investigation. During investigation on the same day i.e. 2.1.2018 at about 11:30 pm in presence of witness Pushkar Singh, the police effected recovery of a lady cycle (black colour - Wisdom mark, one black colour bag with tycoon logo, one mathematics book, rough copy on which name of (victim Class XII) was mentioned alongwith cover of spectacles with mark Raj Opticals, Laxman Vihar, Main Road, Naka Chungi, Kota, Rajasthan. One pen black colour, one drinking water bottle of 250 ml on which King Orange was marked and one slipper of left foot with red and yellow colour with mark 'conform' were also recovered and were taken in possession vide recovery memo Ex-Ka-16.

5. In the meantime, on 3.1.2018 an unknown body of a girl was recovered by the police near a small canal/drain.

Panchayatnama was conducted in which one lady Head Constable Geeta inspected the dead body and reported that the victim was wearing black jeans, belt, black colour top, white sweater and red and blue colour undergarments with black string around her neck and bracelet on her left hand and a ring in finger of hand. She was also wearing pink and while colour socks with yellow and black colour dupatta (Scarf).

6. It was reported that no visible injury mark was there on the dead body. The dead body was sent to the hospital for postmortem examination and in the meantime PW-2-Pushpendra, father of the victim reached hospital and identified that the body is of her daughter (victim-A).

7. Thereafter the postmortem was conducted. The police recorded the following injuries on the dead body.

*"**A.M.I.-** (1) Abraded contusion present in the Area of 29 cm x 15 cm on back of chest & Abdomen.*

*(2) Ligature mark of size 29 cm x 2 cm present on front of neck on and below thyroid Cartilage. Base of mark is brownish & soft. Subcutaneous tissues under the ligature mark is ecchymosed. Their is no gaping. Ligature mark is continuous without interruption Ligature mark is situated 5 cm below Rt. Ear 5 cm below chin & 4 cm below left ear.*

*- Fracture of hyoid bone present alone c Trachea.*

*- No Injury mark present in Vagina or cervix.*

*- 2 Vaginal smear slide sent to pathologist for detection of spermatozoa.*

*- No mud or sand particles present in Trachea or stomach."*

8. During postmortem as many as 12 articles including clothes were recovered from the dead body alongwith a clip and hairs from the head.

9. During further investigation, the police sent vaginal swabs to Forensic Science Laboratory, Agra for examination.

10. Further in order to seek the DNA report of the victim, the police sent blood sample of both, father Pusphendra and mother Babita to the Forensic Science Laboratory, Lucknow alongwith hairs and hairband with hairs and 13 other articles were which recovered during postmortem.

11. On 9.1.2018, the police got a secret information about movement of accused Zulfikar Abbasi and Dilsad Abbasi who were coming in a white colour Alto Car, on which a sticker by the name of "Abbasi boys" was pasted. The police waylaid them and recovered Alto Car bearing No.HR-51 AY-5206. The driver and persons sitting in the car were apprehended by the police and from their personal search, some money was recovered and they disclosed their name as Zulfikar Abbasi and Dilsad Abbasi and from search of the car, one ladies sleeper of right foot with red and yellow colour on which 'Conform' was written, was recovered. The police recorded their confessional statements in which they gave details of the moments, the offence was committed.

12. In the meantime, Puspendra Sharma, father of the victim reached and identified the sleeper which her daughter was wearing on the date of the incident. Thereafter, field unit / Forensic Team conducted search of the car from where red and black colour hairband with some long

hairs, one hair band with black colour and long & short hairs of the lady were recovered which were taken by the forensic team. However, during investigation the both accused Zulfikar Abbasi and Dilshad Abbasi jointly confessed their guilt and gave the details how they committed the offence. It was stated that on the date of the incident both of them with Israil @ Malani decided to pick up a girl to have fun and about about 7:00 pm they reached from "Moor crossing" to MMR Mall via Chandpur crossing in front of the showroom of Royal Enfield, Motorcycle. Thereafter, they took U-turn and they saw a girl coming alone and again they took U-Turn from near Royal Enfield showroom. Then they turn towards unmelted path, they stopped their car and forcibly took the girl into their car and went towards Khurja side and in the running car they committed rape with her one by one and when the girl started crying, they with the help of dupatta (Scarf) which she was wearing on her neck, strangulated her to death and her body was thrown in a drain near village Bali Akbarpur and thereafter, they came back.

13. The arrest memo (Ex-Ka-17) was signed by 12-13 police officials who were part of raiding team alongwith Pushpendra Sharma, father of the victim.

14. Later on, on 11.1.2018, in a similar way, the accused Israil @ Malani was also arrested and he also made confession statement regarding abducting a girl, committing rape on her and then murdering her with the dupatta (Scarf) and they threw the dead body in a drain near village Akbarpur.

15. The police, thereafter, recorded the statement of the prosecution witness and on conclusion of investigation, the charge sheet was submitted and the case was committed to the court of Designated Special Court under POCSO Act.

16. The trial court framed the charges against the accused persons as under :

"न्यायालय अपर सत्र न्यायाधीश न्यायालय सं०-8/
विशेष न्यायाधीश (पोक्सो अधिनियम),
बुलन्दशहर
विशेष वाद सं०- 1844/2018
राज्य प्रति जुल्फीकार आदि

**<u>आरोप</u>**

मैं सुधीर कुमार IV. अपर सत्र न्यायाधीश न्यायालय सं०-8/ विशेष न्यायाधीश (पोक्सो अधिनियम) हुलन्दशहर आप अभियुक्तगण जुल्फीकार, इसराईल तथा दिलशाद पर निम्नलिखित आरोप लगाता हूँ-

प्रथमः- यह कि दिनांक 2.1.2018 को समय 7.30 बजे स्थान ट्यूशन पढ़ने वाली जगह एवं वादी के मकान के मध्य किसी स्थान पर बहद ग्राम चांदपुर थाना क्षेत्र कोतवालीननगर जिला बुलन्दशहर में आप लोगो ने वादिनी मुकदमा बबिता शर्मा की पुत्री आयुषी का विधिक संरक्षकता में से व्यपहरण किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 364 के तहल दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः- यह कि उपरोक्त तिथि समय व स्थान पर से अपने वादिनी

मुकदमा की पुत्री का व्यपहरण के बाद उसके साथ उसकी इच्छा के विरुद्ध एवं जबरदस्ती सामूहिक रुप से बलात्कार किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 376डी के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

तृतीयः- यह कि उपरोक्त तिथि, समय व स्थान पर आपने वादिनी मुकदमा बाकर हत्या कारित की। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०स० की धारा 302 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में हैं।

चतुर्थः- यह कि उपरोक्त तिथि, समय व स्थान पर से आपने यह जानते हुये कि आपने ही वादिनी मुकदमा की पुत्री का अपहरण कर उसके साथ बलात्कार कर उसकी हत्या कारित की है के शव को छिपाने के उद्देश्य से एवं सबूत मिटाने के उद्देश्य से उसके शव को ईर्दगिर्द फेक दिया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०स० की धारा 302 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

पंचमः- यह कि उपरोक्त तिथि, समय व स्थान पर आपने वादिनी मुकदमा की पुत्री की हत्या के समय जो मृतका आयुषी के कब्जे में सामान था उसे बेईमानी से अपने कब्जे में करके उसे उपयोग में संपरिवर्तित किया। इस प्रकार आपने ऐसा अपराध कारित किया जो भा०दं०सं० की धारा 404 के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

पष्ठमः- यह कि उपरोक्त तिथि, समय च स्थान पर आपने नाबालिग पीड़िता आयुषी के साथ गुरुत्तर लैंगिक प्रवेशन करके लैंगिक हमला किया। इस प्रकार आपने ऐसा अपराध करित किया जो धारा 5जी/6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के तहत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्द्वारा आपको निर्देशित करता हूँ कि उपरोक्त आरोप हेतु परीक्षण इस न्यायालय द्वारा किया जावेगा।

दिनांक: 10.7. 2018

ह० अपठनीय
10.07.18
(सुधीर कुमार IV)
अपर सत्र न्यायाधीश
विशेष
न्यायाधीश (पोक्सो अधिनियम), बुलन्दशहर।

अभियुक्त को उपरोक्त आरोप पढ़कर सुनाये व समझाये गये अभियुक्त ने उपरोक्त आरोप से इनकार किया एवं परीक्षण की मांग की।

ह० अपठनीय

10.07.18
(सुधीर कुमार IV)
अपर सत्र न्यायाधीश
विशेष
न्यायाधीश (पोक्सो अधिनियम), बुलन्दशहर।

17. The accused did not plead guilty and claimed trial. PW-1 Babita Sharma, mother of the victim deposed as under :-

साक्षिया ने सशपथ बयान किया कि- मृतका आयुषी शर्मा मेरी बेटी थी घटना के समय मेरी बेटी आयुषी की उम्र करीब 16-17 वर्ष होगी व वह कक्षा-12 मे आल सैन्ट स्कूल बुलन्द शहर में पढ़ती थी मेरी बेटी आयुषी शर्मा सूर्या नगर मे अशोक सिंघल के पास शाम के करीब 6 बजे जाती थी और शाम को करीब 7.30 बजे तक वापस आ जाती थी आयुषी ट्यूशन पढ़ने साइकिल से जाती थी।

घटना दिनांक 2.1.2018 की है मेरी बेटी ट्यूशन पढ़ने उस दिन शाम के 6 बजे रोजाना की तरह अशोक सिंघल के यहाँ गणित का ट्यूशन पढ़ने गयी थी जब मेरी बेटी शाम साढ़े सात बजे तक वापस नही लौटी तो मैं अपने गेट पर खड़े होकर उसका इन्तजार कर रही थी मेरी बेटी नही आयी। जब मैं अपनी बेटी का अपने घर के दरवाजे पर खड़ी होकर इंतजार कर रही थी तो एक कार आल्टो सफेद रंग थी जिसके पिछले शीशे पर अंग्रेजी मे कुछ लिखा था, मेरे घर के सामने से कुछ आगे आकर मुड़कर वापस जी०टी० रोड की तरफ चली गयी। सड़क पर तथा मेरे गेट पर बिजली की लाइट जल रही थी। जब मेरी बेटी वापस नहीं आयी तो मैने अपने घर से करीब 40-50 मीटर की दूरी पर देखा कि मेरी बेटी की साइकिल व उसका पिठ्ठू बैग जो उसकी साइकिल के ऊपर पड़ा था व उसकी एक चप्पल जो साइकिल से एक दो फिट की दूरी पर पड़ी थी। लड़की का सामान देखकर मै परेशान हो गयी। आस पास के लोग भी इकट्ठा हो गये। फिर 100 नंबर पर फोन किया। 100 नंबर की पुलिस आ गयी। जब पुलिस आयी तो बैग को खोलकर देखा एक गणित की किताब व एक कापी एक चश्मे का कवर एक काली पैंसिल व एक पेय पदार्थ की 250 एम०एल० की बोतल मिली जिसको मौके पर पुलिस वाले ने कब्जे में लेकर फर्द लिखी। फिर मैने घटना की बावत घर पर बैठकर अपने गाँव के पुष्कर सिंह से एक तहरीर लिखायी पुष्कर सिंह ने तहरीर पढ़कर सुनायी पुष्कर सिंह ने तहरीर में वही लिखा था जो मैने बोला था। फिर मैने तहरीर ले जाकर कोतवाली नगर मे जे जाकर करीब 11 बजे दी थी।

जब मेरी बेटी घर से टयूशन पढ़ने के लिए गयी थी तो पैरो मे लाल पीली चप्पले, काली जीन्स व काला टॉप व सफेद जर्सी पहनकर गयी कानो मे पीली गोल्ड छोटी बाली पहने थी। गले मे स्टाल (चुन्नी) पहने हुई थी।

दिनांक 9.1.2018 को मेरे पति पुष्पेन्द्र शर्मा ने मुझे दिन के करीब 11.30 बजे फोन पर बताया कि मेरी बेटी आयुषी शर्मा के कातिल दरिंदे नहर पुल के पास पुलिस ने पकड़े है मैं भी वहाँ पर करीब 12 सवा 12 बजे नहर पुल के पास पहुँची तो

मैने अपने पति को बताया कि घटना वाले दिन यही आल्टो सफेद कार थी जो हमारे घर के कुछ आगे मुड़कर वापस जी०टी० रोड पर गयी थी।

कार मे पीली लाल रंग की दाये पैर की मेरी बेटी की चप्पल, काला लाल रंग का हेयर बैण्ड तथा मेरी बेटी के सिर के बाल मिले थे।

गवाह को पत्रावली पर उपलब्ध कागज सं0 4ए/3 दिखाया व पढ़कर सुनाया, जिसे देखकर व सुनकर गवाह ने कहा कि यह वही असल तहरीर है जो मैने पुष्कर सिंह से लिखवा कर थाना को०नगर पर दी थी। इस तहरीर पर प्रदर्श क-1 डाला गया"

मेरी बेटी की लाश 3 तारीख को दादरी के पास बरामद हुई थी।

18. In cross examination, this witness stated that on the date of incident, her husband who was in Coimbatore was informed about incident and only and her other daughter were at home. She further stated that she was standing on the gate of her house waiting for her daughter when, she saw an Alto Car. When she went at the spot and saw articles belonging to her daughter (victim-A) she raised voice then Pushkar Singh came and thereafter Pushkar Singh wrote a complaint it was given to the police. In the meantime, someone called the police by dialing 100 number and police also came at the spot.

19. In further cross examination, this witness has given the detail about the time of the incident, the time when the police came and stayed at the spot for 5-7 minutes. However, this witness admitted that she has not seen the incident of kidnapping of her daughter. She denied the suggestion that the accused persons did not kidnap her daughter or killed her.

20. PW-2- Pushpendra Sharma, father of the victim 'A' stated as under:

"साक्षी ने सशपथ बयान किया कि- मृतका आयुषी शर्मा मेरी बेटी थी। घटना दिनांक 02.01.2018 को समय करीब सात साढ़े सात बजे की है। मेरी बेटी आयुषी शर्मा घटना वाले दिन साइकिल से ट्यूशन पढ़ने गयी थी।

मुझे मेरी पत्नी बताया था कि जब आयुषी ट्यूशन पढ़कर 7.30 बजे तक नहीं लौटी तो गेट पर खड़े होकर इंतजार किया। और उधर देखा तो मेरी गली से कुछ दूरी पर मेरी बेटी का पिट्ठू बैग गणित की किताब व कापी व एक साइकिल, एक चप्पल, एक बोतल पेय पदार्थ की पड़ी मिली।

जब लड़की नही मिली तो पहले 100 नंबर पर किसी से फोन कराया, मै घटना के समय कौयमबतूर में था। मेरी पत्नी ने फोन से सूचना दी थी मै दिनांक 03.01.2018 को वापस आया था। मैने घर आकर बातचीत कर थाने मे जाकर मालूमात की तो पुलिस ने आश्वासन दिया कि हम ढूंढ रहे पर थाने से जब मै वापस आ गया तो मुझे सूचना 03.01.2018 को मिली कि एक लावारिश लाश लड़की सरकारी अस्पताल मे रखी है। जाकर देख

लो। मै मेरा साढू विनोद और पुष्कर सिंह सरकारी अस्पताल दादरी पहुँचा तो देखा कि मेरी लड़की आयुषी शर्मा की लाश स्टेचर पर रखी है। हमने देखते ही पहचान लिया कि लाश मेरी बेटी आयुषी शर्मा की है। वहाँ मुझे एक दरोगा जी मिली उन्होने बताया कि इस लड़की की लाश बलि अकबरपुर (का०फटा) पास बह रहे नाले के पास मिली थी। फिर पी०एम० के बाद लाश को अपने घर ले आये क्रिया कर्म किया।

फिर हम 09.01.2018 को पुलिस का फोन आया कि एक आल्टो कार सफेद रंग की जिसका नं० 5206 जो नहर पुल के पास धोबी घाट बुलन्दशहर पर पकड़ी गयी है इसमे दो बदमाश है।

सूचना पर मै वहाँ पहुँच गया गाड़ी की तलाशी से मेरी बेटी की एक चप्पल, एक हैयर बैण्ड, पीछे की सीट पर औरतो के जैसे बाल छोटे बड़े मिले। गाड़ी मे बैठे जो बदमाश थे एक ने अपना नाम जुल्फिकार व दूसरे ने दिलशाद बताया। दोनो मुल्जिमान ने मेरे सामने यह बताया कि आयुषी शर्मा को हमने गली से इस गाड़ी में उसका अपहरण कर ले गये थे व बलात्कार करने के बाद हमने हत्या कर दी थी। उसके शव को बलि अकबरपुर के पास बह रहे नाले के पुल के पास फेंक दी थी।

पकड़े गये बदमाशो ने घटना में सामिल तीसरे बदमाश का नाम इसराइल उर्फ मलानी बताया। दिनांक 11.01.2018 को मेरी लड़की के साथ घटना करने वाला तीसरा मुल्जिम पकड़ लिया गया था, इसके कब्जे से पुलिस ने पीले रंग की बाली बरामद की थी तो घटना के समय मेरी बेटी आयुषी ने पहनी थी।

जब दि० 09.01.2018 को दिलशाद व जुल्फिकार अब्बासी अभि० गण पुलिस द्वाार धौबी घाट नहर पुल बुलन्दशहर मे पकड़े गये थे, अल्टो कार बरामद हुई थी तो मैने मौके पर पहुँचकर अपनी पत्नी ववीता शर्मा को फोन कर दिन के करीब 12-12.30 बजे बुला लिया था।

मेरी पत्नी ने जाते ही धोबी घाट के पास गाड़ी को देख गाड़ी को पहचान किया था उसने बताया था कि जब मै घटना वाले दिन अपनी बेटी आयुषी शर्मा के इंतजार मे गेट पर खड़ी थी तो यह वही गाड़ी है, जो हमारी गली में घर से आगे से मुड़कर वापस गयी थी"।

दरोगा जी ने मेरी व पुलिस हमराहियान की मौजूदगी में मौके पर दिलशाद व जुल्फिकार अब्बासी की गिरफ्तारी व घटना मे प्रयुक्त गाड़ी बरामद की व गाड़ी में मिले मेरी लड़की के मिले सामान की एक फर्द लिखी थी तथा फर्द लिखने के बाद मुझे पड़कर सुनायी थी। और गवाही मे मेरे भी हस्ताक्षर कराये थे।

गवाह ने पत्रावली पर कागज सं० 9ए/2 को देखकर एवं पढ़कर कहा कि यह वही फर्द है जो मेरे सामने मौके पर दरोगा जी ने लिखी थी।

उस पर गवाही मे मेरे भी हस्ताक्षर है। मेरा इस घटना के सम्बन्ध में दिनांक 13.01.2018 को बयान लिया था। बयान देते समय मैने दरोगा जी को अपनी बेटी का कक्षा 10 का प्रमाण पत्र दिया था, उस प्रमाण पत्र मे मेरी बेटी की जन्मतिथि 05.09.2000 लिखी थी।

दिनांक 27.01.2018 को मेरा व मेरी पत्नी का डी०एन०ए० हेतु सरकारी अस्पताल बु०शहर में रक्त नमूना लिये गये थे। साक्षी ने न्यायालय में उपस्थित मुल्जिमान को देखकर पहचान कर बताया कि जो अल्टो कार के साथ 09.01.2018 को मुल्जिम पकड़े गये ये वह न्यायालय में मेरे सामने है जिनके नाम जुल्फिकार व दिलशाद है। दोनो मुल्जिमान से उनके नाम पूछे गये तो उन्होने अपने नाम वही बताये जो गवाह ने अपने बयान में लिखाये है।

x x xxx cross by defence defferred

कोर्ट सर्टि०

सुनकर तस्दीक किया।

ह० अपठनीय ह० अपठनीय

अष्टम अपर जिला एवं सत्र

न्यायाधीश

बुलन्दशहर

19.12.2018"

21. In cross-examination, this witness stated that he did not orally remember the mobile number of his daughter. However, it is correct that she had a mobile phone but he does not know whether she carried it while going to the tuition. He further stated that he has not visited the place from where the dead body of his daughter was recovered and further stated that Panchanama was prepared in the hospital. He further stated that he tried to contact his daughter but her phone was switched off. In further cross-examination, he stated that when he reached the Govt. Hospital Dadri, the case regarding murder of his daughter was already registered. In reply to a question whether he had read the FIR, he has stated that he was very much mentally disturbed and therefore, he did not remember whether he had read the FIR at that time or not. The deceased was having three injuries, one on neck, one on chest and one on the back. He further stated that he received the information of abduction of his daughter on 2.1.2018 at about 9:30 PM and he returned Bulanshahar from Coimbatore by taking of a flight on 3.1.2018. He denied that suggestion that he did not return on 3.1.2018.

22. PW-3- Vijay Pratap Singh, stated that he is the owner of a show room of Royal Enfield Motorcycle. On 2.1.2018, he was present on show room. There are C.C.T.V. cameras installed in his show room from which the activities on the main road and surroundings are clearly visible. This witness further stated as under:

"दिनांक 02.01.18 को शाम के करीब 7 बजे के 39 मिनट पर एक आल्टो गाड़ी सफेद रंग की सी०सी०टी०वी० केमरे में गली में मुड़ती दिखायी दे रही है। जिसकी फुटेज सी०सी०टी०वी० केमरे में मैने अपनी आँखो से देखी है। जिस गली में गाड़ी मुड़ी है उसमें हमारे गाँव की अपहृतकर्ता/मृतका आयुषी का मकान है। यही सफेद रंग की

आल्टो गाड़ी शाम के करीब 7 बजकर 41 मिनट पर मेरे शोरूम पर लगे सी०सी०टी०वी० केमरे मे फिर दिखाई दी। फिर 40-50 सेकेन्ड बाद यही सफेद रंग की आल्टो कार मेरे शोरूम पर लगे सी०सी०टी०वी० मे केमरे में वापिस आते दिखाई थी। जिसकी सी०सी० केमरे की फुटेज मैने कोतवाली नगर के इंस्पेक्टर साहब के मांगने पर उपलब्ध करा दी थी। मेरे शोरूम पर लगे सी०सी०टी०वी० कैमरे मे दिनांक 02.01.18 के बाद से इन्सपेक्टर साहब को फुटेज देने तक किसी प्रकार की कोई छेड़छाड़ नही की गयी थी। और सी०सी०टी०वी० कैमरे फूटेज ज्यो कि ज्यो इंस्पेक्टर साहब को उपलब्ध करा दी गयी थी। मैने सी०सी०टी०वी० कैमरे मे सफेद अल्टो कार की फुटेज मैने अपनी आँखो से देखी थी। मै 02.01.18 को करीब साढ़े सात बजे से आठ बजे तक अपने शोरूम के बाहर खड़ा था। मैने अपनी आँखो से गाड़ी को आते जाते मुड़ते देखा था आल्टो कार सफेद रंग की जिसमे पिछले शीशे पर अब्बासी बावायेज लिखा था।

इस सम्बन्ध मे मै आज प्रमाण पत्र दाखिल करता हूँ। जो मेरा दस्तखती है। प्रमाण पत्र में अंकित इबारत सत्य व सही है। प्रमाण पत्र पर प्रदर्श क-2 डाला गया। मेरे गाँव के आयुषी शर्मा की अपहरण के बाद उसकी हत्या कर दी गयी थी जिसमे हमारे गाँव नया गाँव चाँदपुर मे गया व आतंक का भय पैदा हो गया। काफी दिनो तक हमारे गाँव के लोगो ने बच्चो को घर से अकेले नहीं जाने दिया। इस सम्बन्ध मे लोगो ने अधिकारियो को ज्ञापन दी थी।"

23. In cross-examination, he stated that Ex.Ka.2, the certificate, was not given to the I.O. and he has given the same first time in the court. He further stated that the memory of hard disk of his C.C.T.V. lasts for about 15-20 days. He got the information about the incident on the next day at about 11:00 AM and came to know that the offence was committed by the same car. He denied a suggestion that there is no C.C.T.V. footage of the car is available and he has prepared a fake evidence.

24. PW-4- Sushil Sharma stated that on 2.1.2018 at about 8:00 PM, he along with his colleague Vedant Sharma were standing on the main gate of his house situated at G.T. Road and they were talking to each other. In the meantime, they noticed that one Alto Car came fcame and stopped in front of Beerkheda and three boys came out and started urinating. Thereafter they moved towards Dadri in the same Alto Car. He further stated that he had seen all the three boys in the light of other vehicles. On seeing the accused persons in the court, he identified that they are the same three persons whom he had seen along with his companion Vedant Sharma on 2.1.2018 as they were urinating in front of the gate of Beerkheda and thereafter they went towards Dadri in the same car. He also stated that on the rear pane of car, 'Abbasi Boys' was written in English which he had noticed. In cross-examination, he stated that he is in the business of agriculture and property dealing. Vedant Sharma is also in the property dealing business and on that day Vedant Sharma had come to show him a piece of land and that is why they were

present at the spot. He stated that he got his statement recorded on 1.3.2018 when he saw the police jeep coming from Sikandarabad to Bulandshahr and therefore, he gave the information to the police in this regard. He further stated that after the registration of the case, he came to know Pushpendra Singh.

25. PW-5- Vikram Singh stated that he was working as a Senior Manager, System on C.C.T.V. at Luhali Toll Plaza. His statement read as under:

"मै 15 दिसम्बर 2015 से लुहाली टोल प्लाजा पर सीनियर मैनेजर के रूप में सिस्टम सी०सी०टी०वी० फुटेज पर कार्यरत हूँ। मेरी दिनांक 02.01.2018 को भी सी०सी०टी०वी० फुटेज लुहाली टोल प्लाजा पर ड्यूटी थी और मेरे द्वारा सी०सी०टी०वी० फुटेज टोल प्लाजा का चैक किया गया था तो दिनांक 26.12.2017 को समय 23.54 बजे सफेद रंग की एल्टो कार जिसके पिछले शीशे पर अब्बासी वॉय लिखा था दादरी से सिकन्द्राबाद की तरफ आयी थी और दि० 27.12.17 को यही कार समय करीब 11.36 बजे सिकन्द्राबाद से दादरी की तरफ जाना दिखायी दी। यही कार दि० 02.01.18 को समय करीब रात के करीब 20.44 बजे सिकन्द्राबाद से दादरी की तरफ गयी थी और फिर यही गाड़ी दि० 02.01.18 को ही रात के करीब 21.35 बजे सिकन्द्राबाद की तरफ आयी टोल प्लाजा पर सी०सी०टी०वी० केमरे में उक्त गाड़ी की तस्वीर नजर आ रही है उसका नम्बर HR-51AY5206 स्पष्ट नजर आ रहा था। दिनांक 03.01.2018 को समय करीब 5 बजे शाम सिकन्द्राबाद से दादरी को गयी और फिर यही कार दि० 03.01.18 को ही 9.16 मिनट पर रात को दादरी से सिकन्द्राबाद की तरफ आयी थी। मैने टोल प्लाजा लुहाली पर लगे सी०सी०टी०वी० केमरे में गाड़ी को आते जाते देखा है। और गाड़ी का नम्बर, गाड़ी का रंग, गाड़ी के पीछले शीशे पर लिखा अब्बासी बॉय अपनी आँखो से देखा है। टोल प्लाजा पर लगे सी०सी०टी०वी केमरे की फुटेज मेरे द्वारा विवेचक के मॉगने पर दी गयी थी विवेचक को फुटेज दिये जाने तक सी०सी०टी०वी केमरे में किसी प्रकार की कोई छेड़छाड़ नही की गयी थी। इस सम्बन्ध में मैं अपने कम्पनी के लेटर पैड पर प्रमाण पत्र टाईप कराकर लाया हूँ जो पत्रावली पर दाखिल करता हूँ। प्रमाण पत्र मैने स्वयं बोल-2 कर कम्प्यूटर पर कम्प्यूटर आपरेटर से टाईप कराया है प्रमाण पत्र पर मेरे हस्ताक्षर भी है प्रमाण पत्र पर प्रदर्श क-३ डाला गया।"

26. In cross-examination, he stated that he had given a certificate to the I.O. regarding C.C.T.V. footage and also given the C.D. of the D.V.R. to the I.O. of 2.1.2018. On a specific question whether the 'Abbasi Boys' was written on the back of the car, this witness stated on seeing the D.V.R. footage that 'Abbasi Boys' was written on the white colour car.

27. PW-6- Ashok Kumar Singhal stated that victim (A) was a student of class

12 and she used to visit his house for taking tuition in Mathematics from 6 P.M. to 7 P.M. and on 2.1.2018, after taking the tuition, she left for home on her cycle. In cross-examination, he stated that on the same day, he received the phone from the police station at about 8:00 PM that the victim has not reached home and he told the I.O. that victim has left his home at 7:00 PM. He stated that the parents of the victim had not asked him about the incident.

28. PW-7- Manoj Kumar Garg stated that he is the Chairman and on 2.1.2018, he came to know that the victim was kidnapped by the accused, namely, Zulfiqar, Israel, Irshad and after committing rape, she was murdered. Due to this, there was tension and fear amongst the parents in the city. In cross-examination, he stated that he is not an eye witness and denied a suggestion that due to political reasons, he has given the statement. He further stated that he had attended the cremation and on a call given by the people, there was a 'Band' in Bulandshahahr.

29. PW-8- Abhilash Kumar, S.I., who conducted the investigation, stated as under:

"दि० 3.1.18 को थाना दादरी जिला गौतमबुद्ध नगर बतौर उपनिरीक्षक के पद पर तैनात था इस दिनांक सूचना के आधार पर मै महिला का० गीता व का० जालेन्द्र के साथ जिल्द पंचायतनामा व दिगर कागजात लेकर मृतका पंचायतनामा भरने हेतु रवाना होकर सी०एच०सी० अस्पताल दादरी पहुँचा था वहाँ पर जाकर देखा कि अस्पताल में स्ट्रेचर पर एक अज्ञात लड़की का शव रखा गया था जिसको मेरे द्वारा शव की शनाख्त कराने का कोशिश की गयी शनाख्त नही हो सकी उसके बाद मैने मौके से पंच नियुक्त का मृतका का पंचायतनामा भरना शुरू किया जो पंचायतनामा व पंचायतनामा से सम्बन्धी कागजात मेरे द्वारा तैयार किये गये जो पत्रावली पर पंचायतनामा कागज सं० 13ए/1 व 2 मौजूद है जो मेरे लेख हस्ताक्षर मे जिस पर प्रदर्श क-4 डाला गया पंचायतनामा से सम्बन्धित कागजात चिट्ठी सी०एम०ओ० तैयार की जो कागज सं० 13ए/3 है। जो मेरे लेख हस्ताक्षर मे है तथा दूसरी चिट्ठी सी०एम०ओ० के लिये इस बावत कि बलात्कार आदि के सम्बन्ध में रिपोर्ट देने की कृपा करे। वह चिट्ठी पत्रावली पर 13ए/4 है। मौजूद है जो मेरे लेख हस्ताक्षर में है। जिस पर प्रदर्श क-6 डाला गया। इसके पश्चात खाखा लाश तैयार की गयी जो पत्रावली पर कागज सं० 13ए/5 मौजूद है मेरे लेख हस्ताक्षर मे है। जिस पर प्रदर्श क-7 डाला गया। इसके पश्चात चालान लाश तैयार की जो कागज सं० 13ए/06 पत्रावली पर मौजूद है। जो मेरे लेख व हस्ताक्षर मे है जिस पर प्रदर्श क-8 डाला गया। पंचायतनामा की कार्यवाही पूर्ण होने पर सभी प्रदर्शक भरने के बाद मृतका के शव को सील करने को कहा था उसी समय मृतका के परिजन आ गये थे। और परिजन के द्वारा मृतका की शनाख्त आयुषी शर्मा

पुत्री पुष्पेन्द्र शर्मा निवासी चांदपुर पी/एस को० नगर के रूप में की गई मेरे द्वारा मृतका शनाख्त होने के पश्चात मृतका के शव को एक कपड़े मे रखकर सील बन्द कर पी०एम० कराने हेतु का० महफूज व का०-जालेन्द्र पी/एस दादरी के सुपुर्द किया गया मेरे द्वारा दोनो का० को हिदायत दी गयी थी कि जब तक मृतका का पी०एम० नही हो जाता है तब तक उसके शव को किसी को छेड़ने व छुने का मौका ना दे।"

30. In cross- examination, he stated that in Panchayatnama, it is not stated that there was any dupatta or other cloth around the neck of the victim and when the dead body was identified by family members, the same was handed over to them after the post-mortem was conducted.

31. PW-9- Dr. K.K. Mishra stated that on 3.1.2018, he was on emergency duty in C.H.C. when the dead body of an unknown female was brought and thereafter, he investigated and sent information to the police vide letter Ex.Ka.9. In cross-examination, he stated that the dead body remained in the same condition as it was brought till the time Pachayatnama was prepared and police arrived.

32. PW-10- Dr. H.M. Lavania stated that on 4.1.2018, she was present in District Mortuary, Noida and she received the dead body of victim at about 3:10 PM for conducting the post-mortem. The statement of this witness along with cross-examination report as under:

"साक्षी का नाम डा० एच०एम० लावनीयाँ हाल तैनाती बतौर पैथोलौजी को नोएडा ने शपथ पूर्वक ब्यान किया कि:- दि० 4.1.18 में जिला मौरचरी नोएडा में थी इस दिन को मेरे द्वारा 3.10 पी०एम० पर मृतका आशुषी शर्मा पुत्री पुष्पेन्द्र शर्मा निवासी चांदपुर थाना कोतवानी नगरी के शव का मेरे द्वारा पी०एम० किया गया मृतका को सील बन्द अवस्था का० 1282 महफूज व का0 1509 जालेन्द्र पी/एस दादरी गौतम बुद्ध नगर लेकर आये थे सील बन्द अवस्था में लेकर आये थे मेरे मिलान करने पर सील मुहर दुरूस्त पाई गई थी। मृतका की शव के साथ 11 पुलिस प्रपत्र साथ लेकर आये थे शरीर मे मृत्यु की पश्चात की अकड़न मौजूद पूरी शरीर पर मौजूद थी शरीर की मृतका का कद काठी सामान थी और व बन्द रक्तरन्जित थी। मृतका के शरीर मृत्यु पूर्व आई निम्नलिखित चोटो थी।

**चोट नं0 1. एक नीलगू निशान, जो खुरसट लिए हुए, जिसका आकार 29/15 के क्षेत्रफल में जो पीठ और उसके नीचले भाग में मौजूद था।**

**चोट नं0 2. गले के चारो तरफ 29/2 से०मी० का लाइगेचर मार्क जो गले के सामने व थाईराइड कार्टलेज के नीचे स्थित था लिगेचर मार्क के नीचे भूरे रंग की खाल नरम थी, गले के चारो तरफ निशान में कोई गैप नहीं था, लिगेचर मार्क दाहिने कान के नीचे 5 सेमी० पर था और बॉये कान से 4 सेमी० नीचे था। और थोड़ी के 5 से०मी० नीचे था। हइयोईड? बोन टूटी हुई**

**थी, श्वास नली के साथ टूटी हुई थी। अन्य अंग जैसे मस्तिष्क,(अस्पष्ट) दोनो गुर्दे व प्लीहा कन्जेस्टेड थे। व हृदय का दाहिना चैम्बर में रक्त मौजूद था व दोनो फेफड़ो मे लैसैरिट ? रक्त मौजूद था (खून का थक्का मौजूद था) अमाश्य मे करीब 300 एम०एल० अधपचा खाना मौजूद था। पीड़िता के दॉत 15/15 के थे मेरी राय मे मृतका की मृत्यु करीब शव विच्छेदन से डेढ़ दिन पूर्व होना सम्भावित है।**

**मृत का कारणः- गला दबा कर दम घुटने से होना संम्भव है।** सील किया गया सामानः निम्न लिखित है

एक जिन्स, एक बैन्ड एक टीशर्ट 2 जरर्सी एक पजामी एक पैन्टी एक गले का दुप्पटा जिसकी गांठा लंगी थी दो हाथ की अंगूठी सफेद धातु की 4 हेयर किलप हाथ एक का नीला बैन्ड एक हेयर बैंड़ एक गली का दांगा को एक कपड़े में रखकर सील सर्वेमुहर करके आये हुऐ दोनो सिपाहियो के सुपुर्द किया गया था। मैने मृतका की दो वैजानल स्मीयर स्लाई शुक्रणु परीक्षण पैथोलाजी के लिये परीक्षण हेतु भेजा गया था। यह पी०एम० रिपोर्ट मेरे द्वारा बरवक्त तैयार की गई थी जो पत्रावली पर मौजूद है। मेरी लेख हस्ताक्षर मे है पी०एम० रिपोर्ट पर प्रदर्श क-10 डाला गया।

मृतका की मृत्यु दि० 2.1.18 को 8 व पौने आठ के बाद रात्रि के समय किसी समय होना संम्भव है। चोट नं0 2 अगर मृतका का गला चुन्नी से दबा कर घौटा जाये तो चोट नं0 2 आना संम्भव है। चोट नं0 1 अगर पीड़िता के साथ कार के अन्दर जबरदस्ती की जाये एवं बलात्कार किया जाये तो चोट आना संम्भव है। चोट नं0 2 मृतका की मृत्यु के लिये प्रर्याप्त है।"

"जिरहः- अभियुक्त इजराईल उर्फ मलानीः-

मै इस अस्पताल में करीब 8 वर्ष से तैनात हूँ पैथोलाजी के पद पर तैनात हूँ। इस समय मुझे याद नही है जिस दिन पीड़िता का पी०एम० किया उस दिन किसी और का पी०एम० किया था या नही इस पी०एम० करने हेतु शव के साथ 11 प्रपत्र प्राप्त हुऐ थे। यह कहना सही है कि इन11 प्रपत्रो का विवरण पोस्टमार्टम रिपोर्ट मे नही किया है मेरे अलावा दो स्यूपर थे जिनके नाम मुझे याद नहीं है पी०एम० के समय मौजूद थे। यह सही है कि किसी स्यूपर (बाल्मीक)

पर लिखी सहयोगी कर्मचारी का नाम पी०एम० मे अंकित नहीं है। यह बात सही है कि मेरी मौजूदगी मे शव को स्यूपर(बाल्मीकी) द्वारा खोला जाता है और उसी के द्वारा सील किया जाता है।

प्रश्नः- पी०एम० के समय जो 11 प्रपत्र शव के साथ भेजे गये थे उन सब पर अज्ञात लड़की लिखा है।

उत्तर- अभियोजन के तरफ से यह आपत्ति की गयी कि प्रपत्रो के ऊपर प्रदर्श क पढ़कर (अस्पष्ट) किये जा जा चुकी है

और विपक्षी के विद्वान अभि० द्वारा उनपर जिरह की जा चुकी है ऐसी स्थिति मे विपक्षी द्वारा उक्त प्रश्न पूछा गया सुसंगत नहीं है।

अभियुक्त की ओर से पी०एम० के समय डा० को जो प्रपत्र शव के साथ प्राप्त कराये गये थे उससे सम्बन्धित जिरह करने का अधिकार है। अपत्ति? तदानुसार निरस्त की जाती है।

सक्षी प्रपत्रों में अवगत अज्ञात नहीं लिखा है। कागज सं० 2 पंचायतनामा 13ए/1 और मृतका का नाम आयुषी लिखा है। इसी पृष्ठ सं० 1 मैने किसी भी पुलिस कर्मी जो शव लाये थे यह नहीं पूछा था कि पंचायतनामा के प्रथम पृष्ठ पर मृतका का नाम लिखा है शेष कागजातो पर अज्ञात लाश लिखा है।

यह कहना सही है कि जो पंचायतनामा की शेष पृष्ठो पर मृतका का नाम नही लिखा है अज्ञात लाश ही लिखा है। यह कहना सही है कि मैने पोस्टमार्टम रिपोर्ट मे शव के गीली अवस्था मे होना अथवा सुखी अवस्था में होना का कोई उल्लेख नही किया है। यह कहना सही है कि आज निश्चित तौर से नहीं बता सकता कि मृतका का शव गीली या सुखी अवस्था में था। पी०एम० के समय मैने कोई वीडियो ग्राफी या फोटो ग्राफी नही करायी थी अज खुद कहा यह कार्य पुलिस का है।

चोट 1:- किसी ऊँचे स्थान से गिर जाने पर या ऊबड़ खबड़ पर गिरने से नही आ सकती है।

यह कहना सही है कि मृतका के पाईवेट पार्ट पर कोई खरोज, खुरसट अथवा नीलगू निशान नही था यह कहना सही है कि पी०एम० के समय यह निश्चित नही बताया जा सकता था कि मृतका के साथ बलात्कार हुआ था या नहीं। आज खुद कहा कि रेप की पुष्टि के लिये वैजानल स्पीयर लेकर स्लाईट तैयार कर परीक्षण हेतु भेजा था। पुलिस के माध्यम से गया था। लड़की के पहने हुऐ कपड़े में ब्लड था अथवा नहीं मैं नहीं बता सकता कि मैने पी०एम० रिपोर्ट में इसका उल्लेख नही किया था। मुझे याद नहीं है कि शव की पी०एम० के पहले से मौजूद थी या मेरे सामने लाई गयी पोस्टमार्टम रिपोर्ट पर मृतका का नाम पंचायतनामे मे प्रथम पृष्ठ पर उसका नाम होने के कारण पी०एम० रिपोर्ट पर लिखा है। पी०एम० करते समय मुझे पता था कि मैं किस का पोस्टमार्टम कर रहा हूँ। और मैने पी०एम० उसका नाम भी लिखा है। शव सील अवस्था में थी लेकिन उस सील कपड़े पर कुछ मृतका के नाम के बारे में नहीं लिखा था और ना ही अलग से स्लिप लगी थी। पोस्ट मार्टम रूम मे एक बॉड़ी होती है लेकिन पी०एम० हाउस में कितनी होती है नहीं बता सकता हूँ। यह सही है कि पी०एम० करने से पूर्व मैने शव की शनाख्त करायी थी। पुलिस का० जो शव लाये थे उन्होने शनाख्त करायी थी पी०एम० करने मे लगभग 1 घन्टा लगा था मृतका की आयु लगभग 20 वर्ष थी।"

33. PW-11- Suraj Kumar, another I.O. gave the information about the investigation conducted by him and he stated that on the basis of written report given by Babita Sharma, Ex.Ka.1, the chik FIR No. 4 has been recorded and Section 364 of I.P.C. was added vide Ex.Ka.11 and G.D. Ex.Ka.12 and thereafter, the post-mortem report was received and Sections 302, 201 I.P.C. was added vide G.D. Ex.Ka.13. In cross-examination, he stated that informant Babita Sharma came with a relative Pushkar Singh on 2.1.2018, no recovery article was deposited in the police station and it was deposited on 5.1.2018 which included one cloth bag containing three sealed packets. He stated that when an information is given on Number 100, the entry is recorded in the control room. He denied a suggestion that the FIR was registered ante-time on the asking of senior police officials. He further stated that in the chik FIR no name of any persons or vehicle is recorded.

34. PW-12- Dalveer Singh, S.I. another I.O. deposed about the further investigation. He stated that he recorded the statement of informant- Babita Sharma and took in possession the recovery memo of the articles recovered at the spot of abduction. He prepared the Naksha Najari vide Ex.Ka.15. The articles recovered were sealed at the spot vide memo Ex.Ka.16. He also recorded the statement of PW-6, Ashok Singhal. This witness further proved that the packet sealed in cloth- Ex.1, backpack- Ex.2, Mathematics book- Ex.3, one copy- Ex.4, cover of spectacles- Ex.5, water bottle- Ex.6, black pen- Ex.7. He also exhibited one slipper of left foot with red and yellow colour along with plastic box as Ex.8 and 9. In cross-examination, this witness stated that informant in her statement under Section 161 Cr.P.C., has not stated about seeing the Alto car. He denied a suggestion that he has not seen the place of occurrence and has conducted the proceedings while sitting in the police station.

35. PW-13- Dhananjai Mishra, S.H.O stated about the investigation conducted by the other co-officials and recording of the GDs by them. He stated that as per the post-mortem report, cause of death was asphyxia as a result of strangulation. Thereafter, he recorded the statement of witness on 6.1.2018 and obtained the C.C.T.V. footage near the house of the deceased and also the statement of other witnesses on 7.1.2018. He took the C.C.T.V. footage of bullet show room dated 2.1.2018 in which at 7:39 PM one Alto car was seeing taking a U-Turn towards Chandpur's side just two minutes before that a girl was seen and thereafter, from the C.C.T.V. footage of Crystal Automobile (Renault), the Alto car turns towards the village where the deceased 'A' was residing. After sometime it was seen coming back. The C.C.T.V. footage is on record, thereafter, he went to Luhali Toll Plaza at Dadri road and on seeing the footage on 2.1.2018 where the above said Alto Car with Haryana Number was seen again on 3.1.2018. The same car at about 5:00 PM was going from Sikandarabad to Dadri. On 8.1.2018, Pushspendra Singh told that on 2.1.2018 at about 7:45 PM one Alto car was seen which turn towards Renault Show Room and on the rear wind screen 'Abbasi Boys' was written in english. The car Registration No. was HR51AY5206. The details of the car were seen which was registered in name of one Naveen Saini r/o Uncha Gaon, Saini Mohalla, Faridabad and on enquiry he told that he has sold this car to Zulfiqar r/o Friends Colony, Sikandarabad. On further

enquiry, brother of accused Zulfiqar namely Gulbahar told that he had purchased this car from Naveen Saini. He further stated that details of the secret information received and the manner in which accused were arrested and recorded their confessional statements about commission of the crime. He further proved that FSL team was called and from the car one slipper of the deceased, hair band, hair etc. were also recovered and were taken in possession, Ex.Ka.17. Thereafter, Section 376 of I.P.C. and Section 3/4 of P.O.C.S.O. Act was added. The sealed parcel was opened from where the recovered articles that is one slipper of red and yellow colour on which 'conform' was written, was recovered. The same was Ex.10 and the transparent polythene was Ex.11 and transparent box was Ex.12. Another sealed packet was opened and from where the sealed hair clip was recovered and a slip of the FSL is also recovered. A black colour hair clip was recovered from the car of the accused which was Ex.13 along with the box as Ex.14 and Ex.15. The hairs which were contain in a transparent box were Ex.16 and boxes as 17 to 1. He has signed on the recovery memo and there is a slip of FSL Lucknow. He also proved a red and black colour hair band recovered at the spot sealed in a plastic bag and is Ex.20 and boxes as Ex.21 and 22. He stated about the confessional statement made by the three accused regarding committing rape with a victim and murdering her. The earrings recovered from accused Israel by opening a box were Ex.23 and 24. The entire proceedings were entered in GDs. The field unit has also collected the photograph of the accused at the spot which are Ex.26 to 56. He stated that in the photograph the car was seen near the bridge of Gang Canal and on the backside on the rear wind screen 'Abbasi Boys' was written. He also proved that on the mat of the car hairs were also visible. He further stated that he has taken in possession the C.D. of C.C.T.V. footage and recorded the statement of owner of bullet show room as well as Manager of the toll plaza. He further stated that on 3.1.2018, he came to know that dead body of girl is lying near the drain, and the police has picked up and thereafter, he started investigation on the said line. He also proved the car Ex.15 which was produced in the court, Ex.57, the CDs of the C.C.T.V. footage of Krishna -- Santosh Enterprises i.e. Royal Engield Bullet Showroom and Luhali Toll Plaza (Ex.58 to 61) which were opened with help of an operator of police line were displayed on a laptop in the court.

36. In cross-examination, this witness has given the complete details of the visibility of C.C.T.V. footage. He denied a suggestion that the C.C.T.V. footage is not the correct copy of original. He further give the details in the manner in which arrest of all the accused was effected and denied a suggestion that the accused were arrested from their homes and under the pressure they were made to make confessional statements.

37. PW-14, Sameul Christopher of All Saint School, Delhi Road, Bulandshahr, produced the school record of the victim. He stated that the victim took admission in their school on 6.5.2011 in Class 6th and was studied up to 2017-18 and at the time of incident, she was studying in Class 12th in the Register of the school and Gazette, at page No.171/29, the date of birth of the victim was mentioned as 5.9.2000. This witness stated that entries were made in his own handwriting and were exhibited K-21 to K-23. Thereafter, statement of accused under Section 313 Cr.P.C. was recorded

and all incriminating evidence was put to them.

38. Accused gave explanation that the prosecution evidence is false and they have been falsely arrested. In reply to question No.29 regarding giving any clarification, the accused stated that they are innocent and have not committed any offence.

39. Accused-Dilshad additionally stated three years prior to the incident, he met with an accident and was on bed rest and while in judicial custody, he was operated upon at AIIMS, New Delhi and is still under treatment. Thereafter, the Trial Court vide judgment of conviction, held the appellants guilty and vide order of substantive sentence, awarded death penalty to the appellants as explained above.

40. Learned counsel for the appellants have jointly argued that the very motive of committing the offences i.e. rape and murder has not been proved by the prosecution.

41. Heavy reliance is placed upon the postmortem report and two the reports submitted by the Forensic Science Laboratory, Agra and Forensic Science Laboratory, Lucknow. For a reference, the Forensic Science Laboratory, Agra read as under :

"प्रेषक,

संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला, उ०प्र०,

15 ताज रोड, आगरा-282001

सेवा में,

सहायक पुलिस अधीक्षक नगर

बुलन्दशहर

पत्रांकः-534-BIO-18

अप०सं०ः 04/18

राज्य बनामःजुलफ्कार अब्बासी

धाराः 364,302,201,376D IPC व ¾ POCSO Act थानाः-कोतवाली शहर

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनाँक 19/01/2018 को विशेष वाहक द्वारा प्राप्त हुये।

<u>सील का विवरण</u>

एक समुद्रित लिफाफा जिस पर मुद्रा ("MORTURY GBN NOIDA") नमूनानुसार की छाप अक्षत थी।

<u>प्रदर्शों का विवरण</u>

01- वेजाइल स्मीयर स्लाइड दो । एक समुद्रित लिफाफा-मृतिका पी.एम से।

02- स्वाब

<u>परीक्षण परिणाम</u>

वस्तु(2) पर रक्त पाया गया।

रक्त के प्रारम्भिक परीक्षण के लिये बेन्जिडीन परीक्षण प्रयोग में लाया गया।

रक्त की पुष्टि के लिये क्रिस्टल परीक्षण प्रयोग में लाया गया।

वस्तु (1) पर रक्त नहीं पाया गया।

वस्तु (2) पर मानव रक्त पाया गया।

वस्तु (1) व (2) पर शुक्राणु अथवा वीर्य नहीं पाया गया।

शुक्राणु तथा वीर्य के परीक्षण हेतु बायोकैमिकल एवं माईक्रोस्कोपिक विधियाँ प्रयोग की गयीं।

नोट- भेजे गये प्रदर्शों के प्राप्त उक्त परिणाम को अन्य उपलब्ध साक्ष्यों के परिप्रेक्ष्य में निर्णय लिया जाना समीचीन होगा।

ह०अप०

ह० अप०

03/12/19 03.12.19

आवश्यक कार्यवाही हेतु अग्रसारित

वैज्ञानिक अधिकारी

संयुक्त निदेशक

डा० अनिल कुमार दीक्षित

वैज्ञानिक अधिकारी"

42. Similarly, the Forensic Science Laboratory, Lucknow read as under:-

"प्रेषक,

निदेशक/संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला, उत्तर प्रदेश, महानगर

लखनऊ- 226006 ।

सेवा में,

Senior Superintendent of police

BULANDSHAHAR

पत्रांक 2018XDNA000367

दिनांक

अपराध संख्या 4/2018

राज्य बनाम JULFIKAR.ETC

अधिनियम/ धारा CHL/3,CHL/4,IPC/201IPC/302,IPC/34,IPC/364,IPC/376- D,IPC/404

पुलिस स्टेशन/थाना KOTWALI CITY मृतक/मृतका का नाम

पी एम संख्या

जी०डी० संख्या

उपर्युक्त मामले से सम्बंधित प्रदर्श प्रयोगशाला में दिनांक 16-04-2018 को विशेष वाहक द्वारा प्राप्त हुए।

<u>सील का विवरण</u>

एक सर्वमोहर बंडल जिस पर "MORTURY NOIDA GBN" मुद्रानमूनानुसार, दो सर्वमोहर लिफाफा जिन पर "DHB" मुद्रानमूनानुसार व तीन सर्वमोहर डिब्बा जिन पर "MONOGRAM UPP" मुद्रानमूनानुसार की छाप अक्षत थी।

<u>प्रदर्शों का विवरण</u>

1.रक्त नमूना(वायल में)

। मूल सर्वमोहर लिफाफा (संभावित पिता- पुष्पेन्द्र शर्मा) से।

2. रक्त नमूना(वायल में)

। मूल सर्वमोहर लिफाफा( संभावित माता-बबिता शर्मा) से।

3. हेयर क्लिप

। मूल सर्वमोहर डिब्बा (मृतका) से।

4. बाल । मूल सर्वमोहर डिब्बा (मृतका) से।

5. हेयर बैण्ड मय बाल

। मूल सर्वमोहर डिब्बा (मृतका) से।

6. जींस पैन्ट । मूल सर्वमोहर बंडल से (मृतिका) (PM NO.-11/18)

7. बैल्ट ।

8. टीसर्ट ।

9. स्वैटर ।

10. पाजामी ।

11.पैन्टी ।

12. दुपट्टा ।

13. अंगूठी ।

14. क्लिप ।

15. ब्लू बैण्ड (हाथ का) ।

16. हेयर बैण्ड ।

17. काला धागा ।

<u>परीक्षण परिणाम</u>

प्राप्त प्रदर्शो (1) से (19) का डीएनए परीक्षण किया गया।

स्त्रोत प्रदर्श (1) (पुष्पेन्द्र शर्मा से) व स्त्रोत प्रदर्श (2) (बबिता शर्मा से), स्त्रोत प्रदर्श (4) (मृतका से) के क्रमशः बायोलाजिकल पिता व माता हैं। (HID-STR KIT)

स्त्रोत प्रदर्श (3), (5) से (9), (11) व (12) (मृतका से) में आंशिक डीएनए प्रोफाइल जेनरेट हुआ।

स्त्रोत प्रदर्श (10) व (13) से (17) (मृतका से) में डी.एन.ए. निष्कर्षण न हो सका।

डी.एन.ए. परीक्षण मे जैनेटिक एनालाइजर व जीन मैपर साफ्टवेयर का प्रयोग किया गया।

उक्त परीक्षण मे मानक विधिया प्रयोग मे लायी गयी।

नोटः- अग्रेषण पत्र के क्र.सं. (1) पर वर्णित डिब्बा से प्रदर्श सं. (4) में केवल बाल प्राप्त हुए।

1. समस्त प्रदर्शों को परीक्षणोपरान्त एक सर्वमोहर बण्डल से रखकर वापस लौटाया जा रहा है।

2. कृपया परीक्षित प्रदर्शों की वापसी की शीघ्र व्यवस्था करें।

अग्रसारित

ह० अप०

ह० अप०

28/8/19

28/8/19

निदेशक

वैज्ञानिक अधिकारी

विधि विज्ञान प्रयोगशाला,उ०प्र०

डी.एन.ए अनुभाग

लखनऊ। यू०पी०

लखनऊ।"

43. It is submitted that as per postmortem report, no injury mark was present in the vagina or cervix and the vaginal smear slide which was sent to Pathologist for detection of spermatozoa, as per report of Forensic Science Laboratory, Agra was negative as in both swabs the spermatozoa and semen were not found.

44. Learned counsel has next argued that even the report of Forensic Science Laboratory, Lucknow do not corroborate the version of the prosecution, as it is submitted that the only conclusion drawn from this report is that from the blood sample of mother and father i.e. PW-1 ( Babita Sharma) and PW-2 ( Pushpendra Sharma, Exhibit 1 & 2, when tallied with the hair of the victim (Exhibit-4), it is proved that PW-1 and PW-2 are the biological father and mother of the victim. It is submitted that from the source 3, 5, 2, 9, 11 and 12 of the victim which includes hairband and hair, recovered from the car of the accused and the wearing clothes including the undergarments, no conclusive finding was recorded as it is opined that only partial DNA profile was generated. Similarly, from the other sources, Exhibit-10 and Exhibits 13 to 17, no DNA conclusion could be drawn.

45. It is thus argued that the allegation of committing rape by the accused persons with the victim are not proved and, therefore, the charge under Section 376-D IPC, is not proved.

46. Learned counsel has next argued that the charge under Section 5(g) read with Section 6 of The Protection of Children from of Sexual Offences Act (POCSO) is also not proved against the appellant as it has come in the postmortem report that the age of the deceased was about 20 years.

47. Learned counsel has next argued that in order to prove and hold a person guilty under Section 5(g) read with Section 6 of POCSO Act, it is to be proved that victim was a child as defined under Section 2(d) of the POCSO Act i.e. below the age of eighteen years. It is also submitted that the medical evidence do not corroborate the allegation of aggravated penetrative sexual assault and, therefore, the appellants have been wrongly convicted.

48. It is next argued that there is no eye witness to the incident and PW1 (Babita Sharma) has made substantive improvement from the FIR version while appearing as a witness in the Court.

49. Learned counsel submits that the statement made in the Court that she was standing on the gate of her house and was waiting for his daughter who had gone to take tuition and while standing on the gate, she had seen a white colour Alto Car in front of her house, which took U-turn after some time towards G.T. road and thereafter, she found the articles belonging to her daughter i.e. a bicycle, a bag and one sleeper lying on the road and thereafter, people gathered there and some one gave call to the police on 100 number, is not mentioned in the FIR and, therefore, there is substantive improvement in the version of the prosecution.

50. It is further argued that PW-2, Pushpendra Sharma, father of victim was not present at the spot as he has stated that he had gone to Coimbatore and on receiving the information, he returned back home next morning i.e. 3.1.2020 and then he reached the spot where the dead body was found, is also an improvised version of the prosecution.

51. It is submitted that in the report submitted by the police for sending the dead body of the victim to the hospital, it is reported that it was dead body of an unknown girl and if PW-2 ( Pushpendra Sharma) had reached at the time of Panchyatnama of dead body, he should have identified the same at the spot

whereas in the later part of the statement, this witness has stated that when he reached the hospital, he identified the dead body of his daughter.

52. Counsel further submits that the dead body was recovered from a small drain and, therefore, the prosecution has failed to explain that the dead body was recovered on whose instance.

53. Counsel has further argued that the statement of PW-3 (Vijay Pratap Singh), who is owner of Royal Enfield Agency, is also not admissible in evidence as he has given statement much after the incident and in cross examination, he has admitted that certificate (Exhibit Ka-2) regarding the authenticity of CCTV footage was for the first time filed in the Court and it was never given to the Investigating Officer.

54. Counsel for the appellant has submitted that PW-3 Vijay Pratap Singh, has admitted in cross examination that he came to know about the incident of kidnapping of a girl on the next day. However, he did not make any statement before the Investigating Officer for a period of about 20-25 days which raises a suspicion.

55. Counsel submits that as per the statement of PW-4 Sushil Sharma, his presence at the spot is doubtful. It is submitted that this witness has stated that at about 8:00 pm, he alongwith his colleague Vedant Sharma was standing on G.T. road when he saw a white colour Alto Car coming from Bulandshahr stopped near gate of Beerkheda, on the opposite side of the road from and three boys came out of the car and started urinating on the road and thereafter they again sat in the car and went towards Dadri side.

56. Counsel has argued that source of the light as stated by this witness is the headlights of the vehicles, was not sufficient to identify them and therefore, statement of PW-4 Sushil Sharma was not worth admissible.

57. It is argued that on 2.1.2018 the sun set around 6:00 pm and it was dark at about 8:00 pm and how PW-4 had seen the car of the appellant. It is also submitted that this witness in cross examination has stated that when he came to know about the incident, he stopped a police vehicle on 1.3.2018 and got his statement recorded regarding incident though he has admitted that he came to know about the incident from the newspaper which proves that this witness was introduced at a much later stage. It is also argued that PW-5 Vikram Singh, CCTV, System Manager of Lohali Toll Plaza has only deposed about the movement of Car No. HR-51-AY – 5206 which has crossed the toll plaza on 2.1.2018 at 20:44 and the car had gone from Sikandrabad to Dadri and again came back from Dadri to Sikandarabad at 21:35 pm. It is argued that the CCTV footage is not very clear and the trial court has wrongly relied upon the same.

58. Learned counsel argued that PW-6 Ashok Kumar Singhal who used to give tuition, in cross examination has stated that after the incident neither he visited the house of the victim nor her parents inquired of the same which is a suspicious circumstance.

59. Counsel submits that PW-7 Manoj Kumar Garg is an interested witness. He being the Chairman, is a political person and has only stated that after the incident, the parents in the city were in panic. However, he admitted that he is not witness of the incident.

60. Counsel next argued that as per the statement of PW-8 S.I. Abhilash Kumar, when he reached CHC Hospital, Dadri, a dead body of an unknown girl, was lying on a streture and thereafter, the proceedings of Panchayatnama started, which bear his signature. After the proceedings of Panchyatnama was completed, family members of the victim came and Pushpendra Sharma, father of the victim, identified her and thereafter, the dead body was sealed and sent for postmortem.

61. It is submitted that as per the confessional statement set up by the prosecution, three accused persons murdered the victim by strangulating her with a dupatta (scarf). However, PW-8 stated that at the time of Panchyatnama or when the family members of the victim identified the dead body, there was no cloth or dupatta (scarf) around the neck of the victim and therefore, the confessional statement of the accused person is not corroborated.

62. Counsel next argued that PW-9 Dr. K.K. Mishra, who received the dead body of an unknown female, has stated that dead body was of an unknown girl and therefore, the version given by PW-2, father of the victim, that he had seen the dead body prior to bringing it to the hospital is not proved. He next argued that as per PW-10, Dr. H.M. Lavania, who conducted the postmortem, the cause of death was asphyxia due to strangulation and from her statement allegation of rape are not proved.

63. This witness has stated that the victim died about 1 and ½ days prior to the time of postmortem and she nowhere stated that victim was subjected to sexual assault, to prove the allegation of rape. In cross examination, this witness stated that all the 11 documents which were sent alongwith postmortem report, it was mentioned that the dead body was of an unknown girl. However, in Panchayatnama Ex-13A/1, the name of the victim is mentioned.

64. Counsel argued that this witness stated that on the private parts of the victim, no bruises or blue contusion were found and at the time of postmortem, she could not give any definite report whether the victim was subjected to rape or not and to ascertain this the vaginal smears slide was prepared and sentd for forensic investigation. It is stated by PW-10 that the age of the victim was about 20 years. In further cross examination, this witness stated that there was a dupatta around neck of the victim which was tied.

65. Counsel next argued that it has come in the statement of PW- 12 S.I. Dalbeer Singh, that the informant (PW-1) in her statement under section 161 Cr.P.C. has not stated that she was waiting for her daughter while standing on the gate or had seen the Alto Car coming and going, which makes the statement of PW-1 doubtful. Counsel has argued that PW-13 SHO Dhananjai Mishra, during investigation found that the car belongs to one Neeraj Saini, R/o Firzabad who has sold it to accused Zulfikar, but there is no document to show that it was sold to him as registration certificate stands in the name of Neeraj Saini.

66. Counsels further submitted that in cross examination, PW-13 has stated that on receiving information that dead body of a girl is found in a drain, it came to his mind that the three boys who came in the Alto Car might have killed her and have thrown the dead body. It is argued that this is an afterthought story prepared by PW-13.

Counsel has thus argued that offence made by the appellant is not proved and they be acquitted of charge.

67. Counsel for the accused Dilshad Abbasi has additionally argued that he was not maintaining good health as at the time of incident, about 3 years before he met with an accident and remained on bed rest for a longtime and has undergone surgery in Meerut and AIIMS, New Delhi during custody.

68. Counsel has argued that while in custody this witness has passing urine a catheter pipe and he cannot urinate in natural way and, therefore, he was not a position to commit the offence.

69. In reply, the learned counsel for the informant as well as learned AGA have opposed the prayer. It is argued that both PW-1, the informant, mother of the victim as well as PW-2, the father of the victim are natural witness and duly proved prosecution case.

70. Counsel submits that on receiving information that minor daughter of PW-1 is abducted, she became perplexed and at the first instance she has only given information to the police regarding her kidnapping as in ordinary course no person in such a situation can give complete details and therefore, informing about seeing a white Alto Car, which was roaming around the place of occurrence at a later stage is a natural version. It is also argued that PW-2, on receiving information, immediately reached back on the next day i.e. 3.1.2018 and, on receiving the information about the recovery of an unknown dead body of a girl lying in Government Hospital, he alongwith his brother-in-laws Vinod and Pushkar Singh reached Government Hospital at Dadri and found that dead body is of his daughter lying which was on a stretcher. He identified the dead body and the police official told him that the dead body was found near a running drain. It is argued that it is nowhere stated by PW-2 that he reached the spot where dead body was recovered. This witness has, further, stated that on 9.1.2018, he received a phone call from police that two miscreants along with a white colour Alto Car had been apprehended. He reached at the spot and in his presence, one slipper, one hairband etc. of his daughter were recovered. The two persons who were apprehended gave their name as Zulfiqar Abbasi and Dilshad Abbasi and in his presence they made a disclosure statement about kidnapping his daughter and after committing rape, they murdered her and had thrown the dead body near the drain.

71. Counsel submits that statement of this witness is par confidence and despite lengthy cross examination, his testimony could not be shattered.

72. It is next argued on behalf of the informant that from the statement of PW-3- Vijay Pratap Singh, owner of a motorcycle showroom as well as PW-5- Vikram Singh, Manager of CCTV system at Luhali, Toll Plaza, it is apparently clear that at the place and time of the incident, the accused persons were roaming in a white colour Alto car bearing registration no. HR-51-AY – 5206 and on the back pane, 'Abbasi boys' sticker was pasted. PW-3 has proved the CCTV footage of his showroom along with certificate Ex.Ka.2 which the trial court by playing the CCTV footage on a laptop has found that it clear and visible. It is argued that from the statement of PW-3 and PW-5 presence of their car is proved. It is next

argued that PW-4, Sushil Sharma, is an independent witness who had identified all the three accused persons in the court as he had seen them urinating in front of the gate of Beerkheda where he was standing along with his colleague Vedant Sharma, therefore, identity of the accused is proved. Learned counsel submits that the police has conducted a fair and impartial investigation as ever the teacher, who was giving tuition to victim, appeared as PW-6 and proved this fact.

73. In reply to the argument raised by learned counsel for the appellants regarding the medical evidence and FSL report, it is submitted that both support the prosecution version. Learned counsel submits that it has come in the statement of PW-14- Sameul Christopher, who produced the school record of the victim, that the victim took the admission in All Saints' School in Class VIth on 6.5.2011 and she was studying in Class XIIth at the time of the incident. The victim has passed classes 6 to 11th from the same school and as per the S.R. register and High School/ Inter Gazette at page 171/29, the D.O.B. of victim is 5.9.2000 and therefore on the date of incident i.e. 2.1.2018, she was aged about 17 years 3 months and 27 days and age given in the post-mortem was 20 years was tentative and only on the basis of the appearance of the girl.

74. Learned counsel submits that as per PW-10, Dr. H.M. Lavania, who conducted the post-mortem has clearly stated that on injury no.1, blue contusion spread over the back and lower portion of the back cannot be caused by fall from higher place on an uneven surface and proved that she sustained these injuries while she was subjected to gang rape.

75. It is also submitted that on injury no.2, there is ligature mark below thyroid cartilage and hyoid bone was broken, windpipe was blocked and the cause of death was clearly opined as asphyxia due to strangulation of neck. Learned counsel has next argued that from the FSL report, DNA of the victim was proved and even the recovery of hairs as well as one slipper from the car along with other articles prove that she was kidnapped and taken in the same car, which was recovered from the custody of the appellants and was gang raped and murdered.

76. Learned counsel submits that, the FSL report from Agra, on Ex.2 i.e. vaginal swabs found human blood which proved that the victim was subjected to sexual assault, even if the sperm or semen was not found. Learned counsel lastly argued that the prosecution has been able to prove the complete chain of circumstances, which prove that on 2.1.2018 all the three accused in conspiracy with each other kidnapped the minor victim and forcibly took her in their white colour Alto car HR51AY5206 which has visible mark 'Abbasi Boys' on the back pane and were seen in the CCTV footage of the motorcycle showroom situated next to the place of incident and also seen in the CCTV footage of the toll plaza followed by the recovery of dead body, coupled with the medical record proved that the confessional statement made by the accused persons about commission of the offence is in the same way, as proved by the prosecution during the investigation and by the prosecution witnesses appearing in the court.

77. It is thus argued that appeal may be dismissed.

78. After hearing learned counsel for the parties, it is worth noticing that the trial court has framed as many as seven points of adjudication:-

i) Whether the age of the victim was below 18 years of age on the date of incident and the victim has gone to take tuition.

ii) Whether the Alto car followed the victim in the street where the house of the victim was situated and immediately after sometime, it returned and the victim did not reach home.

iii) Whether PW-4, Sushil Sharma, has seen the accused getting down from Alto car and urinating on the way from Bulandshahar to Dadri, road in front of Beerkheda.

iv) Whether car no. HR51AY5206 with 'Abbasi boys' written on it is the same car used in accident.

v) Whether victim was murdered before incident and witness PW-4 has seen the accused persons later on in while Alto Car.

vi) Whether in the sequence of events, the aforesaid car no. HR51AY5206 'Abbasi boys' pasted on it was seen in the C.C.T.V. of Luhali toll plaza, going from Sikandarabad to Dadri and after sometime returning from Dadri to Sikandarabad.

vii) Whether the accused have committed the gang-rape with the victim.

79. On re-appreciation of entire evidence, with the assistance of both the counsels for the parties, we find no merit in the present appeals for the following reasons :

A. The age of the deceased is proved to be below 18 years as her date of birth, as per the educational certificate and school record is 5.9.2000 and, therefore, on the date of incident i.e. 2.1.2018, she was aged about 17 years, 03 months and 28 days.

It is proved from the statement of PW-1 as well as PW-6, Ashok Kumar Singhal, the tutor who used to give tuition to victim, that on the date of incident, after taking the tuition from house of this witness, at about 7.00 PM, the victim was returning back from Suryanagar to her house on a bicycle. This fact was also proved by PW-1, the mother of the victim, that everyday she used to go tuition at 6.00 PM and return at night and, therefore, it is proved that the victim was taking tuition everyday from 6.00 to 7.00 PM.

B. At point No. (ii), the prosecution has proved that from the statement of PW-1, the informant, that she had seen the Alto Car at place of occurrence. It is also proved from the statement of PW-3 (the owner of Royal Enfield Showroom) who has proved the CCTV footage by giving the same to the Investigating Officer that on 2.1.2018, at about 7.39 PM, the Alto Car was seen taking U-turn towards Chandpur and a girl was seen just two minutes before going on bicycle and at 7.41 PM the Alto Car turned towards the street where the victim was residing and after 40-50 seconds, it returned back and the victim never reached home. This proved that at this point of time, the victim was kidnapped by the accused persons and was forcibly taken in the Alto Car.

C. At point (iii), Shushil Sharma (PW-4) has clearly stated that he had seen that a white coloured Alto Car stopped in the opposite side of the road in front of the door of Beer Kheda. Three persons got out of the car and urinated in front of the door of Beer Kheda and he had seen them in the light of the vehicles. This witness has stated that he was standing at the gate in

front of the main door along with his friend Vedant Sharma with regard to a property deal. Therefore, the statement of PW-4 is clear and consistent as in cross examination, his testimony could not be shattered by the defence.

D. At point (iv), we uphold the finding recorded by the Trial Court that Alto Car, HR51 AY5206 had a sticker pasted on its back pane 'Abbasi Boys' owned the appellants as they have surname as 'Abbasi' and it has come in the statement of Investigating Officer (PW-13) that the same was purchased from one Neeraj Saini resident of Faridabad. Therefore, the use of the car by the accused committing offence is proved.

E. We also uphold the finding at point Nos. (v) & (vi) that PW-4 had seen the accused persons after committing the offence and the presence of the vehicle crossing the Luhali Toll Plaza is also duly proved PW-5.

F. At point No.(vii), the Trial Court has recorded a finding that the accused persons committed gang rape with the victim who was below 18 years of age and, therefore, held them guilty of offence under Section 376D of IPC and Section 5 (g)/6 of POCSO.

G. The report of the Forensic Science Laboratory, Agra on the vaginal smears slide and swab Ex.2 has opined that human blood was found which suggests that there was aggravated penetrative assault on the victim. Therefore, the finding of the Trial Court on this issue is also upheld.

H. The injury sustained by the victim on her back also suggests that she was subjected to aggravated penetrative sexual assault in the car as she sustained multiple bruises and blue contusion on her upper and lower back.

I. It has come in the statement of PW-10, the doctor who performed the postmortem, that a scarf (dupatta) was tied around the neck of the victim which was used in committing the murder by strangulating her. Therefore, we uphold the finding recorded by the Trial Court that the accused persons committed the offence of kidnapping the victim 'A' who was below the age of 18 years, also committed aggravated penetrative sexual assault on her and then by committing her murder by strangulating with dupatta (Scarf) had thrown her dead body near a drain.

80. Accordingly, we find no merit in judgment of conviction passed by the Trial Court and uphold the same.

81. So far sentence of the appellant is concerned, the Trial Court awarded the death sentence to all the three appellants. However, the Court finds merit in the argument raised by the counsel for the appellant that it is not a 'rarest of the rare' case where death penalty could be awarded and the Trial Court has not recorded any mitigating circumstances which require that only death penalty should be awarded to the accused.

82. In recent judgment the Supreme Court in **Navas alias Mulanavas vs. State of Kerala, 2024 SCC OnLine SC 315** has considered many cases where the Court has commuted death sentence to life imprisonment. The operative part of the order read as under :

*"29. In* ***Haru Ghosh v. State of West Bengal, (2009) 15 SCC 551*** *which involved the murder of two individuals and the attempt to murder the third by the accused who was out on bail in another case, after conviction, this Court while*

*commuting the death penalty after taking into account the aggravating and mitigating circumstances imposed a sentence of 35 (thirty five) years of actual jail sentence without remission. It was noted that commission of the offence was not premeditated since he did not come armed and that the accused was the only bread earner for his family which included two minor children.*

*30. In* ***Mulla & Another v. State of U.P., (2010) 3 SCC 508*** *the accused/appellant, along with other co-accused, was found guilty of murdering five persons, including one woman. This Court confirmed the conviction but modified the sentence. This Court stressed on the fact that socioeconomic factors also constitute a mitigating factor and must be taken into consideration as in the case the appellants belonged to extremely poor background which prompted them to commit the act. The sentence was reduced from death to life imprisonment for full life, subject to any remission by the Government for good reasons.*

*31. In* ***Ramraj v. State of Chhattisgarh, (2010) 1 SCC 573*** *which involved the murder of his wife, this Court imposed a sentence of 20 (twenty) years including remissions.*

*32. In* ***Ramnaresh and Others vs. State of Chhattisgarh., (2012) 4 SCC 257*** *the convicts were sentenced to death by the lower court, with the High Court confirming the sentence, on finding them guilty of raping and murdering an innocent woman while she was alone in her house. This Court confirmed the conviction but found the case did not fall under the 'rarest of rare' category for awarding death sentence. Ultimately, after setting out the well-established principles and on consideration of the aggravating and mitigating circumstances, this Court, while commuting the sentence from death imposed a sentence of life imprisonment of 21 (twenty one) years.*

*33.* ***Neel Kumar v. State of Haryana, (2012) 5 SCC 766*** *was a case where the accused committed murder of his own four-year old daughter. This Court, after considering the nature of offence, age, relationship and gravity of injuries caused, awarded the accused 30 (thirty) years in jail without remissions.*

*34. In* ***Sandeep v. State of Uttar Pradesh, (2012) 6 SCC 107*** *which involved the murder of paramour and the unborn child (foetus), this Court, while considering the facts and circumstances awarded a period of 30 (thirty) years in jail without remission.*

*35. In* ***Shankar Kisanrao Khade vs State of Maharashtra, (2013) 5 SCC 546****, the accused was convicted for raping and murdering a minor girl aged eleven years and was sentenced to death for conviction under S. 302 of IPC, life imprisonment under S. 376, seven years RI under S. 366-A and five years RI under S. 363 r/w S. 34. This Court confirmed the conviction but modified the death sentence to life imprisonment for natural life and all the sentences to run consecutively.*

*36.* ***Sahib Hussain v. State of Rajasthan, (2013) 9 SCC 778,*** *concerned killing of five persons including three children. This Court, taking note of the fact that the guilt was established by way of circumstantial evidence and the fact that the High Court had already imposed a sentence of 20 (twenty) years without remission, did not interfere with the judgment of the High Court.*

*37. In* ***Gurvail Singh & Anr. v. State of Punjab, (2013) 2 SCC 713*** *which involved the murder of four persons, this Court weighed the mitigating factors i.e., age of the accused and the probability of*

*reformation and rehabilitation, and aggravating factors i.e., the number of deceased, the nature of injuries and the totality of facts and circumstances directed that the imprisonment would be for a period of 30 (thirty) years without remission.*

*38. In* ***Alber Oraon v. State of Jharkhand, (2014) 12 SCC 306*** *which involved the murder by the accused of his livein partner and the two children of the partner, this Court, even though it found the murder to be brutal, grotesque, diabolical and revolting, applied the proportionality principle and imposed a sentence of 30 (thirty) years over and above the period already undergone. It was ordered that there would be no remission for a period of 30 (thirty) years.*

*39. In* ***Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353****, which involved the rape and murder of helpless and defenceless minor girl, this Court commuting the death penalty imposed a sentence of 35 (thirty five) years in jail without remission.*

*40. In* ***Selvam v. State, (2014) 12 SCC 274****, the accused was found guilty of rape and murder of nine year old girl. This Court imposed a sentence of imprisonment for a period of 30 (thirty) years without any remission, considering the diabolic manner in which the offence has been committed against the child.*

*41. In* ***Birju v. State of Madhya Pradesh, (2014) 3 SCC 421****, the accused was involved in the murder of a one-yearold child. This Court noted that various criminal cases were pending against the accused but stated that it cannot be used as an aggravating factor as the accused wasn't convicted in those cases. While commuting the death penalty, this Court imposed a sentence of rigorous imprisonment for a period of 20 (twenty) years over and above the period undergone without remission, since he would be a menace to the society if given any lenient sentence.*

*42. In* ***Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675*** *this Court was dealing with an appeal preferred by the accused who was sentenced to death after he was found guilty of committing murder of a minor girl and for kidnapping and attempt to rape after destruction of evidence. This Court reduced the sentence from death to life imprisonment for a minimum 25 (twenty five) years as it noted that there exists a possibility of the accused committing similar offence if freed after fourteen years. This Court also opined that the special category sentence developed in Swamy Shradhanand (supra) serves a laudable purpose which takes care of genuine concerns of the society and helps the accused get rid of death penalty.*

*43.* ***Vijay Kumar v. State of Jammu & Kashmir, (2019) 12 SCC 791*** *was a case where the accused was found guilty of murder of three minor children of the sister-in-law of the accused. This Court, taking note of the fact that the accused was not a previous convict or a professional killer and the motive for which the offence was committed, namely, the grievance that the sister-in-law's family was not doing enough to solve the matrimonial problem of the accused, imposed a sentence of life imprisonment till natural death of the accused without remission.*

*44. In* ***Parsuram v. State of Madhya Pradesh, (2019) 8 SCC 382****, the accused had raped and murdered his own student. The Trial Court sentenced the accused to death which was affirmed by the High Court. This Court took into consideration the mitigating factors i.e., that the accused was twenty two years old*

*when he committed the act and the fact that there exists a possibility of reformation and the aggravating factors i.e., that the accused abused the trust of the family of the victim. After complete consideration and reference to some precedents, this Court imposed a sentence of thirty years without any remission.*

*45. In* ***Nand Kishore v. State of Madhya Pradesh, (2019) 16 SCC 278,*** *the accused was sentenced to death by the Trial Court and the High Court for committing rape and murder of minor girl aged about eight years old. This Court noted the mitigating factors i.e., age of the accused at the time of committing the act [50 years] and possibility of reformation and imposed a sentence of imprisonment for a period of 25 (twenty five) years without remission.*

*46.* ***Swapan Kumar Jha v. State of Jharkhand and Another, (2019) 13 SCC 579*** *was a case relating to abduction of deceased for ransom and thereafter murder by the accused. This Court took into consideration the mitigating factors i.e., young age of the accused, possibility of reformation and the convict not being a menace to society. On the other side of the weighing scale, was the fact that the accused had betrayed the trust of the deceased who was his first cousin and the fact that the act was premeditated. This Court modified the death sentence to one of imprisonment for a period of 25 (twenty five) years with remissions.*

*47.* ***Raju Jagdish Paswan v. State of Maharashtra, (2019) 16 SCC 380*** *was a case where the accused was convicted for the rape and murder of minor girl aged about nine years and sentenced to death by the trial court which was affirmed by the High Court. This Court noted the mitigating factors i.e., murder was not preplanned, young age of the accused, no evidence to show that the accused is a continuing threat to society and the aggravating factors i.e., the nature of the crime and the interest of society, if petitioner is let out after fourteen years, imposed a sentence of life imprisonment for 30 (thirty years) without remission.*

*48. In* ***X v. State of Maharashtra, (2019) 7 SCC 1*** *the accused was sentenced to death by this Court on his conviction for committing rape and murder of two minor girls who lived near his house. However, in review, the question placed before the Court was whether postconviction mental illness be a mitigating factor. This Court answered it in the affirmative but cautioned that in only extreme cases of mental illness can this factor be taken into consideration. The Court reduced the sentence from death to life imprisonment for the remainder of his life as he still poses as a threat to society.*

*49. In* ***Irappa Siddappa Murgannavar v. State of Karnataka, (2022) 2 SCC 801,*** *this Court affirmed conviction of the accused, inter alia, under S. 302 and 376 but modified the sentence from death to life imprisonment for minimum 30 (thirty years). This Court stated that mitigating factors such as young age of the accused, no criminal antecedents, act not being pre-planned, socioeconomic background of the accused and the fact that conduct of the accused inside jail was 'satisfactory' concluded that sufficient mitigating circumstances exists to commute the death sentence.*

*50. In* ***Shiva Kumar v. State of Karnataka, (2023) 9 SCC 817,*** *this Court opined that the facts of the case shocked the conscience of the Court. The accused was found guilty of rape and murder of a twenty eight year old married woman who was returning from her workplace. Despite noting that the case did not fall under the*

*'rarest of rare' category, the Court stated that while considering the possibility of reformation of the accused, Courts held that showing undue leniency in such a brutal case will adversely affect the public confidence in the efficacy of the legal system. It concluded that a fixed term of 30 (thirty years) should be imposed.*

*51. In* ***Manoj and Others v. State of Madhya Pradesh, (2023) 2 SCC 353,*** *the three accused were sentenced to death by the lower court and confirmed by the High Court on their conviction under Section 302 for committing murder, during the course of robbery, of three women. This Court, while modifying the sentence from death to life imprisonment for a minimum 25 (twenty five) years, took into consideration the non-exhaustive list of mitigating and aggravating factors discussed in Bachan Singh (supra) to establish a method of principled sentencing. This Court also imposed an obligation on the State to provide material disclosing psychiatric and psychological evaluation of the accused which would help the courts understand the progress of the accused towards reformation.*

*52. In* ***Madan vs State of U.P., 2023 SCC OnLine SC 1473,*** *this Court was dealing with a case wherein the accused was sentenced to death, along with other coaccused, for murdering six persons of his village. This Court called for the jail conduct report and psychological report of the accused which were satisfactory and depicted nothing out of the ordinary. This Court also took into consideration the old age of the accused and period undergone [18 yrs.] as mitigating factors. This Court concluded that the case did not fall under the rarest of rare category and commuted the death sentence to life imprisonment for minimum 20 (twenty years) including sentence undergone.*

*53. In* ***Sundar vs State by Inspector of Police- 2023 SCC OnLine SC 310,*** *this Court, while sitting in review, commuted death sentence awarded to accused therein to life imprisonment of minimum 20 (twenty years). The accused had committed rape and murder of a 7-year-old girl. Factors that influenced this Court to reach such a decision were the fact that no court had looked at the mitigating factors. It called for jail conduct and education report from the jail authorities and found that the conduct was satisfactory and that accused had earned a diploma in food catering while he was incarcerated. Apart from the above, the Court noted the young age of the accused, no prior antecedents to reach a conclusion warranting modification in the sentence awarded.*

*54. In* ***Ravinder Singh vs State Govt. of NCT of Delhi- (2024) 2 SCC 323,*** *the accused was convicted under Sections 376, 377 & 506 of the IPC for raping his own 9- year-old daughter by the Sessions court and conviction was confirmed by the High Court. The Sessions Court, while imposing life imprisonment, also stated that the accused would not be given any clemency by the State before 20 years. This Court clarified that, as discussed in V. Sriharan (supra), the power to impose a special category sentence i.e., a sentence more than 14 years but short of death sentence can only be imposed by the High Court or if in appeal, by this Court. Considering the nature of the offence committed by the accused and the fact that if the accused is set free early, he can be a threat to his own daughter, this Court imposed a minimum 20 (twenty years) life imprisonment without remissions.*

*55. A survey of the 27 cases discussed above indicates that while in five cases, the maximum of imprisonment till*

*the rest of the life is given; in nine cases, the period of imprisonment without remission was 30 years; in six cases, the period was 20 years (In* ***Ramraj (supra)****, this Court had imposed a sentence of 20 years including remission); in four cases, it was 25 years; in another set of two cases, it was 35 years and in one case, it was 21 years.*

*56. What is clear is that courts, while applying* ***Swamy Shraddananda (supra),*** *have predominantly in cases arising out of a wide array of facts, keeping the relevant circumstances applicable to the respective cases fixed the range between 20 years and 35 years and in few cases have imposed imprisonment for the rest of the life. So much for statistics. Let us examine how the judgments guide us in terms of discerning any principle.*

*57. A journey through the cases set out hereinabove shows that the fundamental underpinning is the principle of proportionality. The aggravating and mitigating circumstances which the Court considers while deciding commutation of penalty from death to life imprisonment, have a large bearing in deciding the number of years of compulsory imprisonment without remission, too. As a judicially trained mind pores and ponders over the aggravating and mitigating circumstances and in cases where they decide to commute the death penalty they would by then have a reasonable idea as to what would be the appropriate period of sentence to be imposed under the* ***Swamy Shraddananda (supra)*** *principle too. Matters are not cut and dried and nicely weighed here to formulate a uniform principle. That is where the experience of the judicially trained mind comes in as pointed out in* ***V. Sriharan (supra).*** *Illustratively in the process of arriving at the number of years as the most appropriate for the case at hand, which the convict will have to undergo before which the remission powers could be invoked, some of the relevant factors that the courts bear in mind are:- (a) the number of deceased who are victims of that crime and their age and gender; (b) the nature of injuries including sexual assault if any; (c) the motive for which the offence was committed; (d) whether the offence was committed when the convict was on bail in another case; (e) the premeditated nature of the offence; (f) the relationship between the offender and the victim; (g) the abuse of trust if any; (h) the criminal antecedents; and whether the convict, if released, would be a menace to the society. Some of the positive factors have been, (1) age of the convict; (2) the probability of reformation of convict; (3)the convict not being a professional killer; (4) the socioeconomic condition of the accused; (5) the composition of the family of the accused and (6) conduct expressing remorse. These were some of the relevant factors that were kept in mind in the cases noticed above while weighing the pros and cons of the matter. The Court would be additionally justified in considering the conduct of the convict in jail; and the period already undergone to arrive at the number of years which the Court feels the convict should, serve as part of the sentence of life imprisonment and before which he cannot apply for remission. These are not meant to be exhaustive but illustrative and each case would depend on the facts and circumstances therein.*

*58. How do these factors apply to the case at hand? The act committed by the accused was preplanned/premeditated; the accused brutally murdered 4 (four) persons who were unarmed and were defenseless, one of whom was a child and the other an aged lady. It is also to be noted that by the*

*act of the accused, three generations of single family have lost their lives for no fault of theirs; Nature of injuries inflicted on Latha, Ramachandran and Chitra highlights the brutality and coldbloodedness of the act.*

*59. On the mitigating side, the accused was quite young when he committed the act i.e., 28 years old; The act committed by the accused was not for any gain or profit; accused did not try to flee and in fact tried to commit suicide as he was overcome with emotions after the dastardly act he committed; accused has been in jail for a period of 18 years and 4 months and the case is based on circumstantial evidence. We called for a conduct report of the appellant from the Jail Authorities. The report dated 05.03.2024 of the Superintendent, Central Prison and Correctional Home, Viyyur, Thrissur has been made available to us. The report indicates that ever since his admission to jail, he had been entrusted with prison labour work such as duty of barber, day watchman and night watchman. Presently, he has been assigned the job as convict supervisor for the last one and a half years. The report clearly indicates that no disciplinary actions were initiated against him in the prison and that the conduct and behavior of the appellant in prison has been satisfactory so far.*

***Conclusion**:*

*60. For the reasons stated above, we uphold the judgment of the High Cout insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following Swamy 60. For the reasons stated above, we uphold the judgment of the High Cout insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following **Swamy Shraddananda (supra)** principle while imposing sentence for the offence under Section 302 IPC. However, in view of the discussion made above, we are inclined to modify the sentence under Section 302 imposed by the High Court from a period of 30 years imprisonment without remission to that of a period of 25 years imprisonment without remission, including the period already undergone. In our view, this would serve the ends of justice.*

*For the reasons stated above, the Appeal is partly allowed in the above terms."*

83. A reference can also be drawn from some recent judgments of the Supreme Court.

84. The Supreme Court in the case ***State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.( Criminal) 564,*** has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

85. The Supreme Court in ***State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.( Criminal)785,*** has held that taking consideration of facts and circumstances of the case, the capital punishment is to be converted into life imprisonment.

86. The Supreme Court in ***Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.( Criminal) 192,*** has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

*"**Aggravating circumstances:** A court may, however, in the following cases impose the penalty of death in its discretion:*

*(a) if the murder has been committed after previous planning and involves extreme brutality; or*

*(b) if the murder involves exceptional depravity; or*

*(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—*

*(i) while such member or public servant was on duty; or*

*(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or*

*(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."*

***Mitigating circumstances**: In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:*

*(1) That the offence was committed under the influence of extreme mental or emotional disturbance.*

*(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.*

*(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*

*(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.*

*(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*

*(6) That the accused acted under the duress or domination of another person.*

*(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."*

87. In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

88. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.( Criminal) 302,*** it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special reason as per requirement of Section 354(3) Cr.P.C. It is also held in the judgment that when the DNA report is not done, an

adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendnecy of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted .

89. The Supreme Court in ***Manoharan Vs. State by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court ) 3746***, has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

90. In ***Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R. (Criminal) 254***, the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

91. In The ***State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. ( Criminal)735,*** the Supreme Court has again held that if there is any circumstance favouring the accused such as lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menance to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

92. In Re: ***Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.( Criminal) 571,*** the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

93. In the light of **Swamy Shraddananda's Case (Supra)** and ***Nisar Ramzan Sayyed Case (Supra), Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar, Manoharan Case (Supra), Veerendra Case (Supra), Anand Kindo & Another Case (Supra), Ravindar Singh Case (Supra), Digambar's Case (Supra) and Bhaggi @ Bhagirah @ Naran's Case (Supra)*** and the provisions of Section 302 of IPC as well as Section 5G/6 of POCSO Act, we find that the sentence of capital punishment be commuted to life imprisonment as the trial Court while awarding death sentence has not recorded any mitigating circumstances in the instant case. The Trial Court has not recorded any specific finding that it is an exceptional case to award death sentence. However, we find the following mitigating circumstances from the record.

(i) The accused appellants have no criminal history and have their families in support.

(ii) The accused-appellants are aged about 24 years as per statement under Section 313 Cr.P.C. and one is facing health problems., therefore, the possibility of reformation and rehabilitation of the appellants in the society cannot be ruled out as the Trial Court has not recorded any finding that awarding severest punishment is the only possibility in the present case.

(iii) The Trial Court has also not recorded any finding that accused can be a menace to the society before awarding capital punishment.

(iv) The Trial Court has not recorded any aggravating circumstances against the appellants which can over weigh the mitigating circumstances especially, when the appellants have no criminal history.

(v) In view of **Navas alias Mulanvas Case (Supra),** there should be exceptional circumstances warranting imposition of excess death penalty which cannot be reversed.

(vi) Lastly, the trial court has also not recorded any finding as to how the present case is rarest of the rare case even though the accused has committed the gravest offence.

94. In the light of the judgment of Supreme Court (supra), there is no aggravating circumstances as the Trial Court has not recorded any satisfaction that in case the life imprisonment awarded to the accused persons, there will be a security threat to the society as the accused persons have no criminal history.

95. Therefore, we are of the opinion that the capital punishment awarded to the appellants should be commuted to life imprisonment for a fixed term of 25 years without any remission. The order of sentence qua the fine is upheld with the aforesaid modification.

96. With the aforesaid modification, the appeals qua conviction are dismissed. However, the appeals qua sentence are partly allowed and the sentence is modified accordingly.

97. The accused appellant are in jail. They will undergo the remaining sentence in accordance with law.

98. Record and proceedings be sent back to the Trial Court forthwith.

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**(2024) 10 ILRA 746**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.10.2024**

**BEFORE**

**THE HON'BLE VIVEK CHAUDHARY, J.**
**THE HON'BLE NARENDRA KUMAR JOHARI, J.**

Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 144 of 2024

**Jitendra Pratap Singh @ Jeetu ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Murli Manohar Srivastava, Upmanyu Srivastava

**Counsel for the Opposite Party:**
G.A., Sumit Kumar Srivastava

**Criminal Law- Code of Criminal Procedure, 1973 - Section438 (6) (b) - Question-** Whether Section 438 (6) (b) Cr.P.C., as it applies to the St. of U.P., puts an absolute bar against applicability of Section 438 Cr.P.C to offences, in which death sentence can be awarded or the aforesaid bar would apply only where the Court comes to a conclusion after examining the facts of the case, that the case warrants imposition of the death sentence? **Answer**-The St. amendment explicitly prohibits anticipatory bail for offences punishable by

death sentence. The statutory bar is absolute. It is not for the Courts to rewrite the law or create exceptions to a legislative mandate that is unequivocal-Courts cannot entertain anticipatory bail application in cases where the St. amendment prohibits it. **(Para15, 19 & 20)** (E-15)

**List of Cases cited:**

1. Vishal Singh Vs St. of U.P Criminal Misc Anticipatory Bail No.2759 of 2023

2. Deshraj Singh Vs St. of U.P. (Neutral Citation No.-2022:AHC:183606)

3. Subhash Kashinath Mahajan v. St. of Maharashtra & anr., (2018) 6 SCC 454

4. Prithvi Raj Chauhan v. U.O.I.& ors.(2020) 4 SCC 727

5. U.O.I.Vs St. of Mah. & ors., (2020) 4 SCC 761

6. Gurudevdatta VKSSS Maryadit & ors.v. St. of Maharashtra & ors., (2001) 4 SCC 534

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Narendra Kumar Johari, J.)

1. Heard Sri Murli Manohar Srivastava, learned counsel for the applicant, Sri Puneet Kumar Yadav, learned A.G.A. for the State, Sri Sumit Kumar Srivastava, learned counsel for the opposite party no.2 and perused the record.

2. A learned Single Judge by order dated 01.04.2024 passed in the instant matter has referred the following question for consideration by a Larger Bench of this Court.

*"I. Whether Section 438 (6) (b) Cr.P.C., as it applies to the State of U.P., puts an absolute bar against applicability of Section 438 Cr.P.C to offences, in which death sentence can be awarded or the aforesaid bar would apply only where the Court comes to a conclusion after examining the facts of the case, that the case warrants imposition of the death sentence."*

3. The reason of such Reference is contradiction in judgment and order dated on 02.12.2023 passed by a learned Judge in Criminal Misc Anticipatory Bail No.2759 of 2023: ***Vishal Singh Vs State of U.P.*** and the judgment and order dated 01.11.2022 passed by another Single Judge sitting at Allahabad in Criminal Misc. Anticipatory Bail Application No.7286 of 2022: ***Deshraj Singh Vs. State of U.P.*** *(Neutral Citation No.-2022:AHC:183606).*

4. In the case of ***Deshraj Singh*** (supra), it is held that though the provision of Section 438(6)(b) of the Cr.P.C. bars granting of anticipatory bail in cases where the offence is punishable by death sentence, however, if no case for death punishment is made out, an anticipatory bail application would be maintainable. Per contra, in the case of ***Vishal Singh*** (supra), a co-ordinate Bench of this Court has held that in case involving commission of an offence under Section 302 I.P.C, which is punishable by death sentence, an anticipatory bail application is not maintainable.

5. Section 438 of the Code provides for grant of anticipatory bail when a person apprehends arrest for a non-bailable offence. The provision, in its original form, vested discretion in the Courts to grant anticipatory bail based on the facts and circumstances of each case, without explicit limitations. However, the provision for anticipatory bail was omitted for State of U.P. by "The Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976)."

Subsequently it was reinstated, with certain modifications, in the State of Uttar Pradesh through "The Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018 (U.P. Act No. 4 of 2019)," which was notified on 06.06.2019. Section 438 of the Cr.P.C., as applicable in Uttar Pradesh, empowers the Courts to grant anticipatory bail, subject to certain specified exceptions and conditions as contained in sub section (6). Section 438(6)(b) in particular bars grant of anticipatory bail in certain cases include case where the offence is punishable by death sentence. Section 438 Cr.P.C. as applicable in State of U.P. is as follows:

*"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely: —*

*i) the nature and gravity of the accusation;*

*ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*

*iii) the possibility of the applicant to flee from justice; and*

*iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested; either reject the application forthwith or issue an interim order for the grant of anticipatory bail:*

*Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended hi such application.*

*(2) Where the High Court or, as the case may be, the Court of Session,' considers it expedient to issue an interim order to grant anticipatory bail under subsection (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be fmally heard for passing an order thereon, as the Court may. deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:—*

*(i) that the applicant shall make himself available for interrogation by a police officer as and when required;*

*(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;*

*(iii) that the applicant shall not leave India without the previous permission of the Court; and*

*(iv) such other Conditions as may be imposed under sub-section*

*(3) of section 437, as if the bail were granted under that section.*

*Explanation:—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.*

*(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of*

*Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be fmally heard by the Court.*

*(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.*

*(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.*

*(6) Provisions of this section shall not be applicable,—*

*(a) to the offences arising out of,-*

*(i) the Unlawful Activities (Prevention) Act, 1967;*

*(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;*

*(iii) the Official Secret Act, 1923;*

*(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.*

*(b) in the offences, in which death sentence can be awarded.*

*(7) If an application under this section has been made by any, person to the High Court, no application by the same person shall be entertained by the Court of Session."*

6. Learned counsel for the applicant has placed reliance on the judgment of the Supreme Court in ***Subhash Kashinath Mahajan v. State of Maharashtra and another, (2018) 6 SCC 454,*** and ***Prithvi Raj Chauhan v. Union of India and others (2020) 4 SCC 727.*** Both the aforesaid judgments are in cases arising out of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act'). Sections 18 and 18A of the 1989 Act read as under:

*"18. Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.*

*18-A. No enquiry or approval required.—(1) For the purposes of this Act,-(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or*

*(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.*

*(2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."*

7. Learned counsel for the applicant has heavily relied upon the judgments in ***Subhash Kashinath Mahajan*** (supra) and ***Prithvi Raj Chauhan*** (supra) and submits that if the complaint does not make out a *prima facie* case, for applicability of provisions of 1989 Act, the bar created by Sections 18 and 18-A of the 1989 Act shall not apply. He submits that the Supreme Court has interpreted Section 18 of the 1989 Act in a liberal manner and in the present matter also, the Court should give similar liberal interpretation to Section 438(6)(b) of Cr.P.C. He submits that similarly where the Court is prima facie of the opinion that a death sentence cannot be awarded, an anticipatory bail application should be entertained.

8. On the other hand, learned A.G.A. for the State and learned counsel for opposite party no.2, strongly oppose the submissions made by learned counsel for the applicant and submit that the provisions of Section 438 of Cr.P.C., are not pari materia to Section 18 of the 1989 Act. The 1989 Act is a special Act and, hence, the interpretation given to the provisions of the said Act cannot be simply picked up and applied to Section 438 of Cr.P.C.

9. We have considered the submissions of learned counsel for the parties at length and also gone through the case laws submitted by them.

10. The 1989 Act is legislated to give protection to particular communities. The offences under the 1989 Act are committed by making certain statements in certain circumstances. It was found by the Supreme Court that in large number of cases, false and fabricated F.I.Rs. are being lodged, thus, strict provisions of the 1989 Act were being abused by the informants for ulterior purposes.

11. In the said circumstances, to balance the situation, the Supreme Court, in special facts and circumstances of the case, passed judgment in case of ***Subhash Kashinath Mahajan*** (supra). The relevant paragraphs of the said judgment read as under:

*"63. We have already noted the working of the Act in the last three decades. It has been judicially acknowledged that there are instances of abuse of the Act by vested interests against political opponents in panchayat, municipal or other elections, to settle private civil disputes arising out of property, monetary disputes, employment disputes and seniority disputes. [Dhiren Prafulbhai Shah v. State of Gujarat, 2016 SCC OnLine Guj 2076 : 2016 Cri LJ 2217] It may be noticed that by way of rampant misuse complaints are "largely being filed particularly against public servants/quasi-judicial/judicial officers with oblique motive for satisfaction of vested interests". [Sharad v. State of Maharashtra, (2015) 4 Bom CR (Cri) 545]*

*64. Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no prima facie case was made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution.*

*65. Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well-established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the court being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where court finds a case to be prima facie genuine*

*warranting custodial interrogation and pre-trial arrest and detention.*

*71. It is thus patent that in cases under the Atrocities Act, exclusion of right of anticipatory bail is applicable only if the case is shown to bona fide and that prima facie it falls under the Atrocities Act and not otherwise. Section 18 does not apply where there is no prima facie case or to cases of patent false implication or when the allegation is motivated for extraneous reasons. We approve the view of the Gujarat High Court in Pankaj D. Suthar [Pankaj D. Suthar v. State of Gujarat, (1992) 1 Guj LR 405] and N.T. Desai [N.T. Desai v. State of Gujarat, (1997) 2 Guj LR 942] . We clarify the judgments in Balothia [State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221 : 1995 SCC (Cri) 439] and Manju Devi [Manju Devi v. Onkarjit Singh Ahluwalia, (2017) 13 SCC 439 : (2017) 4 SCC (Cri) 662] to this effect.*

*76. We are of the view that cases under the Atrocities Act also fall in exceptional category where preliminary inquiry must be held. Such inquiry must be time-bound and should not exceed seven days in view of directions in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] . Even if preliminary inquiry is held and case is registered, arrest is not a must as we have already noted. In Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] it was observed: (SCC p. 57, para 107)*

*"107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court."*

*77. Accordingly, we direct that in absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District. Such permissions must be granted for recorded reasons which must be served on the person to be arrested and to the court concerned. As and when a person arrested is produced before the Magistrate, the Magistrate must apply his mind to the reasons recorded and further detention should be allowed only if the reasons recorded are found to be valid. To avoid false implication, before FIR is registered, preliminary enquiry may be made whether the case falls in the parameters of the Atrocities Act and is not frivolous or motivated.*

*79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar [Pankaj D. Suthar v. State of Gujarat, (1992) 1 Guj LR 405] and N.T. Desai [N.T. Desai v. State of Gujarat, (1997) 2 Guj LR 942] and clarify the judgments of this Court in Balothia [State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221 : 1995 SCC (Cri) 439] and Manju Devi [Manju Devi v. Onkarjit Singh*

*Ahluwalia, (2017) 13 SCC 439 : (2017) 4 SCC (Cri) 662] ;"*

12. The said judgment of ***Subhash Kashinath Mahajan*** (supra) was again visited by the Supreme Court in case of ***Union of India vs. State of Maharashtra and others, (2020) 4 SCC 761,*** and thereafter again was revisited by Three Judges' Bench in case of Prithvi Raj Chauhan (supra). The Supreme Court in case of ***Prithvi Raj Chauhan*** (supra), overruled certain portion of the judgment of ***Subhash Kashinath Mahajan*** (supra). Relevant paragraphs and findings of the ***Prithvi Raj Chauhan*** (supra) case read as follows:

*"9.Concerning the provisions contained in Section 18A, suffice it to observe that with respect to preliminary inquiry for registration of FIR, we have already recalled the general directions (iii) and (iv) issued in Dr. Subhash Kashinath's case (supra). A preliminary inquiry is permissible only in the circumstances as per the law laid down by a Constitution Bench of this Court in Lalita Kumari v. Government of U.P., (2014) 2 SCC 1, shall hold good as explained in the order passed by this Court in the review petitions on 1.10.2019 and the amended provisions of Section 18A have to be interpreted accordingly.*

*10 The Section 18A(i) was inserted owing to the decision of this Court in Dr. Subhash Kashinath (supra), which made it necessary to obtain the approval of the appointing authority concerning a public servant and the SSP in the case of arrest of Accused persons. This Court has also recalled that direction on Review Petition (Crl.) No. 228 of 2018 decided on 1.10.2019. Thus, the provisions which have been made in Section 18A are rendered of academic use as they were enacted to take care of mandate issued in Dr. Subhash Kashinath (supra) which no more prevails. The provisions were already in Section 18 of the Act with respect to anticipatory bail*

*11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions.*

*12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.*

*.....*

*33. I would only add a caveat with the observation and emphasise that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.*

*34. It is important to reiterate and emphasize that unless provisions of the*

*Act are enforced in their true letter and spirit, with utmost earnestness and dispatch, the dream and ideal of a casteless society will remain only a dream, a mirage. The marginalization of scheduled caste and scheduled tribe communities is an enduring exclusion and is based almost solely on caste identities. It is to address problems of a segmented society, that express provisions of the Constitution which give effect to the idea of fraternity, or bandhutva (बन्धुत्व) referred to in the Preamble, and statutes like the Act, have been framed. These underline the social - rather collective resolve-of ensuring that all humans are treated as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams. The question which each of us has to address, in everyday life, is can the prevailing situation of exclusion based on caste identity be allowed to persist in a democracy which is committed to equality and the Rule of law? If so, till when? And, most importantly, what each one of us can do to foster this feeling of fraternity amongst all Sections of the community without reducing the concept (of fraternity) to a ritualistic formality, a tacit acknowledgment, of the "otherness" of each one's identity."*

13. It is settled law that when the words of a statute are clear and unambiguous, Courts must give effect to the legislative intent/literal interpretation. In this context, the wording of the State amendments leaves no room for judicial discretion in granting anticipatory bail for offences punishable by death sentence. The prohibition is absolute and does not allow for exceptions based on the nature of the offence or the facts of the case. The Supreme Court in case of ***Gurudevdatta VKSSS Maryadit and others v. State of Maharashtra and others, (2001) 4 SCC 534*** held:

*"26. ....it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute...."*

In the case of ***Raghunath Rai Bareja and another vs. Punjab National Bank and others, (2007) 2 SCC 230,*** the Supreme Court held :

*"58. We may mention here that the literal rule of interpretation is not only followed by judges and lawyers, but it is also followed by the layman in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say*

*and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean."*

A five Judges Bench of the Supreme Court in the case of ***Sachidananda Banerjee, Assistant Collector of Customs, Calcutta vs. Sitaram Agarwala and another, 1965 SCC OnLine SC 45,*** has held that:

*"The rule of construction of such a clause creating a criminal offence is well settled. The following passage from the judgement of the Judicial Committee in The Gauntlet [(1872) 4 CP 184 at p. 191] may be quoted:*

*"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any instrument."*

*The clause, therefore, must be construed strictly and it is not open to the court to strain the language in order to read a casus omissus. The court cannot fill up a lacuna : that is the province of the legislature.* ***The second rule of construction equally well settled is that a court cannot construe a section of a statute with reference to that of another unless the latter is in pari materia with the former. It follows that decisions made on a provision of a different statute in India or elsewhere will be of no relevance unless the two statutes are in pari materia. Any deviation from this rule will destroy the fundamental principle of construction, namely, the duty of a court is to ascertain the expressed intention of the legislature.*** *" (emphasis added)*

Again a five Judges Bench of the Supreme Court in ***A.R. Antulay vs. Ramdas Sriniwas Nayak and another, (1984) 2 SCC 500,*** has held that:

*"18. It is a well-established canon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience, nor does any canon of construction permit the court to read the section in such manner as to render it to some extent otiose."*

14. A bare perusal of the aforesaid judgments clearly show that in special facts and circumstances, Supreme Court gave a different interpretation to Section 18 of the 1989 Act. Said Section 18 is not at all pari materia to Section 438 of Cr.P.C. and hence, interpretation given to Section 18 of the 1989 Act cannot be applied to Section 438 of Cr.P.C. Neither any facts or material is placed nor any submissions are made by

the applicant to show that Section 18 of the 1989 Act is pari materia to Section 438 of Cr.P.C.

15. In the present case, the State amendment explicitly prohibits anticipatory bail for offences punishable by death sentence. The statutory bar is absolute. It is not for the Courts to rewrite the law or create exceptions to a legislative mandate that is unequivocal. While the Courts are the guardians of individual liberties, they are also bound to uphold the rule of law and respect the boundaries set by the legislature.

16. The argument that the nature of the offence should be considered in determining whether anticipatory bail can be granted, despite the statutory prohibition, is untenable. Such an approach would effectively render the legislative bar meaningless and open the door to judicial overreach.

17. Any perceived hardship or injustice that may arise from the strict application of the statutory bar is a matter for the legislature to address through amendment. It is not for the Courts to fill perceived gaps in the law by exercising discretion contrary to the express provisions of the statute. However, as settled by the Supreme Court in the case of ***Prithvi Raj Chauhan*** (supra), the Court in its inherent jurisdiction under Section 482 Cr.P.C. or under Article 226/227 of the Constitution of India can still grant interim protection from arrest if prima facie, the offences alleged are not made out from the contents of the complaint. Further, even an interim bail can be granted by a Court, in appropriate cases, pending a regular bail application.

18. In light of the clear and unequivocal wording of Section 438 of the Cr.P.C., which prohibits filing of anticipatory bail application in cases where the offence is punishable by death sentence, this Court is of the opinion that no judicial discretion can be exercised to entertain anticipatory bail application in such cases.

19. The answer to the question referred to this Bench is, therefore, in the negative. The Courts cannot entertain anticipatory bail application in cases where the State amendment prohibits it.

20. The reference is answered accordingly. The matter is directed to be placed before the learned Single Judge, who will decide the matter in accordance with the observations made by this Court.

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**(2024) 10 ILRA 755**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 18.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Criminal Misc. Bail Application No. 2171 of 2024

**Yash Pratap Singh ...Applicant**
**Versus**
**State of U.P. ...Opposite Party**

**Counsel for the Applicant:**
Manish Kumar Tripathi, Aditya Vikram Singh

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

**A. Criminal Law-Code of Criminal Procedure, 1973-Sections 309 & 439-** Trial Court has conducted examination of the victim on 6 dates ranging between a period of 2½ months, whereas examination of a witness is to be recorded on a day-to-day basis- When the victim was fully supporting the prosecution case,

neither there was any occasion for the public prosecutor to make a request for declaring him to be hostile nor was there any occasion for the trial Court to declare him to be hostile. It prima facie shows that the public prosecutor has acted under influence of the accused persons so as to give undue advantage to them- The approach adopted by the trial Court in accepting the request of the public prosecutor to declare the victim to be hostile, even when he was fully supporting the prosecution case, speaks volume about the conduct of the presiding officer of the Court.

B. Legal Remembrancer / Principal Secretary (Law) is directed to look into this matter and take suitable action against the public prosecutor in the aforesaid case in accordance with law- Sessions Judge, Lucknow is directed to transfer Sessions Trial from the Court of Additional Sessions Judge, Court No. 16, Lucknow to some other Court to ensure that the trial is conduct fairly, without any undue influence at the behest of the accused persons.

**Bail application rejected**. (E-15)

**List of Cases cited:**

1. Raj Deo Sharma (II) Vs St. of Bihar: (1999) 7 SCC 604

2. St. of U.P. Vs Shambhu Nath Singh: (2001) 4 SCC 667

3. Doongar Singh Vs St. of Raj.: (2018) 13 SCC 741

4. Ramesh Vs St. of Har.: (2017) 1 SCC 529

5. Jaikun Nisha Vs St. of U.P., 2024 SCC OnLine All 5337

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

1. Heard Sri Manish Kumar Tripathi, the learned counsel for the applicant and Sri Anant Pratap Singh, the learned AGA for the State and perused the records.

2. This is the second application seeking release of the applicant on bail in Case Crime No. 668 of 2022, under Sections 147, 148, 307, 323, 504, 506 IPC, Police Station Vibhuti Khand, District Lucknow.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 16.10.2022 at 16:38 hrs. against three named persons, including the applicant, and an unknown person stating that all the accused persons, carrying hockey-stick, baseball-bat and iron rod, had attacked the informant's nephew, causing serious injury to him. The injured was being treated in the Intensive Care Unit of Medanta Hospital.

4. The State has filed a counter-affidavit against the first bail application No. 14054 of 2022, annexing therewith the complete medical-papers of the victim showing that initially he was taken to Ram Manohar Lohia Hospital, where he was managed conservatively and thereafter he was shifted to Medanta Hospital. He had complaints of pain and swelling over left eye, pain and swelling over left cheek and contused lacerated wound on head occipital region. He was bleeding from left ear.

5. In the statement of the victim recorded under section 161, Cr.P.C. he categorically stated that co-accused Aryan Srivastava had started arguing with him and the applicant hit him with a baseball bat. Aryan Srivastava has been granted bail by means of an order dated 05.11.2022 passed by the Sessions Judge, Lucknow.

6. The first application No. 14054 of 2022 was rejected by means of an order dated 26.07.2023 after taking into consideration the nature of allegations, the nature of injury suffered by the victim and the recovery made from the applicant. This Court had also considered the fact that the

applicant is a 19 years old student, who was preparing for competitive examination, he had appeared in NEET (UG), 2022 Examination and he had achieved good percentage. This Court had also considered the fact that the only allegation against the co-accused Aryan Srivastava was that he had started an argument with the victim, whereas there is a specific allegation against the applicant that he had assaulted the victim with a baseball-bat on his head, therefore, the applicant is not entitled to be released on bail on the ground of parity.

7. The second application has been filed on the ground that the victim has not supported the prosecution case in his statement recorded by the trial Court. A copy of the statement of the victim has been brought on record along with a supplementary affidavit dated 11.09.2024. A perusal of the statement of the victim, who has been examined as PW-2, indicates that the victim has fully supported the prosecution case in his examination-in-chief which runs into more than five pages. However, when the victim was fully supporting the prosecution case and not even two pages of examination-in-chief of the victim had been recorded, the learned public prosecutor made a request for declaring the witness to be hostile and strangely, the trial Court accepted this request. Even after accepting the request for declaring the victim to be hostile, his examination-in-chief continued to be recorded and he kept on fully supporting the prosecution case in his examination-in-chief recorded on 15.05.2024. Thereafter PW-2 was cross-examined by the counsel for co-accused Nishant which remained inconclusive and it was resumed after 15 days on 30.05.2024 and in that part of the cross-examination, no major discrepancy came to light in the statement of the victim.

8. Further cross-examination of the victim was conducted on 11.06.2024, i.e. after 11 days and PW-2 was cross-examined by the counsel for the applicant on 12.06.2024. During this cross-examination, the victim changed his stand and stated that although the applicant was present at the place of incident, he had not assaulted him. Further cross-examination of the victim was recorded on 08.07.2024, i.e. after 25 days, when he was cross-examined by the counsel for co-accused Anshuman Mishra and then it was resumed on 31.07.2024, i.e. after 23 days.

9. The learned counsel for the applicant stated that as the victim has turned hostile, the applicant is entitled to be released on bail. He has further submitted that all the other co-accused persons have already been granted bail.

10. Per contra, the learned AGA has vehemently opposed the bail application and he has submitted that the co-accused persons have been granted bail prior to rejection of the first bail application of the applicant and this fact was considered by this Court while rejecting the first bail application of the applicant and this Court was of the view that the role assigned to the applicant was not at par with the role assigned to the other co-accused persons and, therefore, the applicant is not entitled to be granted bail on the ground of parity and I find force in this submission.

11. So far as the ground of the victim turned hostile is concerned, the learned AGA has submitted that a bare perusal of the statement of the victim recorded by the trial Court indicates that the victim was fully supporting the prosecution case in his statement recorded on 15.05.2024 yet the Public Prosecutor was in an apparent haste

to support the accused persons and, therefore, he made a request to the Court whilst the victim was supporting the prosecution case to declare him hostile and strangely this request of the public prosecutor was accepted by the trial Court. It indicates that the prosecution is being influenced by the accused persons even when the applicant is in custody and in case the applicant is released on bail, the probability of prosecution witnesses and conduct of trial being influenced by the accused persons will increase many folds.

12. In the present case, the trial Court has conducted examination of the victim on 6 dates ranging between a period of 2½ months, whereas examination of a witness is to be recorded on a day-to-day basis.

13. Section 309 Cr.P.C. provides as follows:—

***"309. Power to postpone or adjourn proceedings.—***

***(1) In every inquiry or trial the proceedings shall be continued from day-to- day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:*** *Provided that when the inquiry or trial relates to an offence under Section 376, Section 376-A, Section 376-AB, Section 376- B, Section 376-C, Section 376-D, Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.*

*(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:*

*Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:*

*Provided further that* ***when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:***

*Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:*

*Provided also that—*

*(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;*

*(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;*

***(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.***

*Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a*

*remand, this is a reasonable cause for a remand.*

*Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.*

(Emphasis added)

14. In **Raj Deo Sharma (II) v. State of Bihar:** (1999) 7 SCC 604, the Hon'ble Supreme Court stated that "We cannot permit the trial Court to flout the said mandate of Parliament unless the Court has very cogent and strong reasons. ***No Court has permission to adjourn examination of witnesses who are in attendance beyond the next working day"*** (emphasis added).

15. In **State of U.P. v. Shambhu Nath Singh:** (2001) 4 SCC 667, the Hon'ble Supreme Court explained the legislative mandate contained in Section 309 Cr.P.C. in the following words:—

*"11. The first sub-section mandates on the trial Courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the Court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the Court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the Court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the Court. In such situation the Court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,*

***"provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing".***

(emphasis in original)

12. Thus, the legal position is that once examination of witnesses started, the Court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The Court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in Court, as the requirement then is that the Court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the Court to adjourn the case without examination of witnesses who are present in Court.

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial Courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments

are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code."

16. This High Court issued a Circular Letter No. 20/Admin. 'G-II' Dated 14.05.2015, which provides as follows:—

| | |
|---|---|
| 1. C.L. No. 152/VIII-b13, 28.10.1974<br>2. C.L. No. 58-50/Admn „G", 23.11.1992<br>3. C.L. No. 54/VIIb-18, 06.12.2000<br>4. C.L. No. 8/VIIb-18, 07.02.2000<br>5. C.L. No. C-72/1990, 26.07.1990 | In continuation of marginally quoted Court's earlier Circular Letters and in the light of Hon'ble Apex Court's orders passed in the cases of Akil alias Javed VS. State of NCT of Delhi, reported in 2012 (11) SCALE 709, in paras 27 to 36: State of UP Vs. Shambhu Nath Singh and others, reported in 2001 (4) SCC 667; Raj Deo Sharma Vs. State of Bihar, 1999 Cr.L.J. 4541 and Lt. Col. SJ. Chaudhari Vs. State (Delhi) Administration, (1984) 1 SCC 722, I am directed to state that the High Court is noticing disturbing trend in criminal trials, where Sessions cases are being adjourned, in some cases to suit convenience of counsels or because the prosecution or the defence is not fully ready and considers it necessary to draw the attention of all the Sessions Judges and Additional Sessions Judges once again to the provision of Section 309 of the Code of Criminal Procedure, 1973 and directs 73 them to adhere strictly to these provisions and instructions given below while granting adjournment in Sessions Cases: |

*(1) Trial Judges are reminded of the need to comply with Section 309 of the Code in letter and spirit.*

*(2) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded: (Section 309 (1) Cr.P.C.]*

* * *"

17. In **Doongar Singh v. State of Rajasthan:** (2018) 13 SCC 741, the Hon'ble Supreme Court reiterated that: -

*"8. In spite of repeated directions of this Court, the situation appears to have*

*remained unremedied. We hope that the Presiding Officers of the trial Courts conducting criminal trials will be mindful of not giving such adjournments after commencement of the evidence in serious criminal cases. We are also of the view that it is necessary in the interest of justice that the eyewitnesses are examined by the prosecution at the earliest.*

* * *

*10. To conclude:*

*10.1. The trial Courts must carry out the mandate of Section 309 CrPC as reiterated in judgments of this Court, inter alia, in State of U.P. v. Shambhu Nath Singh, (2001) 4 SCC 667, Mohd. Khalid v. State of W.B.: (2002) 7 SCC 334 and Vinod Kumar v. State of Punjab, (2015) 3 SCC 220.*

*10.2. The eyewitnesses must be examined by the prosecution as soon as possible.*

*10.3. Statements of eyewitnesses should invariably be recorded under Section 164 CrPC as per procedure prescribed thereunder."*

18. In **Ramesh v. State of Haryana:** (2017) 1 SCC 529, the Hon'ble Supreme Court expressed its concern about the culture of witnesses turning hostile, in the following words: -

*"39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.*

* * *

*44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:*

*(i) Threat/Intimidation.*

*(ii) Inducement by various means.*

*(iii) Use of muscle and money power by the accused.*

*(iv) Use of stock witnesses.*

*(v) Protracted trials.*

*(vi) Hassles faced by the witnesses during investigation and trial.*

*(vii) Non-existence of any clear-cut legislation to check hostility of witness.*

*45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said:"witnesses are the eyes and ears of justice". When the witnesses are not able to depose correctly in the Court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to*

*avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 as well."*

19. In **Jaikun Nisha v. State of U.P.,** 2024 SCC OnLine All 5337, this Court has taken into consideration that aforesaid provisions of law and has held that the long period consumed by the trial Court in recording the statement of a witness, during which period the witness sided with the accused, is very disturbing. Cross-examination of prosecution witnesses needs to be recorded on a day-to- day basis to avoid the possibility of witnesses being influenced.

20. What prima facie appears from the material available before the Court at this stage is that three named accused persons, including the applicant and one unknown person, carrying hockey stick, baseball bat and iron rods had attacked the victim causing serious injuries to him and he had to remain admitted to Intensive Care Unit of Medanta Hospital. The victim was fully supporting the prosecution case in his statement recorded on 15.05.2024 yet the public prosecutor made a request for declaring the victim to be hostile, which request was strangely accepted by the trial Court.

21. Although Section 309 Cr.P.C. provides that proceedings should continue from day-to-day until all witnesses have been examined yet the statement of the victim has been recorded on 15.05.2024, 11.06.2024, 12.06.2024, 08.07.2024 and 31.07.2024. Apparently, the victim has supported the prosecution case in his statement recorded on all the dates, except in the cross examination conducted by the Counsel for the applicant on 12.06.2024.

22. The long time consumed by the trial Court in recording statement of the victim and adjournment the case on numerous occasions for long durations has given the accused persons an opportunity to influence the victim.

23. When the victim was fully supporting the prosecution case, neither there was any occasion for the public prosecutor to make a request for declaring him to be hostile nor was there any occasion for the trial Court to declare him to be hostile. It prima facie shows that the public prosecutor has acted under influence of the accused persons so as to give undue advantage to them.

24. The approach adopted by the trial Court in accepting the request of the public prosecutor to declare the victim to be hostile, even when he was fully supporting the prosecution case, speaks volume about the conduct of the presiding officer of the Court.

25. When the victim is being influenced at the behest of the accused persons even while the applicant is in custody, the possibility of the witnesses being influenced in case of release of the applicant on bail is very grave. In these circumstances, this Court finds no good ground to enlarge the applicant on bail.

26. The second bail application of the applicant is accordingly **rejected**.

27. Keeping in view the aforesaid conduct of the public prosecutor in making a request for declaring PW-2 in Sessions Case No. 747 of 2023 in the Court of

Additional Sessions Judge, Court No. 16, Lucknow to be hostile even when he was fully supporting the prosecution case, the Legal Remembrancer / Principal Secretary (Law) is directed to look into this matter and take suitable action against the public prosecutor in the aforesaid case in accordance with law.

28. Further, keeping in view the fact that the presiding officer of the Court of the Additional Sessions Judge, Court No. 16, Lucknow has accepted the request made by the public prosecutor and declared PW-2 to be hostile even while PW-2 was fully supporting the case and he has fixed numerous dates for cross-examination of the PW-2 at long intervals, during which the victim changed his statement to support the applicant, the Sessions Judge, Lucknow is directed to transfer Sessions Trial No. 747 of 2023 from the Court of Additional Sessions Judge, Court No. 16, Lucknow to some other Court to ensure that the trial is conduct fairly, without any undue influence at the behest of the accused persons.

29. The Senior Registrar of this Court is directed to communicate this order to the Legal Remembrancer/Principal Secretary (Law) and the Sessions Judge, Lucknow to ensure its compliance. Let a copy of this order be sent to the Hon'ble Administrative Judge of Lucknow Judgeship also for information.

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**(2024) 10 ILRA 763**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 03.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Matters Under Article 227 No. 4668 of 2024

**Ram Prakash Giri ...Petitioner**
**Versus**
**Rakesh Giri & Ors. ...Respondents**

**Counsel for the Petitioner:**
Hemant Kumar Mishra, Abhishek Mishra, Arti Ganguly

**Counsel for the Respondents:**

**A. Civil Law - Constitution of India,1950-Article 227-Civil Procedure Code,1908-Order 39 rule 2-A, section 80-the petitioner filed a case challenging the validity of an interim order passed by Civil Judge-the interim order arose under Order 39 Rule 2-A of CPC in a pending suit –The Civil judge ruled that the petitioner did not comply with the mandatory section 80 CPC, which requires a notice to be served before instituting legal action against public servants or the government-The High court ruled that the mandatory procedure u/s 80 CPC does not apply if the suit is against individuals acting in their private capacity-The interim order was set aside-the civil judge was directed to proceed further with the case while issuing notices appropriately as per law.(Para 1 to 10)**

**The writ petition is allowed.** (E-6)

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

1. याचिकाकर्ता के विद्वान अधिवक्ता श्री हेमन्त कुमार मिश्रा को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 227 के अन्तर्गत प्रस्तुत इस याचिका द्वारा याचिकाकर्ता ने विद्वान सिविल जज (अवर खंड), गोंडा द्वारा प्रकीर्ण वाद संख्या 543 सन 2024 में पारित आदेश दिनांक 09.09.2024 की वैधता को चुनौती दी है।

3. उपरोक्त प्रकीर्ण वाद याचिकाकर्ता द्वारा धारा 39 नियम 2-क व्यवहार प्रक्रिया संहिता के अन्तर्गत प्रस्तुत प्रार्थना पत्र के आधार पर योजित हुआ। विद्वान सिविल जज (अवर खंड) ने मुंसरिम की आख्या का अवलोकन किया, जिसमें यह कहा गया कि याचिकाकर्ता ने धारा 80 व्यवहार प्रक्रिया संहिता के प्राविधानों का अनुपालन नहीं किया है। याचिकाकर्ता ने उक्त आख्या के विरुद्ध अपनी आपत्ति में कहा कि विपक्षी संख्या 6, 7 तथा ४ को उनके नामों से उनके निजी व्यक्तित्व के रूप में पक्षकार बनाया गया है तथा वे राज्य सरकार के रूप में पक्षकार नहीं है। अतः धारा 80 व्यवहार प्रक्रिया संहिता के प्राविधान प्रकरण में लागू नहीं होंगे।

4. विद्वान सिविल जज ने आलोच्य आदेश में यह कहा कि विपक्षी संख्या 6, 7 तथा 8 लोक सेवक हैं तथा उनके द्वारा कथित रूप से किए गए कृत्य लोक सेवक के रूप में किए गए कृत्य प्रतीत होते हैं। अतः धारा 80 व्यवहार प्रक्रिया संहिता की नोटिस निर्गत किया जाना आवश्यक है।

5. आलोच्य आदेश दिनांक 09.09.2024 द्वारा विद्वान सिविल जज (अवर खंड), गोंडा ने बिना विपक्षीगण को धारा 80 व्यवहार प्रक्रिया संहिता की नोटिस दिए हुए प्रार्थना पत्र को अंगीकृत करने से अस्वीकार किया है। अंगीकरण के स्तर पर मात्र प्रार्थी को सुना जाना होता है तथा विपक्षी को इस स्तर पर सुनवाई का कोई अधिकार प्राप्त नहीं है। चूँकि अंगीकरण के स्तर पर पारित आदेश से व्यथित होकर याचिकाकर्ता ने संविधान के अनुच्छेद 227 के अन्तर्गत यह याचिका प्रस्तुत की है, इस याचिका में भी विपक्षीगण को सुनवाई हेतु नोटिस किए जाने की कोई आवश्यकता नहीं है। अतः विपक्षीगण को नोटिस के बिना यह याचिका अंतिम रूप से निस्तारित की जा रही है।

6. याचिकाकर्ता के विद्वान अधिवक्ता ने उपरोक्त आदेश दिनांक 09.09.2024 की वैधता को चुनौती देते हुए तर्क किया कि धारा 80 व्यवहार प्रक्रिया संहिता के प्राविधान मात्र सरकार के विरुद्ध "वाद" प्रस्तुत किए जाने की स्थिति में लागू होते हैं। धारा 80 व्यवहार प्रक्रिया संहिता में "वाद" का तात्पर्य मूल वाद से है। धारा 39 नियम 2-क व्यवहार प्रक्रिया संहिता के अन्तर्गत प्रस्तुत किया गया प्रार्थना पत्र "वाद" की श्रेणी में नहीं आता है।

7. धारा 39 नियम 2-क व्यवहार प्रक्रिया संहिता के प्राविधान अस्थाई निषेधाज्ञा की उल्लंघन की स्थिति में न्यायालय को उल्लंघनकर्ता को दंडित करने की शक्ति प्रदान करती है। न्यायालय द्वारा पारित अस्थाई निषेधाज्ञा का उल्लंघन निश्चित रूप से अवैधानिक रूप से किया जाने वाले कृत्य होगा तथा किसी भी न्यायालय के आदेश का उल्लंघन किसी लोक सेवक द्वारा लोक सेवा सम्बन्धित दायित्व के निर्वहन में किया गया कृत्य नहीं कहा जा सकता है।

8. तदनुसार इस न्यायालय का यह स्पष्ट अभिमत है कि धारा 80 व्यवहार

प्रक्रिया संहिता के प्राविधान धारा 39 नियम 2-क व्यवहार प्रक्रिया संहिता के अन्तर्गत प्रस्तुत किए गए प्रार्थना पत्र पर लागू नहीं होंगे।

9. उपरोक्त समीक्षा के आलोक में विद्वान सिविल जज (अवर खंड), गोंडा द्वारा प्रकीर्ण वाद संख्या 543 सन 2024 में पारित आदेश दिनांक 09.09.2024 विधि में संधार्य नहीं है तथा निरस्त किए जाने योग्य है।

10. तदनुसार, याचिका **स्वीकार** की जाती है। वाद संख्या 543 सन 2024 में पारित आदेश दिनांक 09.09.2024 निरस्त किया जाता है।

11. विद्वान अपर सिविल जज (अवर खंड) गोंडा को यह निर्देश दिया जाता है कि याचिकाकर्ता द्वारा आदेश 39 नियम 2-क व्यवहार प्रक्रिया संहिता के अन्तर्गत प्रस्तुत प्रकीर्ण वाद संख्या 543 सन 2024 में पक्षों को नोटिस निर्गत करके विधिनुसार अन्तिम कार्यवाही करना सुनिश्चित करें।

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**(2024) 10 ILRA 765**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE ARVIND SINGH SANGWAN, J.**
**THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.**

Criminal Appeal No. 7317 of 2018
And
Criminal Appeal No. 7326 of 2018

**Bhagwan Dei** **...Appellant**
**Versus**
**State of U.P.** **...Respondent**

**Counsel for the Appellant:**
Nagendra Bahadur Singh, Sudarshan Singh

**Counsel for the Respondent:**
G.A.

**Criminal Law - Criminal Procedure Code, 1973 - Section – 313 - Indian Penal Code, 1860 – Sections 34 & 302** - Appeals – against Conviction and Sentence – FIR - offence of Murder – investigation – victim died during treatment – Chargesheet – cognizance – sentence – Evaluation of Evidence – credibility of witness testimonies and the admissibility of the dying declaration - court finds that - the applicants were convicted for the murder of deceased, who died from service burn injuries – the prosecution alleged that the appellants, along with the victim's husband, were responsible for her death – however, husband was found innocent, and the evidence against the appellants was deemed insufficient – the prosecution failed to prove the charges against the appellants - held – appellants acquitted of charges due to lack of credible evidence linking them to the crime – prosecution witnesses not being reliable or trustworthy – dying declaration deemed suspicious and not admissible – impugned judgment set aside – present appeal is allowed – direction issued for releasing them accordingly. (Para – 62, 63, 64)

**Appeals Allowed.** (E-11)

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. The present appeals have been filed challenging the judgment of conviction and order of sentence dated 13.11.2018, passed by VIth Additional Sessions Judge/Special Judge, Prevention of Corruption (UPSEB), Bareilly in Sessions Trial No. 254 of 2013 by which the appellants were held guilty of offence punishable under Section 302 IPC read with Section 34 of IPC and were sentenced to imprisonment for life with fine of Rs. 20,000/- each and in case of default in payment of fine, to further undergo six months' imprisonment.

2. Heard Sri Vinay Kumar Tripathi, learned counsel for the appellant and learned A.G.A. for the State.

3. Paper book is ready. LCR is requisitioned. With the assistance of learned Advocates, the entire trial court record as well as the paper book are re-scrutinized and the evidence is re-appreciated.

4. The Supreme Court, in S.L.P. Criminal No.193 of 2024 vide order dated 2.1.2024 has directed to dispose of the present appeals expeditiously.

5. The FIR was registered on a complaint given by informant PW-1, Sanjeev Kumar which read as under:

*"श्रीमान थाना प्रभारी आवला*

*महोदय*

*निवेदन इस प्रकार है कि मेरी मझली बहन कि शादी लगभग 7-8 वर्ष पूर्व ग्राम पैगा तह० आवला जि० बरेली में बलवीर सिंह पुत्र भानू प्रताप सिंह के साथ मेरे पिता जी ने सम्पन्न की थी। शादी में 3 लाख रू० नगद लगभग 4 लाख का समान दिया था परन्तु बलवीर सिंह फौज में कार्यरत है। इसलिए वह किसी को नहीं समझता है। जब घर पर आता है तो शराब पीकर अपनी पत्नी और गांव वालो के साथ झगड़ा करता है। और अपनी पत्नी डिंम्पल से बार बार पैसो एवं रूपया अपने मायके से लाने को कहता है। हम लोगो ने इसको कई बार आर्थिक एव धन की सहायता की परन्तु यह शराब पीकर बार बार कई बार मेरी बहन को मारने का प्रयास किया आज दिनांक 14.5. 2014 को बलवीर के पिता न होने पर आज मेरी बहन को बलवीर सिंह फौजी, की मॉ एवं उसकी छोटी बहन कान्ति एवं फौजी के भाई नरोत्तम ने मिलकर मेरी बहन को मारा पीटा और बाद में तेल छिड़ककर आग लगा दी इस समय मेरी बहन मृत्यु और जिन्दगी से जूझ रही है।*

*अतः आप से निवेदन है कि हम भाईयॉ(का०फटा) बहन के प्रति होने वाले अत्याचार को देखते हुए उपरोक्त लोगो पर कार्यवाही करने की कृपा करे।*

*आपकी महान कृपा होगी।*

*लेखक*

*राजीव कुमार*

*प्रार्थि संजीव कुमार s/o राम चन्द्र*

*नि. खुली थाना भमोरा*

*इक्ज क- 1 जिला बरेली"*

6. Thereafter, the chik FIR was registered. The victim Dimple was admitted in Ishan Hospital, Bareilly where statement of victim was recorded by PW-9, Laxmi Shankar Singh, Executive Magistrate, which read as under:

*"Patient Dimple can*
*Give statement*

*ह० अप०*

*14.5.14 8.30 पी.एम.*
*Dr. Kaushal Kumar*
*Ms. (Surg) M.Ch*
*(Plastic Surqury)*

*डिम्पल w/o बलवीर निवासी पैगा थाना ऑवला, जिला बरेली जो इशान*

अस्पताल बरेली में आकस्मिक वार्ड में भर्ती है ने मृत्युपूर्व बयान किया कि मेरा पती बलवीर शराबी है तथा रोज शराब पीकर मुझे मारता- पीटता है तथा खाने नही देता है। आज दिनांक 14.5.14 को समय लगभग 6.00 बजे मेरा पती शराब पीकर मुझे मारने पीटने लगा। उसी बात पर झगड़ा हुआ। मेरे पती बलवीर देवर नरोत्तम तथा अम्बरीश तथा सास भगवान देई ने मिलकर मिट्टी तेल छिड़ककर जला दिया। शादी हुए लगभग 9 साल हो गये।

ह० अप०

शील अस्पष्ट

बयान सुनकर तस्दीक किया।

14.5.14 समय 8.35

RTI डिम्पल

बयान लिखना 8.30 पी.एम. पर प्रारम्भ किया। बयान 8.35. पी.एम. पर पूर्ण हुआ।

ह० लक्ष्मी शंकर सिंह

ह० अप०

ए.सी.एम. 1

शील अस्पष्ट

14.5.14 समय 8.35 पी.एम.

प्रदर्श क - 8

Pt remind
conscious during
statement

ह०अप०

14.5.14 8.30 पी.एम.

Dr. Kaushal Kumar
Ms. (Surg) M.Ch
(Plastic Surqry)

प्रदर्श क - 8"

7. The victim died during her treatment on 18.5.2014 in the same hospital. After her death, the Panchayatnama was prepared and the dead body was sent for post-mortem examination. After post-mortem was conducted, the Investigating Officer recorded the statements of the witnesses and also effected recording of certain articles from the place of occurrence. Finally, the charge-sheet was submitted before the trial court.

8. The trial court framed the charges against both the appellants- Bhagwan Dei and Narrotam. The order framing charges is reproduced as under:

**"आरोप**

"मैं, मृदुलेश कुमार सिंह, अपर सत्र न्यायाधीश, कक्ष सं०ः 13. बरेली आप अभियुक्तगण भगवानदेई एवं नरोत्तम पर निम्न आरोप लगाता हूँः-

1- यह कि दिनोंकः 14.05 2014 से लगभग 7-8 वर्ष पूर्व वादी संजीव कुमार की मझली बहन डिंपल की शादी बलवीर सिंह के साथ होने के बाद जब वह विदा होकर वहद ग्राम ग्राम पैगा थाना आँवला जनपद बरेली अपनी ससुराल आप लोगों के यहाँ आयी तो आप लोगों ने डिंपल को दहेज में रूपये पैसे लाने के लिए कहा। उक्त दहेज की माँग पूरी न होने पर आप लोगों ने डिंपल को शारीरिक व मानसिक रूप से प्रताडित किया। इस प्रकार आपने ऐसा अपराध कारित किया जो धारा 498 ए

*भा०द०सं० के अन्तगत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।*

*2- यह कि दिनॉकः 14.05.2014 को किसी समय उपरोक्त स्थान पर आप लोगो ने आपस में एक राय होकर वादी संजीव कुमार की मझली बहन डिंपल को मारपीट कर उसके ऊपर तेल छिड़ककर आग लगा दी जिससे डिंपल की ईशन अस्पताल में उपचार के दौरान मृत्यु हो गयी। इस प्रकार आप लोगों ने डिंपल की हत्या कारित की। इस प्रकार आपने ऐसा अपराध कारित किया जो धारा-302/34 भा०द०सं० के अन्तर्गत दण्डनीय अपराध है जो इस न्यायालय के प्रसंज्ञान में है।*

*3- यह कि दिनॉकः 14.05.2014 से लगभग 7-8 वर्ष पूर्व वादी संजीव कुमार की मझली बहन डिंपल की शादी बलवीर सिंह के साथ होने के बाद जब वह विदा, होकर वहद ग्राम ग्राम पैगा थाना ऑवला जनपद बरेली अपनी ससुराल आप लोगों के यहाँ आयी तो आप लोगों ने डिंपल को दहेज में रूपये पैसे लाकर देने हेतु दुष्प्रेरित किया। इस प्रकार आपने ऐसा अपराध कारित किया जो धारा-3 दहेज प्रतिषेध अधिनियम के अन्तर्गत दण्डनीय है जो इस न्यायालय के प्रसंज्ञान में है।*

*4- यह कि दिनांकः 14 05 2014 से लगभग 7-8 वर्ष पूर्व वादी*

*...व कुमार की मझली बहन डिंपल की शादी बलवीर सिंह के साथ होने के बाद जब वह विदा होकर वहद ग्राम ग्राम पैगा थाना आँवला जनपद बरेली अपनी ससुराल आप लोगों के यहाँ आयी तो आप लोगों ने डिंपल को अपने मायके से दहेज में रूपये पैसे लाने की माँग किया। इस प्रकार आपने ऐसा अपराध कारित किया जो धारा -4 दहेज प्रतिषेध अधिनियम के अन्तगत दण्डनीय अपराध है जो इस न्यायालय के प्रसंज्ञान में है।*

*एतद् द्वारा आपको निर्देशित किया जाता है कि उक्त आरोप * के लिए आपका विचारण इस न्यायालय द्वारा किया जायेगा।"*

*Both the accused did not plead guilty and claimed trial.*

9. In prosecution evidence, PW-1, Sanjeev Kumar- informant appeared and the operative part of his statement read as under:

*"संजीव कुमार उम्र लगभग 33 वर्ष पेशा खेती पुत्र श्री रामचन्द्र नि. ग्राम खुलीतार पुर थाना भमौरा जि० बरेली ने सशपथ व्यान किया कि मृतका डिम्पल मेरी मझली बहिन थी। घटना से 7 वर्ष पूर्व श्री बलवीर सिंह फौजी निवासी ग्राम पैगा थाना आंवला के साथ की थी। शादी मे हमने तीन लाख रूपया नकद व चार लाख का सामान दहेज में दिया था। मेरी बहिन डिम्पल शादी के बाद अपनी ससुराल पैंगा मे रही थी। मेरी बहिन फौजी के साथ उसके संयुक्त परिवार मे रही थी। उस परिवार मे पति बलवीर बहिन कान्ती, माँ*

*भगवान देई देवर नरोत्तम दूसरा देवर अमरीश ससुर भानुप्रताप रहते थे। अदालत में इस समय अभियुक्त की माँ भगवान देई हाजिर है। मेरे बहनोई फौज की नौकरी करते है। मेरी बहिन डिम्पल अपनी ससुराल में रहती थी। मेरी बहिन डिम्पल को मेरा बहनोई कभी अपनी नौकरी के स्थान पर लेकर नही गया। छुट्टियों में अथवा छुट्टी लेकर रहने के लिए पैंगा घर पर आता था।*

***मेरे बहनोई का स्वभाव झगडालू किस्म का और जुआ खेलने व शराब पीने का था। व मेरी बहिन अपने परिवार के सदस्यों व गाँव वालो से झगड़ा करता था। मेरे बहनोई फौज मे नौकर होने के कारण कहता था कि उसका कोई कुछ नहीं बिगाड़ सकता है। यह बात वह कई बार कहता था कि पुलिस मेरा कुछ नहीं बिगाड़ सकती कानून मेरा कुछ नहीं बिगाड़ सकता।***

***मेरी बहिन डिम्पल को उन्होने कई बार मारा पीटा और उस से पैसा लाने के लिए बार बार कहता था। कई बार हमने आर्थिक मदद की थी मगर उसके बावजूद भी उसने मार पीट करना व पैसा मांगना जारी रखा।***

***घटना दि० 14.5.14 की है। मेरे बहनोई ने सुबह से ही शराब पी ली थी। शराब पीकर घर आया। मेरी बहिन मसाला पीस रही थी घर में मौजूद भगवान देई, नरोत्तम, अमरीश व बहिन क्रान्ति थे सभी लोग मौजूद थे। पति बलवीर मेरी बहिन से पूछ रहा था कि खाना नही बनाया है। मेरी बहिन के कहा बना तो रही हूँ। इतने में वह आग बबूला हो गया। सिल वटना उठा कर उसने मुँह पर मार दिया मेरी बहिन के दाँत भी टूट गये। मेरी बहिन इन सब लोगों के हाथ जोड़ती रही किसी ने उसको बचाया नही। मेरी बहिन के बाल पकड़ के कमरे के अन्दर मिट्टी का तेल छिड़क कर पति बलवीर ले गया और भगवान देई, देवर नरोत्तम, नन्द क्रान्ति दूसरा देवर अमरीश इन सबने मिलकर मेरी बहिन डिम्पल में आग लगा दी। इस घटना को मेरे भान्जे सचिन मेरी बड़ी? ममता और नरेन्द्र पाल जो ममता का पड़ोसी है। इन लोगों ने देखा व सुना था*** *और उन्होने ही घटना के बारे में मुझे बताया था। मेरी बहिन दि० 14.5.14 को नेम सिंह आदि द्वारा ईशान अस्पताल मे बुरी तरह जली हुई हालत में भर्ती करायी गयी। दि० 14.5.14 को समय करीब 5.30 6.00 बजे के बीच में (शाम को) जलाने व मारपीट की घटना हुई थी। मैने सूचना प्राप्त होने के बाद एक तहरीर अपने भाई राजीव से बोल बोल कर लिखायी थी। गवाह ने पत्रावली मे शामिल कागज सं0 4 क/2 को देखकर कहा कि यह वही तहरीर है जो मेरे बोलने पर मेरे भाई ने लिखी थी। गवाह ने तहरीर 4क/2 को पढकर कहा कि इसमे वही मजमून लिखा है जो मैने बोला था। जब तहरीर पर दस्तखत नही है तो मैने कहा किये होगे। मेरे हस्ताक्षर हडवड़ी मे करने मे रह गये होगें। तहरीर मे मजमून नही लिखा है जो मैने बताया था।*

*इस तहरीर पर प्रदर्श क-1 डाला गया। तहरीर लेकर मै आंवला कोतवाली थाना गया था। तहरीर मैने दीवान जी को दी थी। और थाने पर मुकदमा कायम कराया था।"*

10. In cross-examination, this witness stated that he has given the report to the police as per information given to him by Narendra Pal and his sister Mamta and nephew Sachin. He stated that on the complaint Ex.Ka.1, neither he has signed nor his brother Rajeev who scribed the same has signed.

11. In further cross-examination, he stated that regarding the death of the victim, the police did not obtain his signature on any document and he has given the complaint as informed by the aforesaid three persons.

12. PW-2- Narendra Pal made the following deposition:

*"दि० 14.5.14 की घटना है। मैं अपने खेतो पर से काम करके वापस घर आ रहा था। समय करीब 5 या 5.1/2 बजे का रहा होगा। मै बलवीर के घर के सामने पहुँचा। मैंने बलवीर के घर से बहुत तेज (शोर) को सुना। बलवीर के गेट बाहर वाला अन्दर से बन्द था। लोहे का गेट है। टूटा हुआ है। उसमे से साफ दिखाई देता है। मैंने देखा कि बलवीर नरोत्तम, अमरीश smt भगवानदेई चारो लोग मिलकर लात घुसा से मारपीट कर रहे थे। पड़ोस की ममता भी अपने घर से कूड़ डालने आयी थी। वह भी शोर सुनकर आयी वह भी शोर सुनकर रूक गयी डिम्पल सिल वटटा पर कुछ पीस रही थी। बलवीर डिम्पल के बाल पकड़कर खिचते हुए अन्दर ले गया। बाकी लोग बलवीर के पीछे पीछे अन्दर चले गये। फिर इन लोगो ने मिट्टी का तेल छिड़ककर आग लगा दी। मैंने दरवाजे पर आवाज लगायी कि सालो उसे क्या मार डालोगे। मेरे शोर पर बहुत से लोग इक्टठे हो गये। शोर सुनकर सभी मुल्जिमान बाहर वाला गेट खोलकर जिस पर हम लोग खड़े थे। खोलकर निकल गये।*

*इसके बाद हम सभी लोग अन्दर चले गये थे। सभी नें मिलकर डिम्पल को आग बुझायी थी। उस कमरे में डबल बेड के वरावर मे 2 लीटर पेप्सी की बोतल मे लगभग 100 ग्राम मिट्टी का तेल बचा हुआ था। गांव का ही सचिन मौके पर आ गया। उसके यहाँ बुलेरो गाड़ी है। उसने फोन करके ड्राइवर व गाड़ी मगँवायी थी। डिम्पल को उस गाड़ी में बिठाकर कन्हई लाल नेमसिंह, Smt. राजकुमारी ईशान अस्पताल बरेली ले गये। डिम्पल के जाने वाद मैं तथा अन्य लोग वहाँ से चले गये थे। मैं अपने घर चला गया था। दरोगा जी ने लगभग एक माह बाद मेरा व्यान लिया था। मैं हास्पिटिल नही गया था।"*

13. In cross-examination, this witness stated as under:

*"यह बात सही है। कि बलवीर फौजी और ममता पति सुरेन्द्र चार- छः घर*

*है। यह बात सही है कि डिम्पल सुरेन्द्र के घर आती जाती थी। लेकिन कम आती थी। क्योकि बलवीर फौजी डिम्पल के साढू सुरेन्द्र के घर आने से रोकता था। और इसी पर बलवीर फौजी व डिम्पल की बहन ममता के बीच मतभेद था। डिम्पल के ममता अपनी बहन व बहनोई के कारण उसके मरने से पूर्व विवाद भी हुआ था। यह बात इसलिए ममता का पति सुरेन्द्र बलवीर फौजी से शराब पीने से नाराज रहते थे। क्योंकि बलवीर फौजी शराब पीता था। उसकी इस आदत के कारण ममता व सुरेन्द्र बुरा मानते थे और नाराज रहते थे। बलवीर फौजी के यहाँ आना-जाना नही था।*

***घटना के बाद मैं 20-25 दिन के लिए बाहर चला गया था। घटना के बाद मैं 20-25 दिन के लिए बाहर चला गया था। लगभग एक महीने बाद दरोगा जी मेरे घर आये थे। यह बात भी मैंने दरोगा जी को बता दी थी कि मैने व अन्य वहाँ पर मौजूद लोगो ने वहाँ पर डिम्पल के ऊपर रेता व मिट्टी डालकर जलने से बचाया था। अगर दरोगा जी ने यह बात मेरे ब्यानों में नहीं लिखी है तो मैं इसका कोई कारण नही बता सकता।"***

14. PW-3- Mamta, sister of the victim Dimpal made the following deposition:

*"मृतका डिम्पल की शादी की आज से लगभग 13-14 वर्ष हो चुके है। मेरी शादी भी ग्राम पैगा मे सुरेन्द्र पाल के यहाँ हुई है और इसी गाँव के बलवीर से डिम्पल की शादी हुई थी। शादी के बाद कुछ दिन तक माहौल सही रहा उसके बाद बलवीर डिम्पल से परिवार वालो से दारू पीकर झगड़ा मारपीट करता था। मेरी बहिन ने अपनी परेशानी मुझे कभी नही बतायी थी जो बताया होगा वह मेरे मम्मी व पापा को बताया होगा। मेरी मम्मी पापा ने मुझे कुछ नहीं बताया फिर कहा कि एकाद बार कहा था कि डिम्पल को बलवीर परेशान व मारपीट करता है। मेरी बहिन को इन लोगो ने अलग कर दिया था। पहनने को कपड़े नहीं दिये थे। सब मेरे मम्मी पापा भेजते थे।*

***घटना दि० 14.5.14 की है। मुझे पता लगा जब मैं कूड़ा डालने जा रही थी। डिम्पल के घर के बराबर में कूड़ा डालने गयी थी तो मैने देखा कि यह सभी लोग डिम्पल को मारपीट रहे थे। बलवीर के हाथ में बटवा, नरोत्तम के हाथ मे डन्डा अम्वरीश? के हाथ मे फुकनी तथा सास के हाथ में चिमटा था। फिर डिम्पल का जूड़ा पकड़ कर डिम्पल को अन्दर कमरे में ले गया तथा मिट्टी का तेल छिड़क कर आग लगा दी।"***

15. In cross-examination, she stated as under:

***"मेरी बहिन डिम्पल को शादी के 5-6 साल बाद अलग कर दिया था। मेरी बहिन अलग कमरे में रहती थी। अपने***

***बच्चों के साथ अलग रहती थी। सास व देवर अलग रहते थे। बहिन मेरी अपना खाना अलग बनाती थी। सास अपना खाना अलग बनाती थी। यह बात सही है मेरी बहिन को मरने से 3-4 साल पहले अलग कर दिया था।*** *मेरी बहिन बलवीर के घर आने पर ही मेरे घर आती थी। मेरे बलवीर से अच्छे सम्बन्ध थे मेरा कभी बलवीर से लड़ाई झगड़ा नहीं हुआ था। बलवीर शादी से पहले से मेरे यहाँ आता जाता था उसको मैं शादी से पहले से अच्छी तरह से जानती थी। मेरे पति ने उसे ट्यूशन पढ़ायी थी इसलिए वह मेरे पति का सम्मान करता था।* ***बलवीर शादी के बाद से शराब पीने लगा था। पहले कुछ नही पीता था। बलवीर मे शराब पीने के अलावा जुआ व सभी ऐब थे।***

*बलवीर फौजी के छोटे भाई अम्बरीश पढते थे। नरोत्तम भी पढ़ाई करते थे यह नहीं पता कि डाक्टरी की पढ़ाई करते थे या क्या पढ़ाई करते थे। बलवीर फौजी उनकी पढाई में आर्थिक मदद करता था*

***मेरी बहिन पति व ससुराल वालो से मानसिक रूप से परेशान भी रहती थी। मुझसे डिम्पल यह कहती थी कि तुमने ही मेरी शादी करायी है यदि आपने मेरी शादी अच्छे घर में करवायी होती तो मैं आपसे आटा चावल व पैसा नहीं मॉगती, न ही मुझे अपमानित होना पड़ता और न ही आप लोगो से मुझे बार बार मॉगनी पड़ती। मैने फौजी को समझाया था लेकिन फौजी पर कोई असर नहीं पड़ा। मैं अपनी बहिन को समझाती रहती थी। तो वह यही कहती थी कि मैं आप लोगो से मदद लेते लेते बहुत अपमान्ति हो चुकी हूँ अब मुझे अच्छा नहीं लगता। फौजी बलवीर जब छुट्टी पर आता था तो अपने घर पर ही रहता था। इस घटना से पहले फौजी एक महीना पहले अवकाश पर आया था। इस अवकाश पर आने से पहले फौजी अवकाश पर कितने दिनो पहले आया मुझे नहीं पता। बलवीर फौजी के जुआ खेलने व शराब पीने के कारण भी मेरी बहिन मानसिक रूप से परेशान रहती थी। मुझे भी उसने मरने से पहले बताया था कि मैं मानसिक रूप से बहुत परेशान हूँ।"***

16. However, this witness denied a suggestion that the victim has committed suicide.

17. PW-4- Sachin Singh, son of Mamta- PW-3 made a following deposition:

***"घटना दि० 14.5.14 की है। मैं उस दिन अपने गाँव में मौजूद था। घटना शाम के 5:30 बजे 6:00 बजे का समय रहा होगा। बलवीर फौजी के घर से चीखने चिल्लाने की आवाजे आ रही थी तो इस पर मॉ दौड़ती और चिल्लाती हुई उसके घर की ओर भागी। जब मेरी मम्मी बलवीर फौजी के घर पहुँची तो मेरी मौसी काफी जल चुकी थी।*** *जब मैं वहाँ पहुंचा तो मेरी मौसी*

*डिम्पल मुझसे, बरेली के सचिन मेरे मौसा बलवीर और मेरी सास भगवान देई, नरोतम देवर, अमरीश देवर ने मिलकर मुझे जलाया है। फिर मेरी गाड़ी घटना स्थल पर मंगायी गयी फिर उन्हें उसमे लिटाकर व बैठा कर जीशान हास्पीटल ले गये। गाड़ी में नेम सिंह, कन्हई व राजकुमारी अस्पताल जाने में साथ थे। मैं और मेरी माँ अस्पताल नहीं गये।"*

18. In cross-examination, this witness stated as under:

*"मौसी के मरने के बाद मेरी अपने मौसेरे भाई बहिन से बात होती है कम बात होती है। दोनो बच्चे समझदार है और पढ़ते लिखते है। लेकिन किन किन कक्षाओं मे पढ़ते है मैं यह नहीं बता सकता। सारा खर्चा उनके दादी दादा और पिता जी उठाते है।"*

19. PW-5- Brij Kishore, another prosecution witness, who was witness to the Panchayatnama, was declared hostile and did not support the prosecution version as he has stated that he has not signed on the opinion of Panches.

20. PW-6- Dr. Vijay Pal Singh, who conducted the post-mortem of the victim deposed as under:

*"दिनांक 19.5.14 को मैं उक्त पद पर तैनात था, उस दिन मेरी ड्यूटी पोस्टमार्टम में थी। उक्त दिवस मेरे द्वारा 3.46 पी.एम. पर डिम्पल D/o रामचन्द्र तिवारी पैगा ps आवला बरेली उम्र 30 वर्ष (Sic) पी.एम. किया गया था। मृतका का शव मय 9 पुलिस प्रपत्रो सहित सील बन्द हालत में एच.सी. हेमसिंह ps कोतवाली लेकर गये थे। मृतका की शय की पहचान राजीव (भाई) एवं कुलदीप कुमार (जीजा) की द्वारा की गयी थी।*

*मृतका के शव का सामान्य परीक्षण करने पर पाया कि शव की औसत उचाई 155 सेमी० की तथा कद काठी सामान्य थी। आंखे मुहं खुले थे। अकड़न मौजूद थी। सड़न के लक्षण मौजुद नहीं थे।*

*मृतका की शरीर पर मृत्यु पूर्व आयी वाहय चोटो का विवरणः-*

***मृतका का पूरा शरीर पूरा ऊपर एवं भीतर को जला हुआ था केवल तलवे का छोड़कर। बाल झुलसे थे। त्वचा जगह जगह फटी हुई थी। तथा लाइन आफ रेडनेस मौजुद थी।***

*आन्तरिक परीक्षण*

*मस्तिष्क की झिल्लियां सूजी थी। दोनो तरफ फेफड़े सूजे हुये थे तथा काटने पर पस पाया गया। हृदय का दायां हिस्सा भरा, बायां खाली था तथा हृदय के अंदर चेरी रेड रंग का रक्त मौजूद था। उदर, पित्ती जली हुई थी। पेट खाली था। यकृत सूजा था तथा वजन 1200 ग्राम था। पिताशय भरा था। तिल्ली सूजी थी वजन 110 ग्राम था। दोनो तरफ के गुर्दे की काटने पर पस पाया गया तथा वजन 230 ग्राम थे। मृतका के गर्भाशय से एक लड़की जिसकी लम्बाई*

*19 सेमी थी लगभग पांच माह के गर्भ के बराबर पायी गयी। मृतका का (शव) शरीर लगभग एक दिन पुराना था।*

***मेरी राय में मृतका की मृत्यु मृत्यु पूर्व जलने के कारण जहर बाद (सेफ्टीसीमिया) के कारण हुई थी।***

*गवाह ने पत्रावली में शामिल कागज सं० 9 क/1 को देखकर कहा कि यह पी.एम.आर. नं0 598 मैंने दौरान शव विच्छेदन अपनी लेख व हस्ताक्षर में तैय्यार किया। मैं अपनी लेख व हस्ताक्षर की पुष्टि करता हूँ प्रदर्श क-2 डाला गया।*

*X X X X X X*

***मैंने पी.एम करते समय मृतका के शरीर पर वर्न इंजरी के इलावा और कोई चोट नही पायी थी।*** *पी.एम.आर. के साथ लाए व 9 पुलिस प्रपत्रो के साथ में एफ.आई.आर साथ में नहीं आयी थी। साक्षी ने पंचायतनामा देखकर कहा कि इस पर अपराध सं., धारा का कोई उल्लेख नहीं है इसी तरह से नमूना मोहर फोटो लाश, चालान फार्म पर भी इजांच सं० व धारा बनाम का उल्लेख नही है इसी तरीके से जी.डी. की प्रति पर भी अपराध धारा का उल्लेख नही है। इसी तरीके से इसी प्रकार ईशान अस्पताल द्वारा पी.एस. प्रभारी निरीक्षक कोतवाली को भेजा गया मेमो में इस बात का उल्लेख है कि मृतका डिम्पल को भगवानदेई (सास) ने (sic). इलाज ईशान अस्पताल मे दि. 14.5.14 को भर्ती किया गया। जिसकी दौराने इलाज अस्पताल में ही मृत्यु हो गयी थी। मृतका का चेहरा जला था। मैं नहीं बता सकता कि मृतका किस स्थिति में किस प्रकार से जली होगी। मृतका आगे पीछे दोनो तरफ से जली थी। बाल झुलसे थे।*

*यह कहना गलत है कि यह चोटे आत्महत्या या अन्य (Sic) तरीके से ही आयी होगी।"*

21. PW-7- Dr. Kaushal Kumar, who treated the victim at Ishan Hospital, deposed as under:

*"दि० 14.5.14 को समय 8-10 पी.एम पर smt डिम्पल 35-30 वर्ष W/O बलवीर R/o पैगां ps आवलॉ बरेली श्री भगवान देई सास द्वारा संजीव भाई जिसका मोबाइल नं० अंकित किया गया द्वारा भर्ती कराया गया। भर्ती के उपरान्त मेरे द्वारा इसकी चोटो का निरीक्षण किया व उसकी सामान्य परीक्षण किए गए। मरीज 95% जली थी, मिट्टी की तेल की महक आ रही थी। भर्ती के समय पूछे जाने पर कि आप कैसे जली, मरीज ने बताया कि उसके पति ससुर सास दोनो देवर ने उसको पीटा और फिर मिट्टी का तेल डालकर आग लगा दी। मरीज को भर्ती कर के उसकी जाँचोपरान्त इलाज शुरू किया गया। दौराने इलाज मरीज की 18.5.14 को 6.56 पी.एम पर उसकी मृत्यु हो गयी।*

*सुबह 7-15 बजे मरीज की बी०पी० 141/92 नब्ज 92, आक्सीजन की मात्रा*

*शरीर में 100% थी की सांस की गति 24 प्रति मिनट थी। मेरी जानकारी में है मरीज का मृत्यु कालीन व्यान का मेमो अस्पताल द्वारा भेजा गया जिसपर लक्ष्मी शंकर सिंह ए.सी.एम. । तत्कालीन द्वारा मृत्यु कालीन व्यान लिखा गया। का० सं0 52 ख 1 to 52 ख-3 पर प्रदर्श क्रमश-3-4-5 डाला गया।*

*X X X By defence councel for all accused.*

*साक्षी ने इलाज की केस सीट देखकर बताया कि मृतका को (SIC) इलाज मेरे अस्पताल में इलाज हेतु उसकी सास भगवानदेई द्वारा भर्ती कराया गया।*

*केस सीट पर मृतका की सास के अलावा (का० फटा) किसी व्यक्ति का नि० अंगूठा। हस्ताक्षर भर्ती (का० फटा) समय नही थे। जो व्यक्ति इलाज के लिये मरीज को भर्ती करता है वही व्यक्ति इलाज की फीस जमा करता है। केस सीट 14.5.14 की है। मरीज को भर्ती करने की है वह मेरे द्वारा तैयार की गयी है। उस पर लाने वालो मे सास भगवानदेई का ही नाम है।* ***यह बात सही है कि केस सीट पर मरीज का निशानी अंगूठा। हस्ताक्षर नही कराया गया उसके द्वारा मरीज द्वारा कोई सत्यापन नहीं किया गया।***

*पहले मरीज को भर्ती करने के पूर्व ही मरीज के इलाज फर्स्ट एड देना शुरू कर देते है उसकी बाद अन्य कार्य वाही इलाज से सम्बन्धित करते है। इस कार्यवाही में आम तौर 15-20 मिनट का समय लग जाता है।*

*मरीज जिस समय भर्ती किया उस समय सैप्टीसीमिया जहर बाद नहीं था, बल्कि वाद मे दौराने इलाज जहरबाद सैप्टीसीमिया होने की समांवना रहती है। परन्तु इस मरीज की सैप्टीसिमिया नही था। फिर साक्षी ने कहा कि यह चोटे बाद जहरबाद होनी की संम्भावना रहती है।"*

22. PW-8- Sabir Hussain, who prepared the chik FIR, Ex.Ka.6 and made G.D. entry, Ex.Ka.7. In cross-examination, this witness stated as under:

*"तहरीर मे घटना के समय का उल्लेख नही है। तहरीर मे घटना की तिथि का भी उल्लेख नही है यह बात सही है कि तहरीर पर वादी के हस्ताक्षर नही है मै हस्ताक्षर वादी की तहरीर पर भूलवश देख नही पाया। मैने विवेचक की विवेचना हेतु चिक की प्रति सम्बन्धित कार्यालय वाद वापसी विवेचक 15.5.14 को दिया था। वास्ते विवेचना किस समय दिया ध्यान नही है। जी०डी० की कार्बन प्रति जी०डी० नं० 24, समय कटा है।* ***उसके उपर जो कागज सं0 16 क/4 है। तारीख में ओवर राईटिंग है यह मेरे द्वारा नही की गयी है मुझे नहीं मालूम कि किसने की मैंने चिक पर वादी के हस्ताक्षर कराए थे, मैने मूल चिक पर हस्ताक्षर नही कराए, चिक रजिस्टर पर कराए थे। यह कहना गलत है***

***कि चिक मैने अपनी? सुविधानुसार समय डालकर किता की है।"***

23. PW-9- Laxmi Shankar Singh, Administrative Officer, who recorded the statement of the victim deposed as under:

*"दिनांक 14.5.14 को मैं बरेली में अपर नगर मजिस्ट्रेट के पद पर तैनात था। उस दिन मैने ईशान अस्पताल मे जाकर डिम्पल S/O बलवीर R/o पैगां पी.एस. आवला बरेली का मृत्यु पूर्व व्यान अंकित किया। मेरे व्यान अंकित करने के पूर्व मरीज की सम्बन्ध? मे व्यान देने की स्थिति में ही सवहित? प्रमाणपत्र डा० कौशल हाल तथा व्यान पूर्ण रूप से अंकित करने के बाद डा० द्वारा अपना प्रमाणपत्र अंकित किया गया।*

*गवाह ने पत्रावली मे शामिल कागज 60 क/1 को देखकर कहा कि यही मेरे द्वारा अंकित किया गया व्यान (डिम्पल w/o बलवीर का है।) इस कागज पर 8-30 पी.एम. डा० प्रमाण पत्र, व्यान शुरू होने के पूर्व 8-40 पी.एम. व्यान खत्म होने के बाद डा० द्वारा प्रमाण पत्र अंकित किया गया। व्यान गवाहान का नि० अंगूठा (आर.टी.आई) मेरे समक्ष व्यान पर लगाया गया। कागज 60क/1. पर मैने अपने हस्तलेख हस्ताक्षर एवं अपनी मोहर की पुष्टि करता हूँ। मृतका द्वारा अपने व्यान मे पति बलवीर द्वारा शराब पीकर मारना पीटना और 14.5.14 को समय 6:00 बजे शराब पीकर मारने पीटने लगा इसी बात पर झगड़ा किया जिस पर बलवीर नरोत्तम, अम्बरीश, भगवानदेई द्वारा मिलकर मिट्टी तेल छिड़क कर जला देना के बारे मे बताया तथा अपनी शादी को 09 वर्ष होना बताया। कागज सं० 60 क/1 पर प्रदर्श क-8 डाला गया।*

*X X X By accused councel for all accused*

*व्यान में घटना 6 बजे होना लिखा है जो उसने बताई थी, लेकिन सुबह की थी यह शाम की थी। यह मृतका ने नही बताया। मैने इस व्यान अंकित करने से पूर्व डा0 से मरीज मृतका के स्वस्थ होने की जानकारी ली थी। मृतका के स्वस्थ मस्तिष्क के संबंध मे डा० द्वारा प्रमाणपत्र अंकित किया गया। मैने स्वयं द्वारा इस आरोप पत्र व्यान लेने से पूर्व कोई उल्लेख अंकित नही किया।* ***मेरे व्यान मे "डिम्पल w/o बलवीर----- पीटने लगा"। और इसी बात पर " तस्दीक किया। उपरोक्त व्यान (दोनो) मेरे द्वारा मेरे द्वारा अपने हस्तलेख में पूर्व व्यान लिखा गया। यह कहना गलत है कि मृतका के दोनो व्यान अलग अलग हस्तलेख मे है। " इसी बात पर ------ तसदीक किया" बाद में अलग से अन्य व्यक्ति के लेख में लिखा है। यह कहना गलत होगा।***

***मैने डिम्पल का आर.टी.आई लगवाया है। उस पर मेरे द्वारा उक्त अंगूठे को अलग से प्रमाणित नहीं किया है। व्यान***

***मे "व्यान लिखना 8-30 पी.एम-------- पूर्व हुआ" यह और" डिम्पल w/o बलवीर मारने पीटने लगा" दोनो एक से लेख मे P.M. है। इसी तरीके से 14.5.14 समय 8-35PM तथा मेरे हस्ताक्षर एक लेख मे है। शेष अलग लेख मे है।*** *यह कहना गलत होगा। समस्त व्यान एक ही राइटिंग में मेरे द्वारा लिखे गए है तथा व्यान लिखने के बाद व्यान कर्ता को आर.टी.आई लिखा गया। तथा मेरे हस्तलेख मे यह प्रमाणपत्र अंकित किया गया कि व्यान लिखना 8-30 पी.एम पर प्रारम्भ किया व्यान 8-35 पी.एम पर पूर्व (SIC) उसके बाद मैंने अपने हस्ताक्षर पढकर अंकित किया गया। व्यान लिखने से पूर्व मृतका के परिवार वाले को अलग कर दिया था।*

*व्यान लिखने से पूर्व उसकी परिवार को कौन कौन से सदस्यो को बाहर किया मैं नही बता सकता।"*

24. PW-10- Manoj Prakash, Tehsildar stated that he conducted the Panchayatnama which is Ex.Ka.9 and also prepared the challan of the dead body and letter of CMO which are Ex.Ka.10 to Ex.Ka.13.

25. In cross-examination, this witness stated that the victim was admitted in the hospital by her mother-in-law, Bhagwan Dei. He further deposed as under:

***"साक्षी के पंचायतनामा मे राय पंचान मे पंच संजीव कुमार s/o रामचन्द्र निवासी खुली तारपुर व किसी अन्य पंचायतनामे के साक्षी ने यह मुझे नहीं बताया कि मृतका को किसके द्वारा जलाया गया है*** *केवल यह बताया गया कि मृतका की मृत्यु दौरान इलाज दौरान जलने के कारण आयी चोटो से ईशान अस्पताल बरेली में हुई है। पचायतनामा की कार्यवाही 19.5.14 को हुई थी यदि किसी साक्षी ने कहा है कि कार्यवाही 18.5.14 को पचायतनामा की कार्यवाही की गयी है। तो साक्षी ने गलत व्यान दिया है मैने 18.5.14 को पचायतनामा की कोई कार्यवाही नही की थी न ही किसी साक्षी के पंचायतनामा पर हस्ताक्षर कराए थे। पचायतनामा की कार्यवाही की सूचना दि० 19.5.14 को 11-50 ए.एम. पर मिली थी।* ***पंचायतनामा की कार्यवाही के दौरान मृतका के हाथ दोनो पूर्णतः आगे पीछे हाथो की उगंलिया व शव आगे पीछे का थड़ एव पैर जली थी। पूर्णतः जले थे। मैंने पुरे शरीर मृतका के पूरे शरीर पर अस्पताल की पट्टी बांधी थी। मृतका की दोनो आखें - मुंह पूर्णता जला था।"***

26. PW-11- Baldev Prasad, one of the Investigating Officers stated that he has prepared the site plan, Ex.Ka.14 and recovered a burnt mattress and some other articles, which is Ex.Ka.15. He has recorded the statement of the victim as Ex.Ka.16. In cross-examination, he stated that he has not taken the bed in possession and no matchbox or other articles were found. There was no mark of burning on the walls or any other articles and he denied a suggestion that the recoveries were not effected at the spot.

27. In cross-examination, this witness stated as under:

*"यह बात सही है कि मैं जब अस्पताल पहुँचा तो मजरूब डिम्पल के भाई, मां राजकुमारी मौजूद थे। उन्ही की मौजूदगी मे मैं व्यान लेता रहा। यह बात सही है कि मजरूब के मुंह में आक्सीजन की नली लगी थी, परन्तु व्यान लेते समय मैंने उसको हटवा दिया अर्थात निकलवा दी थी। यह बात डा० को बताई, उन्होने नली निकाली थी। यह बात सही है कि डाक्टर से नली निकलवाने के बाबत मैंने कोई उल्लेख नही किया। मजरूब का व्यान लेने में मुझे 20 मिनट लगे थे। व्यान लेने के बाद मैंने डाक्टर से यह नहीं कहा कि मरीज को आक्सीजन की नली पुनः लगा दो। मैंने व्यान लेने से पूर्व उसके स्वस्थ्य होने का कोई प्रमाण पत्र नहीं लिया, न लिखा है। व्यान लेने से पूर्व स्वतंत्र साक्षी का भी व्यान नहीं लिया कि मजरूब व्यान देने की स्थिति मे है।"*

28. PW-12- Shakti Singh, who conducted the further investigation stated that he has recorded the statement of the victim after taking permission of the court, he proved certain G.D. entries regarding recording the statement of the witnesses which is Ex.Ka.14. This witness was further cross-examined and stated that on a complaint (Ex.Ka-1) given by the informant neither informant has signed nor scriber has signed. He further stated that the entire dead body of the victim including palms of hands and feet were burnt and victim sustained 95% burn injuries. He also admitted that as per the hospital record, victim was admitted by mother-in-law, Bhagwan Dei. He stated that he has seen the statement of the victim which was recorded by earlier Investigating Officer and there are cuttings on the said statement. He further stated that he cannot say that it is recorded in two different hand writings. He stated that he recorded the statement of Narendra Pal on 13.6.2014, Sachin on 21.06.2014 and Mamta on 27.6.2014 i.e. after one month.

29. PW-13- Rajeev Kumar, another brother of the victim stated that he had no knowledge about the incident and he has scribed the complaint on asking of Sanjeev, however, he did not sign the same as he was perplexed and stated that Ex.Ka.1 is the same complaint. In cross-examination, this witness stated as under:

*"मेरा बहनोई ने शादी के बाद से शराब पीना शुरू कर दी थी। बहनोई का नाम बलवीर है। जुआ भी खेलना शुरू कर दिया था। मेरी बहिन जुआ शराब के लिए मना करती थी तब ही बहनोई मेरी बहिन को मारता पीटता था। हम लोग भी जुआ शराब के लिए मना करती थी परन्तु वह नहीं मानता था गांव में भी उत्पात लड़ाई झगड़ा करता था। मैं अपने बहनोई की जुआ शराब झगड़ा उत्पात आदि बातो से नराज रहता था।*

*मेरी बहिन भी जुआ शराब के लिए मना करती थी परन्तु यह मानता नहीं था। और इसकी बुरी आदतो की वजह से नाराज रहती थी। मेरी बड़ी बहिन ममता व*

***उसकी पति भी समझाते थे लेकिन यह बुरी आदते नहीं छोडता था जिसकी वजह से मेरे बड़े बहनोई व बहिन नाराज रहते थे।"***

*"मैंने इस घटना से पूर्व कोई रिपोर्ट अपेन बहनोई व उसके परिवार वाले के खिलाफ नही लिखवाई थी। मेरा बहनोई भी पालन पोषण मेरी बहिन का करता था। मेरे माता पिता भी आर्थिक सहायता करते थे। बलवीर फौजी अपने दोनो भाइयों को पढ़ाता था और अपने माता- पिता की सहायता करता था। मेरी बहिन डिम्पल से बड़ी बहिन ममता की आर्थिक स्थिति डिम्पल से अच्छी थी। मेरा बहनोई बलवीर फौजी अपने साथ जहा तैनात था साथ कभी नहीं ले गया। इस वजह से मेरी बहिन नाराज नही रहती थी, लेकिन बहिन साथ जाने को कहती थी परन्तु कभी साथ नही ले गया।* ***मेरे बड़े बहनोई सुरेन्द्र और बलवीर फौजी के घर के बीच की दूरी लगभग 100-150 मीटर की दूरी है।*** *मेरी बहिन डिम्पल के घर के पास उसके चचिया ससुर का मकान है। आस पास मकान है। उनके नाम नहीं मालूम।* ***मेरी बहिन डिम्पल के घर से ममता के घर जाने के लिए गली मुड़कर जाना पड़ता है। मेरी बहिन अलग कमरे में रहती थी और अन्य परिवार जन अलग अलग कमरे में रहते थे। मेरी बहिन के दोनो देवर पढ रहे थे लेकिन किस क्लास में पढ़ रहे थे नहीं मालूम।*** *मैं पुलिस को लेकर डिम्पल के घर नहीं गया था बल्कि बड़े भाई गए थे। मैं घर चला गया था। मेरे बड़े भाई घटना वाले दिन पुलिस लेकर उसी दिन गए थे जिस समय गए थे नहीं मालूम।*

*जब मेरी बहिन की मृत्यु हुई थी उस समय मै वहां मौजूद नहीं था, मुझे सूचना देकर बुलवाया गया था। मैं अपने बहिन के शव को लेकर पोस्टमार्टम हाउस गया था वहां पर और रिश्तेदार आ गए थे। वहां पर पुलिस नहीं आयी थी। भगवानदेई को मेरे सामने पुलिस ने गिरफ्तार नहीं किया। मैं बहिन के जलने की सूचना मिलने पर अस्पताल गया था। बाद में भी गया था। बहिन डिम्पल की मृत्यु की सूचना मिलने पर उसके घर नहीं गया सीधे अस्पताल गया था। जब सूचना जलने की मिली तब उसके घर गया था. फिर उसके बाद नही गया। अस्पताल में पुलिस किस समय आयी जानकारी नहीं है। मैं अस्पताल गया था। भाई अस्पताल नही गया था। मेरा भाई थाने में रिपोर्ट लिखाने गए थे। मेरा भाई रिपोर्ट लिखाने के एक घंटे बाद मुझे मिला था। मेरा भाई किस समय मिला याद नहीं है मेरा भाई लगभग 8-30 बजे या 9.00 बजे गांव से थाना रिपोर्ट लिखाने गया था। वापस आने पर भाई ने बताया कि मैं रिपोर्ट लिखाकर आया हूँ।*

*मैं गांव पैगा से सीधे रिपोर्ट लिखाने गए अस्पताल नही गया। भाई ने ग्राम पैगा से मेरे साथ थाना गया था। थाने से दोनो साथ साथ वापस आए थे। मैं थाने के बाहर रूक गया मेरा भाई थाना के*

*अन्दर गया था। भाई के थाने से वापस आने में करीब 15 मिनट लगे थे। यह सही है कि तहरीर पर मेरे व मेरे भाई के हस्ताक्षर नही है। तहरीर के अन्त में तिथि अंकित नहीं है। फिर कहा कि तहरीर के अन्दर जो मजबून लिखा है उसमे तिथि अंकित है। मुझे किसी पुलिस वालो ने इस घटना के बाबत उससे पूछताछ कभी नहीं की थी। यह सही है कि आज दूसरी बार गवाही के लिए आया हूँ। न्यायालय से मुझे सम्मन मिला था। मैं घटना के बाद बाहर काम करने चला गया था। यह कहना गलत है कि मेरे बताए अनुसार मेरी बहिन के साथ कोई घटना घटित न हुई हो। बल्कि मृतका का भाई होने व अपने परिवार के दबाव में झूठी गवाही दे रहा हूँ।*

*यह कहना गलत है कि मुझे सूचना देकर बुलाया गया हो।"*

30. This witness denied a suggestion that the deceased has committed the suicide.

31. Thereafter, the statement of accused was recorded under Section 313 of Cr.P.C. in which all the incrimination evidences were put to them. In reply to question no. 4, the appellant- Bhagwan Dei stated that she has taken her daughter-in-law to Ishan Hospital and had borne the entire medical expenses. In response to question no. 16, she stated that the deceased was not in a position to make statement and her statement is recorded in collusion with the informant. In reply to question no.18, she stated that there are two different statements of the victim and from perusal of the same it is clear that in order to make the case serious, the Investigating Officer has made cuttings. In reply to para 26, the victim stated as under:

*"प्रश्न सं०26 क्या आपको कुछ और कहना है?*

*उत्तर- मेरा पुत्र बलवीर फौजी विवाद के कुछ समय बाद परिवार से अलग हो गया था और अपनी पत्नी व बच्चों के साथ अलग रहता था वह पुत्र होने के कारण आर्थिक मदद परिवार की करता था। उसकी आर्थिक मदद के कारण ही मैं अपने पुत्र नरोतम व अम्बरीश? को शिक्षा दिला रही थी। जिसके कारण मृतका व बहन मृतका तथा ममता का पुत्र सचिन एवं मृतका के भाई संजीव व राजीव तथा उसके माता पिता मुझसे व पुत्र बलवीर फौजी तथा मेरे परिवाजन से नाराज रहते थे। मृतका अपने पति बलवीर के साथ जहाँ वह सैनिक के पद पर तैनात था मय बच्चों के साथ जाकर रहना चाहती थी। फौजी ने पत्नी व बच्चों को तैनाती स्थल पर साथ ले जाने से मना कर दिया जिसके कारण तनाव व आवेश में आकर पति के ड्यूटी पर चले जाने के बाद नाराज होकर स्वयं आग लगा ली। मृतका को बचाने के लिए शहर के प्रतिष्ठित बर्न इशान अस्पताल में मेरे द्वारा अन्य लोगों के सहयोग से भर्ती किया लेकिन वह बच न सकी और दौरान इलाज उसकी मृत्यु हो गयी। दहेज के लिए प्रताड़ित व परेशान नहीं किया गया। मैं निर्दोष हूँ।"*

32. Similar statement was made by accused Narottam.

33. In defence, the accused examined DW-1- Nem Singh who made the following deposition:

*"मैं अपने गांव के भानुप्रताप को जानता हूँ। भानुप्रताप के 03 लड़के नाम कमशः बलवीर, नरोत्तम, अम्बरीश है। बलवीर फौज मे कार्यरत है। इसकी शादी डिम्पल के साथ हुई थी जो ग्रा० खुलीतारपुर ग्राम के रामचन्द्र की लड़की थी। बलवीर के 2 बच्चे है। बलवीर अपनी पत्नी डिम्पल के साथ रहता था। अपने माता पिता से अलग रहता था। मेरा घर बलवीर फौजी के पड़ोस से तीसरा घर है। "*

*"बलवीर फौजी अपने माता पिता भाईयों की आर्थिक मदद करता था। इसी कारण बलवीर व उसकी पत्नी डिम्पल, डिम्पल के मायके वाले तथा डिम्पल का बहनोई एवं डिम्पल की बहिन ममता व उसका बहनोई सुरेन्द्र, फौजी व उसकी परिवार वालो से नाराज रहते थे। बलवीर फौजी के घर के पास कूड़ा आदि डालने की जगह नहीं थी। बलवीर के घर के आस पास (sic) है। सुरेन्द्र का मकान बलवीर के मकान से 300 मीटर दूर है। गलियां पार करने के बाद।*

***बलवीर फौजी जब ड्यूटि पर चला गया तो उनकी पत्नी डिम्पल द्वारा कमरे में बन्द होकर आग लगा ली जिसमे वह जल गई। मैं व गांव के काफी लोग इकट्ठा हो गए। हम लोग डिम्पल को किवाड़ तोड़कर निकाला।*** *जब हम लोगों ने निकाला तो बेहोश थी, हल्की सांसे चल रही थी। उसके किवाड़ तोड़कर मैने व गावं के अन्य लोगों ने निकाला उसके बाद डिम्पल को मैं, सास भगवानदेई राजकुमारी व राजेन्द्र गड़ी से लेकर इलाज कराने बरेली अस्पताल गए ले गए भगवानदेई ने डिम्पल को भर्ती कराया सारा खर्चा भर्ती से पहले व बाद मे भगवानदेई ने किया था। इलाज के दौरान डिम्पल की मृत्यु हो गयी। मैंने आज व्यान अपनी स्वेच्छा से बिना किसी जोर दबाव के सोच समझकर दे रहा हूँ।*

*सुरेन्द्र के परिवार वालो से मेरी कोई दुश्मनी नही है। बलवीर फौजी से भी रिश्तेदारी नहीं है। गांव बस्ती के हिसाब व बिरादरी के नाते भाई लगता है। डिम्पल के दोनो बच्चों का लालन पोषड़ बलवीर के माता पिता इस समय कर रहे है।"*

34. In lengthy cross-examination, the testimony of this witness could not be shattered because the vicitm was residing with her in-laws. Even to the court cross-examinations, he stated that there was no demand of dowry in the village.

35. DW-2- Rajendra made the following deposition:

*"मैं बलवीर फौजी को जानता हूँ यह तीन भाई 02 बहिने है। बलवीर फौजी की शादी डिम्पल जो ग्रा० खूलीतारपुर की रहने वाली थी, घटना से 10-15 वर्ष पूर्व हुई*

*थी। शादी में मैं शामिल हुआ था। बलवीर फौजी की शादी से पूर्व नौकरी लग गयी थी। बलवीर फौजी अपनी पत्नी व बच्चो के साथ रहता था। माता पिता के साथ नहीं रहता था। बलवीर फौजी के बच्चे का पालन पोषण स्वयं करता था। खाने के लिए गल्ला उसके माता पिता उसे देते थे। बलवीर फौजी के पिता का नाम कृषि भूमि है। बलवीर फौजी के पिता भानुप्रताप खेती करते है। बलवीर फौजी का एक भाई घटना के समय बरेली में रहकर पढ़ाई कर रहा था, दूसरा बाहर गया हुआ था। शादी के बाद से लेकर उसकी पत्नी डिम्पल के मरने तक मैने कभी किसी प्रकार की कोई बात पत्नी डिम्पल को तंग व परेशान करना वाली बात नहीं सुनी थी।* ***बलवीर फौजी के घर के पास में कूड़ा डालने की कोई जगह नहीं है। बलवीर की पत्नी डिम्पल की बहिन उसके गाव निवासी सुरेन्द्र के साथ व्याही है। जिसका नाम ममता है। आर्थिक स्थिति में सुरेन्द्र का परिवार बलवीर फौजी के परिवार से ज्यादा मजबूत है। बलवीर फौजी की पत्नी डिम्पल अपनी बहिन ममता के यहां आती जाती थी। बलवीर फौजी अपनी पत्नी के लिए बहिन ममता के घर ज्यादा आने जाने से जाने से रोकता था लेकिन डिम्पल मानती नही थी। डिम्पल अपनी बहिन बहनोई की बात ज्यादा मानती थी। इस बात से बुरा मानते थे, कहते थे हमारा पहले से रिश्ता है तुम डिम्पल को रोकने वाले कौन होते हो। बलवीर अपनी माता पिता व भाईयो को आर्थिक मदद करता था। बलवीर फौजी घटना वाले दिन सुबह*** *5-6* ***बजे अपनी ड्यूटि पर आगरा कैंट की तरफ जो जाती है से वापस आती है।*** *3* ***बजे बरेली आ गया ड्यूटि पर जाने के लिए।*** *उसके बाद घटना बाले दिन फिर बलवीर फौजी के गांव में नही देखा और अभी तक वापस गांव में नहीं आया हूँ। बलवीर फौजी की पत्नी डिम्पल को फौजी की मां भगवानदेई (सास) रामदेई, राजकुमारी, नेमसिंह, कंहई लाल ने ईशान अस्पताल में भर्ती कराया था। आग लगने से वह बोल नही रही थी, स्थिति गम्भीर थी। इलाज के दौरान डिम्पल की अस्पताल में ही मृत्यु हो गयी। डिम्पल ने अपने कमरे में बन्द करके अपने आप आग लगाई थी। मैं वह जगह देखी थी जहा डिम्पल ने आग लगाई। जहां डिम्पल ने आग लगाई यहां शोर पर मेरे अलावा महावीर नरेश आदि लोग थे। डिम्पल को हमने कमरे की किवाड़ तोड़कर जली अवस्था मे निकाला था। जब किवाड़े तोड़कर कमरे से निकाला तब काफी लोग वहां मौजूद थे।"*

This witness was also cross-examined at length by the public prosecutor and he denied that the accused have committed the offence or that he has given the wrong statement.

36. DW-3- Ram Lal, another witness has stated in a similar manner as of DW-1 and DW-2. He stated that the victim and her husband Balbeer were not having cordial relationship and Balbeer used to

stop his wife Dimpal- victim from visiting the house of Surendra, husband of Mamta. This witness was also cross-examined at length and in reply to the question, he stated that he has only villager and not related to Balbeer.

37. Thereafter, the trial court vide impugned judgment of conviction hold the appellant held guilty of offence under Sections 302/34 of I.P.C. and vide order of sentence awarded life imprisonment along with fine to both the appellants.

38. Heard Sri Vinay Kumar Tripathi, learned counsel for the appellant and learned A.G.A. for the State. With their assistance, the entire trial court record as well as the paper book are re-scrutinized and the evidence is re-appreciated.

39. Counsel for the appellant has argued that in the complaint, it is stated that Balveer, husband of victim-Dimpal was a drunkerd person and used to give her beatings. On 14.5.2014 at about 6.00 PM, after consuming liquor, he started beating her and thereafter he along with other accused poured kerosene oil and lit the fire.

40. It is also stated that the marriage was about nine years old and victim was separate in mess from appellants/in-laws.

41. Counsel for the appellant submits that during investigation, the husband of the victim who was the main accused was found innocent as he was an Army Personnel and was not present at the spot. Similarly, Ambrish (brother-in-law) was also found to be innocent whereas appellant-Bhagwan Dei and other brother-in-law of the deceased namely, Narottam were held guilty though PW-1 to PW-3 have admitted that victim was living separately.

42. Counsel submits that the motive was primarily attributed towards the husband-Balveer as the informant even in his statement has made similar allegations against the husband.

43. It is next argued that Narendra Pal (PW-2) is not an eye-witness though this witness has stated that husband of the victim-Dimpal namely, Balveer, was serving in Army, he used to consume liquor and create nuisance in village while he was on leave. Because of his behaviour, victim had left her matrimonial home and stayed her parental home for about 4 to 5 months and thereafter, she was brought back. However, he stated that he has no knowledge whether Balveer was making any demand of dowry. Counsel submits that the statement of PW-2 is at variance with the statements of other two eye-witnesses namely Mamta (PW-3) and Sachin (PW-4) who are the sister and the nephew of the deceased. It is submitted that PW-2 has stated that Mamta had come to the place of occurrence for throwing garbage and the main gate of the house of Balveer was locked. He stated that Balveer caught hold of Dimpal from her hairs and pushed her inside the room and other persons also followed them and by pouring kerosene oil, lit the fire. Counsel submits that this witness has not named the appellants and has only stated “other persons”. Counsel further submits that this witness has clearly stated that his statement was recorded by the S.H.O. after one month as he had gone out of station for 20-25 days. However, there is no explanation where he had gone and why he had not recorded the statement promptly. Counsel submits that this witness has stated that by throwing sand and earth, the people had doused the fire, whereas this fact was not so mentioned by PW-3 and PW-4 and, therefore, PW-2 is not an eye-witness.

44. It is next argued that Mamta (PW-3) who is sister of the deceased as well as her son Sachin (PW-4) have stated that the marriage of Dimpal was performed with Balveer about nine years ago and after marriage, for some time, their relations were normal and, thereafter, Balveer used to pick up quarrel with Dimpal and his family members. However, his sister never told about the same. Both PW-3 and PW-4 have stated that Dimpal was separated by her in-laws and she was residing separately for the last four years.

45. Counsel submits that for the first time PW-3 by making improvements had stated that when she had gone to throw garbage, she saw that Balveer was carrying Batwa, Narottam was carrying stick, Ambrish was carrying a pipe and mother-in-law was carrying tongs (chimta) and they took Dimpal inside the room and by pouring kerosene oil lit the fire. However, she did not corroborate version of PW-2 that fire was doused by throwing sand and earth.

46. It is submitted that in cross examination, this witness has stated that after 5-6 years of marriage, Dimpal was separated by her in-laws and she used to reside separately with her children. Her mother-in-law and brother-in-law were residing separately. They were separate in mess as her sister and mother-in-law of her sister used to cook separately. Counsel submits that this witness stated that Balveer has all the vices including drinking and gambling etc. She also stated that younger brother of Balveer namely, Ambrish, as well as appellant-Narottam were studying and Balveer used to provide them financial help.

47. Counsel has led much emphasis on the admission made by PW-3 and PW-4, the two eye-witnesses of fact, where they have admitted that the Dimpal due to behaviour of her husband was mentally disturbed as her husband was not giving her money as he was addicted to bad vices like drinking and gambling. It is also stated by these witnesses that Balveer never took his wife-victim to his place of posting. It is argued that because of this reason, the victim committed suicide. The defence set up by the accused is proved from the admission of both PW-3 and PW-4.

48. Counsel submits that as per the statement of Sachin Singh (PW-4) neither PW-3 nor PW-4 himself are the eye-witnesses as this witness has stated that after they heard the noise of shouts, his mother i.e. PW-3 ran towards house of her aunt-Dimpal and saw that her aunt had sustained burn injuries. This witness further stated that when he reached at the house of her aunt, he along with Bhagwan Dei and Narottam etc. took the victim to Ishan Hospital, Bareilly.

49. Counsel submits that from the statement of PW-3 and PW-4, if read together, it is apparent that both the witnesses are not the eye-witnesses and they reached at the spot after the victim has already sustained the burn injuries.

50. Counsel thus submits that none of the witnesses of facts i.e. PW-2 to PW-4 are in fact the eye-witnesses.

51. It is next argued that as per statement of Dr. Vijay Pal Singh (PW-6) who conducted the postmortem, has reported that the entire body of the victim was burnt except the lower portion of the foot and even her hairs were burnt. It is argued that as per his statement even the victim had suffered severe burn injuries on

palm of her hands and she was not in a position to affix her thumb impression.

52. It is also argued that this witness stated that except the burn injuries there was no other injury reported on the dead body.

53. It is argued that Dr. Kaushal Kumar (PW-7) who treated Dimpal from 14.5.2014 till her death i.e. 18.5.2014 has stated that at the time of admission of Dimpal, she was having 95% burn injuries and admitted that on the case history regarding the manner, how she sustained injuries, he has not obtained the thumb impression of the victim for certifying the same to be correct to corroborate that Balveer gave her beatings as per F.I.R. version.

54. Counsel argued that this witness has prepared the case history on 14.5.2014 regarding admission of victim, who was admitted by appellant-Bhagwan Dei (mother-in-law) and she died because of septicaemia.

55. Counsel has next submitted that as per the case history Ex.Ka-3, Ka-4 & Ka-5, the patient was admitted at about 8.00 PM and she was administered multiple injections and was also administered oxygen. It is submitted that injection 'NS-500' was given to her for controlling the balance of sodium in the body. It is submitted that injection 'Taxim 500' was given as an antibiotic and injection 'Rabicip' was given for heart burning and pain.

56. The Counsel has further submitted that injection 'Melzap' was given for reducing the anxiety in the body and injection 'Primacort – 200 mg' was given for burning sensation and injection 'Diclofinac' was also given as anti inflammatory drug and pain killer. It is argued that all these medicines, as per PW-7, were administered to the victim within 15 to 20 minutes of her admission.

57. It is thus submitted that the Dying Declaration which was recorded around 8.35 PM by PW-9, nowhere reflects that PW-9, before recording the statement, has satisfied himself whether the victim was in a fit mental condition to record the statement though the Doctor only opined that the patient remained conscious during the statement. Counsel submits that in view of the seductive medicines given to the victim, even if she was conscious, it cannot be held that she was in a fit mental condition to record her statement voluntarily.

58. With reference to the dying declaration (Ex.Ka-8), it is also submitted that PW-9 has nowhere recorded that after he recorded the statement, it was read over to the victim and only thereafter she had put her right thumb impression. It is also submitted that as per the post-mortem report as well as the statement of the Investigating Officer, even the palms of hands were having burn injuries and, therefore, PW-9 has not recorded any satisfaction that he had put right thumb impression of the victim and there was no injury on it.

59. It is lastly submitted that PW-9 himself has not recorded any satisfaction by asking few preliminary questions to the victim to satisfy himself that she was in a fit mental condition to record the statement.

60. Counsel has next argued that the dying declaration is. in fact. written in two

handwritings. A bare perusal of the dying declaration (Ex.Ka-8) with regard to the statement of victim as reproduced above upto the line "Today i.e. 14.5.2014 at about 6.00 my husband after consuming liquor started giving me beatings." after this, the next four lines though handwritten are in bold fonts as compared to the previous part of the statement. In the subsequent part, the name of the appellants, Bhagwan Dei and Ambrish figured. There can be two possibility either that the statement was recorded by two persons by leaving it incomplete at the first instance or that the signature of the Doctor at the top and bottom and thumb impression of the victim were taken on a blank paper and in order to adjust the spacing, the scriber (PW-9) at subsequent point of time wrote five lines in bold fonts so that the spacing is adjusted. It is argued that if the statement is recorded by one person in one go, there will not be variation in the fonts of the word used while writing it in handwriting and, therefore, it makes the dying declaration highly suspicious.

61. In reply, learned A.G.A. for the State has, however, submits that all the witnesses have duly corroborated the version and have named the appellants as the person who have poured kerosene oil and lit the fire. On a Court query as to why the name of the husband-Balveer Singh was left out from the investigation and how he was found innocent, the A.G.A. has submitted that in the morning on the date of incident, he had gone back to join his duty in Army at Agra and, therefore, he was not found present at the spot.

62. After hearing the counsel for the parties and on perusal of the Trial Court record as well as the entire evidence including the case history as prepared by PW-7 and dying declaration recorded by PW-9, we find merits in this case for the following reasons :

A. As per the treatment-sheet (Ex.Ka-4), seven injections were administered to the victim who was admitted in Ishan Hospital by PW-7, Dr. Kaushal Kumar, who treated the victim from 14.5.2014 till her death i.e. 18.5.2014. As argued by the counsel for the appellants that three of the injections were seductive in nature and, therefore, the Doctor has not given a certificate that the patient though was conscious was in a fit mental condition to record her statement.

B. Laxmi Shankar Singh (PW-9) who recorded the dying declaration has not formed his own opinion by asking few preliminary questions to the victim, if she was in a fit mental condition to record her statement. This witness has stated that he started recording the statement at 8.30 PM and it was completed at 8.40 PM and doctor had again given an opinion that the victim was conscious.

A bare perusal of Ex.Ka-8 i.e. Dying Declaration shows that there are cuttings on the same and after writing five lines, spacing has been increased by writing it in bold alphabets in Hindi and, therefore, we find merits in the argument of the counsel for the appellant that on a blank paper, opinion of the doctor was taken and thumb impression of the victim was also obtained and, thereafter, the statement was written. Initially, part of the statement i.e. five lines up to statement "Today i.e. 14.5.2014 at about 6.00 my husband after consuming liquor started giving me beatings" is written in small font. Later part where name of the appellants are mentioned was written in bold fonts just to adjust the spacing.

C. PW-9 has nowhere recorded that after recording the statement he had

read over the same to the victim, who after understanding the same had put her thumb impression on the same.

D. On perusal of statement of PW-2, Narendra Pal, he cannot be held to be an eye witness, we find that this witness has stated that Balveer Singh, husband of victim-Dimple was serving in Army and used to consume liquor and create nuisance in the village whenever he was on leave and due to his behaviour, victim-Dimple at one point of time has left matrimonial home and after 4-5 months, she was brought back. However, this witness has further stated that he had no knowledge regarding demand of any dowry and stated that when he heard the noise, the main door of the house of Balveer Singh was locked and when he entered the house, he saw that Balveer Singh has caught hold of Dimple from her hairs and pushed her inside the room and 'other persons' followed him.

This witness is not specific that accused Bhagwan Dei and Narottam, were the 'other persons', who had followed Balveer Singh in the room. This witness never stated that after incident he had gone out for 20-25 days and his statement was recorded by the Investigating Officer after one month. There is no explanation of this delay. Therefore, this statement of this witness is not trustworthy.

E. On perusal of statement of PW-4-Sachin Singh who is nephew of victim if read with statement of PW-3-Mamta, who is sister of the victim, it is apparently clear that both of them are also not the eye witness. PW-4-Sachin Singh has stated that on hearing the voice, his mother (PW-3-Mamta) ran towards the house of victim and saw that she was burning and, therefore, she has not witnessed the incidence. PW-4-Sachin Singh himself has also admitted that when he reached the house, the victim has already sustained burn injuries and, therefore, both are not the eye witnesses.

F. There are material discrepancies in the statements of PW-2-Narendra Pal, PW-3-Mamta and PW-4-Sachin Singh. PW-2-Narendra Pal stated that by throwing sand and earth, the fire was doused but this was not so stated by PW-3 & PW-4. PW-3 stated that she had gone near the house of victim to throw garbage but this is not so stated by her son-PW-4 rather he has clearly stated that he and his mother heard noise from the house of victim and rushed to the place where the incident had taken place.

G. The defence witnesses as well as PW-1-Sanjeev Kumar have admitted that there is a distance of 100 meters between the house of victim-Dimple and his sister PW-3-Mamta and in between, there are 3-4 houses.

The defence witnesses have also stated that there is no place to throw garbage near the house of victim, therefore, the statement of PW-2- Narendra Pal, PW-3-Mamta & PW-4-Sachin Singh is not trustworthy that they are the eye witnesses.

H. The entire motive of committing the offence is attributed to the husband of the victim namely, Balveer Singh who is son of appellant no.1 and brother of appellant no.2. All the witnesses have stated that Balveer Singh was present at the spot and first he, after consuming liquor, gave beating to the victim, then by catching hold of her from her hairs, he pushed her inside a room and he along with two brother-in-laws of Dimpal, namely, Narottam and Ambrish, sister-in-law Kanti and mother-in-law Bhagwan Dei by pouring kerosene oil, put the victim on fire.

Learned AGA for State has conceded that Balveer Singh was not found present at the spot as he had gone back to join his army duty in the morning on

14.5.2014 i.e. the date of incident and even the role of Kanti (sister-in-law) and Ambrish (another brother-in-law) was also not verified during the investigation and no charge-sheet was filed either against husband Balveer Singh, his brother-Ambrish or sister-Kanti.

Therefore, the motive attributed against the appellant that Balveer Singh was harassing his wife(victim), is not proved.

I. Even otherwise, PW-2 & PW-3, the real sister and the nephew of the victim have admitted that 5-6 years prior to the incident, Balveer Singh and his wife Dimple (victim) had separated from the family of appellant Bhagwan Dei and both the families were separate in mess as they were cooking food separately. Therefore, the presence of appellants is highly doubtful specially when appellant Bhagwan Dei herself got admitted the victim in the hospital and stayed there with her till she died after 4 days.

J. There is no explanation as to why PW-2 got recorded his statement after one month of the incident as he has stated that after the incident, he had gone out of village for 20-25 days and never recorded statements to the police promptly. Similarly; the statements of PW-3 & PW-4 was also recorded much after the death of the victim and it was not recorded in between the time i.e. 14.5.2014 till her death on 18.5.2014 and, therefore, the possibility of false implication cannot be ruled out.

K. It has come in the statements of both PW-3 & PW-4 that the victim was under depression as her husband Balveer Singh has never taken her to his house while on duty in the Army and she was insisting him to take her along.

Both these witnesses have also stated that due to the bad vices of Balveer Singh, who was addicted to drinking & gambling and used to maltreat her and gave beating, was main reason that the victim used to remain depressed. Therefore, the defence taken by the appellant that on 14.5.2014 when the husband of victim left home to join back the duty in the Army in the morning, later on, in the evening, she committed suicide because she was mentally disturbed, cannot be ruled out.

L. The Trial Court has not given any weightage to the two defence witnesses i.e. DW-1 & DW-2, who are the residents of the village and have deposed so that after Balveer Singh had returned back on Army duty, his wife Dimple by locking the door had herself poured kerosene oil and had committed suicide by burning. These witnesses have stated that after breaking open the door, she was taken out of room.

63. In view of the above, we find merits in this present appeal that the prosecution has failed to prove the charges against the appellants.

64. Accordingly, the present appeal is allowed and the appellants are acquitted of the charges. The judgment of conviction and order of sentence is set aside. The appellants, namely, Bhagwan Dei and Narottam were on bail during the trial and are in custody from the date of judgment i.e. 13.11.2018 and have undergone total sentence of more than six years actual and they be released from the custody forthwith if they are not required in any other case.

65. The Trial Court's record be remitted back forthwith.

66. A copy of the order be sent to the concerned Jail Superintendent immediately.

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**(2024) 10 ILRA 789**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 03.10.2024**

**BEFORE**

**THE HON'BLE VIVEK KUMAR BIRLA, J.**
**THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.**

Criminal Misc. Writ Petition No. 13827 of 2024

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

**Counsel for the Petitioners:**
Dheeraj Kumar Pandey, Mukesh Kumar Pandey

**Counsel for the Respondents:**
G.A., Anand Kumar Singh

**(A) Criminal Law – Constitution of India,1950 – Article 226, 246(2) & 254(2) - Bhartiya Nagarik Suraksha Sanhita, 2023 - Sections 173, 174 & 174(2) – Bhartiya Nyaya Sanhita, 2023 - Section 351(2), - Criminal Law (Amendment) Act, 1932 – Section 10 - Indian Penal Code, 1860 - Section – 506** - Writ Petition – Validity of FIR – petitioner argued that Section 351(2) of the B.N.S., corresponding to Section 506 IPC, constitutes a non-cognizable offence under the B.N.S.S., consequently, only a Non-Cognizable Report (N.C.R.) can be registered under Section 174 B.N.S.S., and any investigation requires prior approval from a Magistrate under Section 174(2) B.N.S.S - cognizability in U.P. - the court held that St. Notification dated 31.07.1989 made Section 506 IPC cognizable - Section 531(2)(b) B.N.S.S. preserves this, ensuring Section 351(2) B.N.S. remains cognizable - Legal Interpretation - Articles 246(2) and 254(2) of the Constitution permit St. amendments, and the Criminal Law (Amendment) Act, 1932, already authorizes such modifications. (Para – 14, 15, 16, 19)

**(B) Criminal Law – Constitution of India,1950 – Article 226, 246(2) & 254(2) - Bhartiya Nagarik Suraksha Sanhita, 2023 - Sections 73, 174 & 174(2) – Bhartiya Nyaya Sanhita, 2023 - Section – 351(2), - Criminal Law (Amendment) Act, 1932 – Section 10, - Indian Penal Code, 1860 - Section – 506** - Writ Petition – Validity of FIR - allegation of Mala-fide FIR - the petitioner argues that the FIR was lodged to cancel anticipatory bail in Case Crime No. 102 of 2024 – court finds that, multiple civil and criminal disputes exist between the petitioner and the informant – the FIR lacks specific details (date, place, time of incident), raising concerns of malicious intent – hence, - notice issued to respondent No.5. - A.G.A. granted three weeks to file a counter affidavit - Petitioner granted two weeks to file a rejoinder affidavit - Next hearing scheduled for the week commencing 11.11.2024 - No coercive action against the petitioner until the next hearing. (Para – 20, 21, 22, 23, 25)

**Writ Petition Pending.** (E-11)

**List of Cases cited:**

1. St. of Haryana & ors. Vs Bhajan Lal & ors., 1992 Supp. (1) SCC 335,

2. Aires Rodrigues Vs Vishwajeet P. Rane & ors.; (2017) 11 SCC 62,

3. Rakesh & ors. Vs St. of U.P.; Application u/s 482 No. 23628 of 2021, delivered on 29.11.2021,

4. Mata Sevak Upadhyay Vs St. of U.P.; Criminal Misc. Writ Petition No. 7215 of 1994,

5. Arnold Rodricks & anr. Vs St. of Mah. & ors.; AIR 1966 SC 1788

6. Vinod Rao Vs St. of Guj.; 1980 SCC OnLine Guj 86.

7. Harishankar Bagla & anr. Vs St. of M.P.; (1954) 1 SCC 978.

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

Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri Mukesh Kumar Pandey, learned counsel for the petitioner, Sri Anand Kumar Singh, learned counsel for the respondents and Sri Pankaj Saxena, learned AGA for the State.

2. The present petition has been filed with the following prayers:-

*"a) to issue a writ, order or direction in the nature of certiorari quashing the order dated 08.07.2024 passed by Additional Police Commissioner Commissionerate Ganga Par P.S. Tharwai Prayagraj (Respondent no. 3).*

*b) to issue a writ, order or direction in the nature of certiorari quashing the impugned First Information Report dated 12.07.2024 registered as F.I.R. No. 196 of 2024, under Section 351(2) of the Bharatiya Nyaya Sanhita, 2023, Police Station- Tharwai, Commissionerate Prayagraj."*

3. Learned counsel for the petitioner at the very outset submits that he is not pressing prayer no.'a' and he confines his argument for the prayer no.'b' only.

4. Learned counsel for the petitioner submits that the impugned F.I.R. is bad in the eyes of law because Section 351(2) of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as "B.N.S.") (corresponding to Section 506 I.P.C.) is non-cognizable offence as per the first Schedule of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "B.N.S.S.") for which only an N.C.R., under Section 174 B.N.S.S., can be registered and investigation of non-cognizable offence cannot be conducted without the permission of Magistrate under Section 174(2) B.N.S.S.

5. It is further submitted by learned counsel for the petitioner that several civil and criminal disputes are pending between the petitioner and the first informant and the impugned F.I.R. is mala fide which has been lodged just to make out a ground to cancel the anticipatory bail of the petitioner in Case Crime No. 102 of 2024, under Sections 147, 148, 149, 323, 325, 504, 506, 392 I.P.C. which was also lodged by the present first informant. It is lastly by learned counsel for the petitioner that the impugned F.I.R. deserves to be quashed as the same is barred by Section 174(2) B.N.S.S. In support of his contention, learned counsel for the petitioner has also relied upon the judgement of the Apex Court in the case of ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp. (1) SCC 335*** in which it is observed that if from the perusal of the F.I.R. no cognizable offence is made out then the F.I.R. deserves to be quashed.

6. Per contra, learned A.G.A. has submitted that though in the first Schedule of B.N.S.S. Section 351(2) B.N.S. is non-cognizable offence, but in the corresponding Section 506 I.P.C., the State Government in exercise of its power under Section 10 of the Criminal Law (Amendment) Act, 1932 has issued a notification dated 31.7.1989, making Section 506 I.P.C. a cognizable offence. Therefore, in view of Section 531(2)(b) of B.N.S.S., such amendment in Section 506 I.P.C. is saved and the same will continue to be cognizable offence in view of the State amendment. Therefore, Section 351(2) B.N.S. is cognizable offence in the State of U.P. in view of the State notification dated 31.7.1989. In support of

his contention, learned A.G.A. has relied upon the judgement of the Apex Court in the case of ***Aires Rodrigues vs. Vishwajeet P. Rane and others; (2017) 11 SCC 62*** as well as judgement of Single Bench of this High Court in the case of ***Rakesh and others vs. State of U.P.; Application u/s 482 No. 23628 of 2021***, delivered on 29.11.2021.

7. After hearing learned counsel for the parties two questions have arisen for determination (i) whether Section 351(2) B.N.S. is a cognizable offence in U.P., in view of the notification dated 31.7.1989 and the impugned F.I.R. was correctly lodged under Section 173 B.N.S.S. instead of Section 174 B.N.S.S. and; (ii) whether the impugned F.I.R. suffers from mala fide as civil and criminal proceedings have been pending between the parties.

8. For deciding first question, it would be relevant to consider Section 531 B.N.S.S. which saves the notification issued under Cr.P.C. even after enforcement of B.N.S.S.; Section 8 of the General Clauses Act which prescribes the construction of references in any enactment regarding the repealed Act as well as Section 10 of the Criminal Law (Amendment) Act, 1932, which permits the State legislature to amend the Cr.P.C. Section 531 B.N.S.S., Section 8 of General Clauses Act and Section 10 of Criminal Law (Amendment) Act 1932 are being quoted as under:-

*" **Section 531 of B.N.S.S.:- Repeal and savings.-***

*(1) The Code of Criminal Procedure, 1973 (2 of 1974) is hereby repealed.*

*(2) Notwithstanding such repeal?*

*(a) if, immediately before the date on which this Sanhita comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), as in force immediately before such commencement (hereinafter referred to as the said Code), as if this Sanhita had not come into force;*

*(b) all notifications published, proclamations issued, powers conferred, forms provided by rules, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the said Code and which are in force immediately before the commencement of this Sanhita, shall be deemed, respectively, to have been published, issued, conferred, specified, defined, passed or made under the corresponding provisions of this Sanhita;*

*(c) any sanction accorded or consent given under the said Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Sanhita and proceedings may be commenced under this Sanhita in pursuance of such sanction or consent.*

*(3) Where the period specified for an application or other proceeding under the said Code had expired on or before the commencement of this Sanhita, nothing in this Sanhita shall be construed as enabling any such application to be made or proceeding to be commenced under this Sanhita by reason only of the fact that a longer period therefor is specified by this*

*Sanhita or provisions are made in this Sanhita for the extension of time.*

***Section 8 of General Clauses Act:- Construction of references to repealed enactments.-***

*(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.*

*(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.*

***Section 10 of the Criminal Law (Amendment) Act:- Power of State Government to make certain offences cognizable and non-bailable***

*(1)The State Government may, by notification in the Official Gazette, declare that any offence punishable under sections 186, 188, 189, 190, 228, 295-A, 298, 505, 506 or 507 of the Indian Penal Code (45 of 1860), when committed in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), be cognizable, and thereupon the Code of Criminal Procedure, 1898 (5 of 1898), shall, while such notification remains in force, be deemed to be amended accordingly.*

*(2)The State Government may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under section 188 or section 506 of the Indian Penal Code (45 of 1860), shall be non-bailable."*

9. From the perusal of Section 531(2) of B.N.S.S., it is clear that the notification issued under the Code of Criminal Procedure, 1973, which was in force immediately before commencement of B.N.S.S., shall be deemed to be issued under the corresponding provision of B.N.S.S.

10. Similarly, as per Section 8 of the General Clauses Act, 1897 on repealing a Central Act which was re-enacted, reference of repealed Act under any enactment shall be deemed to be reference to re-enacted law. Therefore, reference of I.P.C. and Cr.P.C. in Section 10 of the Criminal Law (Amendment) Act will be deemed to be reference of B.N.S. and B.N.S.S. after the repealing of I.P.C. and Cr.P.C. Therefore, if any amendment is made by the State Government in exercise of its power under Section 10 of Criminal Law (Amendment) Act in I.P.C. and Cr.P.C., then same amendment will be deemed to be made in B.N.S. and B.N.S.S. after repeal of I.P.C. and Cr.P.C.

11. The State of U.P., in exercise of its power under Section 10 of the Criminal Law (Amendment) Act, 1932 which is a central legislation, had issued notification dated 31.7.1989, amending the First Schedule of Cr.P.C. and making Section 506 I.P.C., cognizable offence if same is committed in any of the districts of the State of U.P. It is relevant to mention here that Section 10 of the Criminal Law (Amendment) Act, 1932, which is still in force, has authorized the State Government to make certain offences, including offence

under Section 506 I.P.C., cognizable and non bailable. Therefore, amendment made by the State notification dated 31.7.1989 in Section 506 I.P.C., making it cognizable and non-bailable shall be deemed to be notification issued in respect of Section 351(2) B.N.S. For reference the U.P. State notification dated 31.7.1989 is being quoted as under:-

*"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act No. XXIII of 1932) read with Section 21 of the General Clauses Act, 1897 (Act No. 10 of 1897) and in supersession of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the India Penal Code when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) be cognizable and non-bailable."*

12. The Apex Court also considered this issue in the case of ***Aires Rodrigues (supra)*** and held that the amendment made in Code of Criminal Procedure, 1998 will be deemed to be amendment made in Code of Criminal Procedure, 1973 and such amendment will be saved under Section 484 Cr.P.C., 1973. Paragraph Nos. 8 & 9 of the ***Aires Rodrigues (supra)*** is quoted as under:-

*"8. Section 10 of the Criminal Law Amendment Act, 1932, under which the said Notification has been issued, is as follows:*

***"10. Power of State Government to make certain offences cognizable and non-bailable.-****(1) The [State Government] [ Substituted for "Provincial Government" by A.L.O., 1950] may, by notification in the [Official Gazette] [ Substituted for "Local Gazette" by A.O., 1937] , declare that any offence punishable under Sections 186, 188, 189, 190, 228, 295-A, 298, 505, 506 or 507 of the Penal Code, 1860, when committed in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.*

*(2) The [State Government] [ Substituted for "Provincial Government" by A.L.O., 1950] may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under Section 188 or Section 506 of the Penal Code, 1860 shall be non-bailable."*

***There is no dispute that the 1932 Act is a Central legislation and even today it is operative and power conferred under Section 10 can be exercised.***

***9. In these circumstances, merely because the 1898 Code has been repealed and replaced by the 1973 CrPC, could not affect the situation. Section 484 CrPC, 1973 as well as Section 8(1) of the General Clauses Act, 1897 saved a notification which may have been issued under CrPC of 1898. Section 8 of the General Clauses Act is as follows:***

*"8. Construction of references to repealed enactments." (1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a*

*different intention appears, be construed as references to the provision so re-enacted.*

*(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."*

***In these circumstances, we are unable to sustain the view taken in the impugned orders."***

13. This issue again came into consideration in a full Bench judgement of Allahabad High Court in the case of **Mata Sevak Upadhyay vs. State of U.P.; Criminal Misc. Writ Petition No. 7215 of 1994,** decided on 8.9.1995. In that case the full Bench held that Section 10 of the Criminal Law (Amendment) Act is valid and the State Government notification dated 31.7.1989, making Section 506 I.P.C. cognizable and non-bailable in exercise of power under Section 10 of the Criminal Law (Amendment) Act, is also valid. In this case, the full Bench has relied upon the judgement of the Apex Court in the case of ***Arnold Rodricks and another vs. State of Maharashtra and others; AIR 1966 SC 1788*** as well as a Division Bench judgement of the Gujarat High Court in the case of ***Vinod Rao vs. State of Gujarat; 1980 SCC OnLine Guj 86*** and observed in paragraphs No. 108, 109, 110 of **Mata Sevak Upadhyay (supra)** are quoted as under:-

*"108. From this authority, it follows that to maintain the rule of flexibility, which is utmost necessary to run the administration, delegation of some powers, which are not essentially legislative in nature, is necessary. Legislature cannot sit every time to make law to cover all situation arising time to time, and, therefore, after the essential legislative policy having been laid down, the Legislature can leave to the State Government to make necessary changed in the interest of smooth administration. The Legislature has made offence under Section 506, IPC, and has also laid down the essential procedure for trial thereof. So far as the cognizability or bailability of that offence is concerned, the State Government is empowered to change the schedule under Section 10 of the Act of 1932 to make the offence cognisable or non-bailable depending on the exigencies of the administration. In view of the rule laid down in Arnold Rodrick's (supra), the power conferred on the State Government to amend the schedule to the CrPC is permissible. What is amended is not the offence which is declared by the Legislature in the exercise of essential legislative power. Amendment by virture of Section 13 is such which does not override the essential legislative power.*

*109. For the reasons Section 10 of the Act of 1932 as well as the notification of August 2, 1989, both the held valid.*

*110. In the premises, Sections 3, 4, 7, 8 and 14 of the Act of 1989 and Section 10 of the Act of 1932 and notification No. 777/VIII-9-4 (2) (87), dated July 31, 1989, published in the U. P. Gazette (Extraordinary) Part IV, Section Kha, dated 2nd August, 1989, are held valid."*

14. Code of Criminal Procedure comes in the List-III (concurrent list). Therefore, the parliament as well as State Legislature can amend the same in view of the Article

246(2) of the Constitution of India which is quoted as under:-

*"**Article 246(2)-** Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List?)."*

15. However, in case there is repugnancy between the laws, made by the Parliament and the State Legislature then such law made by the State Legislature shall be reserved for consideration of the President and will prevail in the State only after getting the assent of the President in view of the Article 254(2) of the Constitution of India which is quoted as under:-

*"**Article 254(2)-** Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:*

*Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."*

16. Though the Cr.P.C. is enacted by the Parliament, which made Section 506 I.P.C. as non-cognizable, but the State by its notification dated 31.7.1989, made it a cognizable offence. In normal circumstances, the matter would have been sent for consideration of the President and only after receiving the assent of the President, the amendment made by the State would prevail in the State. However, the Criminal Law (Amendment) Act, 1932 is a central act and this Act itself authorizes the State Government to make Section 506 I.P.C. as cognizable offence in the First Schedule of the Code of Criminal Procedure. Therefore, there is no requirement for seeking assent of the President of India for prevailing the same in the State.

17. This issue was also considered by the Apex Court in the case of ***Harishankar Bagla and another vs. State of Madhya Pradesh; (1954) 1 SCC 978.*** In this case, the issue was if the Act of the Parliament itself permits to issue an order with an effect of amending the central Act, then this amendment will not be deemed to be made by the State Government but the same is the legislated declaration of the central Act. This amendment will have effect notwithstanding any inconsistency therewith contained in any other enactment other than this Act. Paragraph No.21 of ***Harishankar Bagla (supra)*** is quoted as under:-

*"21. Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under Section 3 and the provisions of an existing law, to the extent of the repugnancy, the existing law stands repealed by implication, it seems to us that the repeal is not by any act of the delegate, but the repeal is by the legislative act of Parliament itself. By enacting Section 6 Parliament itself has declared that an order made under Section 3 shall have*

*effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the legislature itself has declared its will that way in Section 6. The abrogation or the implied repeal is by force of the legislative declaration contained in Section 6 and is not by force of the order made by the delegate under Section 3. The power of the delegate is only to make an order under Section 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act. Parliament being supreme, it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the act of Parliament itself. There is no delegation involved in the provisions of Section 6 at all and that section could not be held to be unconstitutional on that ground."*

18. Therefore, in view of the law laid down by the Apex Court in the case of ***Hari Shankar Bagla (supra)***, even the central Act can be amended by the State in exercise of power under Section 10 of the Criminal Law (Amendment) Act, which itself is a central legislation and in case of inconsistency, assent of the President is not required in such notification.

**19. From the above analysis, it is clear that the notification dated 31.7.1989, issued in exercise of power under Section 10 of the Criminal Law (Amendment) Act under the first Schedule of Cr.P.C., 1973, will be deemed to be issued for amending schedule-I of the B.N.S.S. making Section 351(2) B.N.S. (corresponding Section 506 I.P.C.) as cognizable and non bailable and such notification is already saved by Section 531(2) B.N.S.S. which is pari material of Section 484 of Cr.P.C., 1973. Therefore, in the State of U.P., Section 351(2) B.N.S. will remain cognizable and non bailable in view of the notification dated 31.7.1989 which was in force at the time of repealing the Cr.P.C. by B.N.S.S.**

20. So far as the second question that the impugned F.I.R. suffers from mala fide is concerned, from the perusal of the record, it appears that two civil suits, regarding the property in dispute as well as criminal cases are pending between the parties and in the F.I.R. lodged by respondent No.5, in Case Crime No. 102 of 2024, under Sections 147, 148, 149, 323, 325, 504, 506, 392 I.P.C., P.S. Tharwai, District Prayagraj, the petitioner had got interim bail. Thereafter, the impugned F.I.R. was lodged without mentioning the date, place or time of the incident of threatening to respondent No.5. Thereafter, respondent No.5 also filed an application before the Deputy Commissioner of Police, Gangapar for cancelling the anticipatory bail application of the petitioner in Case Crime No. 102 of 2024.

21. Apart from the above, perusal of the impugned F.I.R. as well as application dated 3.7.2024 of respondent No.5, also show that the main emphasis of respondent No.5 to cancel the anticipatory bail of the petitioner in Case Crime No. 102 of 2024, registered at P.S. Tharwai, District Prayagraj, therefore, contention of the petitioner that the impugned F.I.R. suffers from mala fide, appears to have substance. Therefore, on this point the matter requires consideration.

22. Issue notice to respondent No.5.

23. Learned A.G.A. is granted three weeks' time to file counter affidavit. The petitioner shall have two weeks thereafter to file rejoinder affidavit.

24. List in the week commencing 11.11.2024.

25. Till the next date of listing, no coercive action shall be taken against the petitioner in F.I.R. No. 196 of 2024, under Section 351(2) of the Bharatiya Nyaya Sanhita, 2023, Police Station- Tharwai, Commissionerate Prayagraj, provided the petitioner cooperates in the investigation.

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**(2024) 10 ILRA 797**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

**THE HON'BLE SIDDHARTH, J.**
**THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Criminal Misc. Writ Petition No. 16673 of 2024

**Abdul Mannan & Ors. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
A.C. Srivastava, Ram Lakhan Deobanshi

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

**Criminal Law - Indian Penal Code, 1860 - Sections 419, 420, 323, 504, 506, 467, 468, 471 &120B - Waqf Act, 1995 - Sections 51, 52 & 83(2) - Quashing of FIR - Petitioners and opposite party no.4 belongs to same family - Ancestors of them created Waqf in 1959, in respect of property owned by him and was registered by U.P. Sunni Central Waqf Board - The Board vide order dated 19.03.2019 appointed petitioner No. 1 as Mutawalli, to manage affairs of said Waqf - F.I.R was lodged by opposite party no.4 against petitioners - Allegations against them that they are damaging Waqf property for their personal gain, petitioner No.1 manipulated a 'Hiba-nama' dated 27.10.1969 in respect of part of said property and mutated in his name, in Revenue Records - They illegally alienated Waqf property even without approval of Board - Petitioners submitted that properties mentioned in Waqf-deed dated 14.03.1959 are different than properties mentioned in Hiba-nama. (Para 3, 4, 5, 6)**

**Held, informant tried to transform civil dispute into a criminal one - Dispute was adjudicable only by competent forum constituted u/s 83(1) of Waqf Act, thus impugned F.I.R without sanction of Board, was unsustainable in law and contravened the provisions of section 52A (3) of Waqf Act, quashed. (Para 14, 16)**

**Writ Petition allowed.** (E-13)

**List of Cases cited:**

1. Indian Oil Corporation Vs NEPC India Ltd. reported in 2006 (6) SCC 736

2. Professor R.K. Vijayasarathy & anr.Vs Sudha Seetharam & anr.reported in 2019 (16) SCC 739

(Delivered by Hon'ble Mohd. Syed Qamar Hasan Rizvi, J.)

1. Heard Shri A.C. Srivastava, learned counsel for the petitioners, Shri Anil Kumar Srivastava, learned counsel for opposite party no.4 and learned Additional Government Advocate for the State.

2. Since pure legal issue is involved in this case therefore, without calling counter affidavit, with the consent of the learned counsel for the parties, the present Writ

Petition is being decided finally at the stage of first hearing in view of the second proviso to Rule 2 of Chapter XXII of the Allahabad High Court Rules (Rules of Court, 1952).

3. By means of the present writ petition under Article 226 of the Constitution of India, the petitioners have prayed for quashing the First Information Report dated 29.08.2024, registered as Case Crime No. 0293 of 2024, under Sections 419, 420, 323, 504, 506, 467, 468, 471 and 120B of the Indian Penal Code at Police Station-Shahganj, District-Jaunpur and also for a direction to the official respondents not to arrest the petitioner in pursuance of impugned First Information Report.

4. The relevant facts of the case in brief as culled out from the averments made in the writ petition are that the present petitioners and the opposite party no.4 belongs to the same family. The ancestors of the petitioners and opposite party no.4, namely, Late Sheikh Asgar son of Sheikh Ghooran resident of Erakiyana, created a Waqf in the year 1959, in respect of the property owned by him and remained '*Mutawalli'* of the same till his death. Thereafter, as per the deed of Waqf, his son Mohd. Amin assumed the office of *Mutawalli-ship*. The said Waqf was duly registered by the U.P. Sunni Central Waqf Board, Lucknow as Waqf No. 49A-Jaunpur. After the death of the aforesaid Mohd. Amin, his son Mohd. Firoz Alam became the Mutawalli of the said Waqf on 01.01.2011. The U.P. Sunni Central Waqf Board vide order dated 19.03.2019 removed the said Mohd. Firoz Alam from the office of *Mutawalli-ship* and in the vacancy thus caused, appointed Shri Abdul Mannan the petitioner No. 1 herein as the Mutawalli, to manage the affairs of the said Waqf.

5. The pleadings as available before us, shows that the petitioner No.1 is holding the *Tauliyat* since 19.03.2019 i.e., the date of his appointment as *Mutawalli*. In the instant case, one Mohd. Rizwan, son of Late Nizamuddin who is the opposite party no. 4 herein, lodged a First Information Report (herein after referred as 'F.I.R'.) dated 29.08.2024 against the petitioners, namely, Abdul Mannan, Mohd. Rehan, Mohd. Shakir and Abdul Hannan alleging therein that the petitioners are damaging the Waqf for their personal gain. It is also alleged that despite full knowledge of the fact that Late Sheikh Asgar devoted all of his property as Waqf on 14.03.1959, the petitioner No.1 manipulated a 'Hiba-nama' dated 27.10.1969 in respect of a part of the aforesaid property and further got the same mutated in his name, in the Revenue Records. In the said F.I.R., it has been categorically alleged that on the strength of the aforesaid unlawful entries made in the Revenue Records on the basis of a fraudulent '*Hiba-nama'*, he illegally alienated the said Waqf property in favour of about 40 persons even without the approval of the U.P. Sunni Central Waqf Board. Further allegation as made in the said F.I.R. is that on 18.06.2024, at about 10:00 AM, petitioners tried to erect a boundary wall and a gate on the said Waqf property and on being opposed by the Informant / opposite party no.4 along with his sons, the petitioners uttered filthy abuses while beating the informant with kicks / punches and stick and also threatened to kill, resulting into the lodging of the impugned F.I.R.

6. Assertion on behalf of the petitioners is that the allegation as levelled by the opposite party no. 4 in the impugned

F.I.R. is totally bald and have no substance. The properties alleged to have been alienated are not the Waqf property and the same has been acquired by the above named petitioner from his grandfather through Hiba-nama dated 27.10.1969. The properties mentioned in the Waqf-deed dated 14.03.1959 are entirely different than the properties mentioned in the said *Hiba-nama*. The contention of the learned Counsel for the petitioner is that the present F.I.R. is nothing but a tactics to exert under pressure upon the petitioners to step back from pursuing the pending proceeding under Case Crime No. 376 of 2013. The submission as advanced by learned counsel for the petitioners is that dispute between the parties is purely of civil nature and can only be adjudicated before the competent forum. It is the settled law that the parties in the civil dispute could not be permitted to use criminal proceedings as hand-twisting device. Further, no mention of any injury caused to anyone in the alleged incident, itself exposes the falsehood of the concocted story as alleged to have taken place on 18.06.2024 as narrated in the impugned F.I.R.

7. The contention of the learned counsel for the petitioner is that the informant / opposite party no.4 has no locus-standi to lodge the F.I.R. in view of the specific bar as provided under Section 52A (3) of the Waqf Act, 1995 that specifically provides that in case of any alienation of the Waqf property without sanction of the Board, no court shall take cognizance of any offence under the said section except on a complaint made by the Board or any officer duly authorised by the State Government in this behalf and, therefore, the lodging of F.I.R. by the opposite party no.4 alleging alienation of the Waqf property without the sanction of the Board, is de-hors of the Waqf Act, 1995.

8. Before delving into the question as to whether the opposite party no. 4 is competent under law to lodge an F.I.R. seeking prosecution against the petitioners regarding the alleged alienation of the Waqf property; it would be apposite to go through the provisions as stipulated under the Waqf Act, 1995 dealing with the alienation of the Waqf property.

For ready reference, the provisions of Sections 51, 52 and 52A are reproduced hereinafter: -

***51. Alienation of waqf property without sanction of Board to be void.—****(1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board:*

*Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013).*

*(1A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void ab initio:*

*Provided that in case the Board is satisfied that any waqf property may be developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two-thirds of the total membership of the Board:*

*Provided further that nothing contained in this sub-section shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:*

*Provided also that—*

*(a) the acquisition shall not be in contravention of the Places of Public Worship (Special Provisions) Act, 1991 (42 of 1991);*

*(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;*

*(c) no alternative land is available which shall be considered as more or less suitable for that purpose; and*

*(d) to safeguard adequately the interest and objective of the waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property.*

***52. Recovery of waqf property transferred in contravention of section 51.—****(1) If the Board is satisfied, after making any inquiry in such manner as may be prescribed, that any immovable property of a waqf entered as such in the register of waqf maintained under section 36, has been transferred without the previous sanction of the Board in contravention of the provisions of section 51 or section 56, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.*

*(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.*

*(3) Every order passed under sub-section (2) shall be served—*

*(a) by giving or tendering the order, or by sending it by post to the person for whom it is intended; or*

*(b) if such person cannot be found, by affixing the order on some conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:*

*Provided that where the person on whom the order is to be served, is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be the service upon the minor.*

*(4) Any person aggrieved by the order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the Tribunal within whose jurisdiction the property is situate and the decision of the Tribunal on such appeal shall be final.*

*(5) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.*

*(6) In exercising his functions under this section the Collector shall be guided by such rules as may be provided by regulations.*

***52A. Penalty for alienation of waqf property without sanction of Board.—****(1) Whoever alienates or purchases or takes possession of, in any manner whatsoever, either permanently or temporarily, any movable or immovable property being a waqf property, without prior sanction of the Board, shall be punishable with rigorous imprisonment for a term which may extend to two years: Provided that the waqf property so alienated shall without prejudice to the provisions of any law for the time being in force, be vested in the Board without any compensation therefor.*

*(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any offence punishable under this section shall be cognizable and non-bailable.*

***(3) No court shall take cognizance of any offence under this section except on a complaint made by the Board or any officer duly authorised by the State Government in this behalf.***

*(4) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this section."*

*(emphasis supplied by this Court)*

9. From a bare perusal of sub-Section (3) of Section 52A of Waqf Act, 1995 it is crystal clear that the same categorically bars the Court to take cognizance of any offence under the said Section except on a Complaint made by Board or any officer duly authorized by the State Government in this behalf.

10. Further, in the instant case, by means of the impugned F.I.R. the informant / opposite party no. 4 has alleged alienation of the Waqf property by the *mutawalli* of the Waqf. At this stage it would not be out of place to note that legislature has described the mutawalli of waqf as 'public servant' under sub-section (2) of section 101 of the Waqf Act, 1995, which reads as under: -

*"(2) Every mutawalli of a [waqf], every member of managing committee, whether constituted by the Board or under any deed of [waqf], every Executive Officer and every person holding any office in a [waqf] shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860)."*

11. It would not be out of place to mention that the Waqf Board under Section 64(1)(k) of the Waqf Act, 1995 itself has been bestowed with the power to take action against the *mutawalli*, on being found that he misappropriates or fraudulently deals with the property of the Waqf.

12. From the impugned F.I.R. it is apparent that substratum of the dispute is the very character of the property alleged to have been alienated by the petitioners in as much as, whether the same belongs to the Waqf or not ? In case of being Waqf property, whether the previous sanction as stipulated under Section 51 of the Waqf Act,1995 was obtained or not? Whether the *Hiba-nama* dated 27.10.1969 is a genuine and valid document? Further, whether the petitioner no.1 was rightly appointed as the *mutawalli* of the Waqf in question by the U.P. Sunni Central Waqf Board vide order dated 19.03.2019 by removing the earlier *mutawalli*?

13. Undoubtedly, the disputes as referred in the preceding paragraph are amenable to Section 83 of the Waqf Act, 1995. Sub-Section (2) of Section 83 of the

Waqf Act, 1995 categorically provides that any dispute, question or other matter relating to the Waqf shall be determined by the Waqf Tribunal duly constituted under the Waqf Act, 1995. Section 83 (2) of The Wakf Act, 1995 reads as under:-

*"(2) Any mutawalli person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf."*

14. In view of what has been narrated and discussed hereinabove, we hold the opinion that by means of the impugned F.I.R. the opposite party no. 4 has tried to transform the civil dispute into a criminal one. The Hon'ble Supreme Court has very critically addressed the said issue in the case of In**dian Oil Corporation versus NEPC India Limited reported in 2006 (6) SCC 736**, wherein Hon'ble the Apex Court has taken serious notice of the growing trend of mischaracterising civil dispute into criminal. Further, putting a note of caution in case of **Professor R.K. Vijayasarathy and another versus Sudha Seetharam and another reported in 2019 (16) SCC 739**, the Hon'ble Supreme Court of India has been pleased to observe that cloaking a civil dispute as criminal matter in the absence of requisite ingredients necessary to constitute a criminal offence is abuse of Court's process. In the present case the foundation of the impugned F.I.R. is the allegation of alienation of the property in question by the petitioner No. 1. The crux of dispute involved in the matter lies in determination of the fact that as to whether the property in question allegedly alienated is indeed a Waqf. The said dispute is effectively adjudicable only by the competent forum duly constituted under section 83(1) of the Waqf Act, 1995.

15. It is well settled that while exercising its jurisdiction under Article 226 of the Constitution of India, the Court is not confined to the procedural stage of a case but is empowered to take into account the surrounding circumstances leading to the initiation of the proceeding. Undoubtedly, quashing of F.I.R or proceeding is warranted where it manifests that there is a legal bar against the institution or continuance of the proceeding. In the instant case, the allegation of alienation of the property in question by the petitioner in contravention of the provisions under Section 51 of the Waqf Act, 1995, is the genesis of the dispute which cannot be prosecuted as a State Case based upon F.I.R. in the teeth of Section 52A(3) of the Waqf Act, 1995, which categorically provides that no Court shall take cognizance of any offence under this Section except on a Complaint made by the Board or any officer duly authorised by the State Government in this behalf.

16. In the light of the deliberations made herein above the impugned F.I.R. dated 29.08.2024 lodged by the opposite party no. 4 in respect of the alleged alienation of the Waqf property without the sanction of the Waqf Board, is unsustainable in law, being in contravention to the legal bar as stipulated under sub-section (3) of section 52A of the Waqf Act, 1995.

17. Accordingly, considering the statutory restriction being imposed under sub-Section (3) of Section 52A of the Waqf

Act, 1995, the impugned F.I.R. dated 29.08.2024 registered at Case Crime No. 0293 of 2024; Police Station-Shahganj, District-Jaunpur; to the extent it relates to Section 419, 420, 467, 468, 471 of the Indian Penal Code is liable to be **quashed** and is hereby quashed to that extent. So far as the rest of the alleged offence under Sections 323, 504, 506 and 120B of the Indian Penal Code as mentioned in the F.I.R. dated 29.08.2024 are concerned, it is pertinent to note that since these offences are non-cognizable, therefore, prosecution is at liberty to proceed with the investigation only after seeking required permission in terms of the provisions of Section 155(2) of Code of Criminal Procedure.

18. However it is made clear that this order shall not prevent the concerned Waqf Board or any officer duly authorized by the State Government to institute Complaint in terms of Section 52A of The Waqf Act, 1995.

19. As a fall out and consequence of the above deliberation, this Writ Petition is **allowed** with the observations and directions set forth herein above.

20. Parties to this writ petition shall bear their respective costs.

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**(2024) 10 ILRA 803**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 24.10.2024**

**BEFORE**

**THE HON'BLE ASHWANI KUMAR MISHRA, J.**
**THE HON'BLE VIKAS BUDHWAR, J.**

Criminal Appeal Nos. 6632 of 2019, 6501 of 2019, 3104 of 2021 & 151 of 2019

**Hakim ...Appellant**

**Versus**

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

**Counsel for the Appellant:**
Araf Khan, Lihizur Rahman Khan, Pankaj Kumar Shukla, Sanjay Kumar Dwivedi

**Counsel for the Respondent:**
Anil Kumar Pandey, G.A.

**Criminal Law –Indian Penal Code,1860 - Sections 147, 148 & 302 read with Section 149 IPC awarding imprisonment for life with a fine of Rs. 25,000/- and a default sentence of one year three months- whether the first information report is anti-timed or not- possibility of F.I.R. having been lodged after deliberation and consultation cannot be ruled out- deposition of star witnesses doubtful- it is nothing but a classic case of improvement- various shortcomings not only in the investigation- prosecution theory itself appears doubtful for holding appellant's guilty of commission of the charged offence- material contradictions not only in the oral testimony of the prosecution witnesses- entire prosecution theory is botched up sans any credibility- prosecution has failed to establish the commission of the crime by the accused beyond reasonable doubt-conviction set aside-appeal allowed. (Paras 36, 38, 42, 43 and 45)**

**HELD:**
Certainly, a defective investigation may not demolish the prosecution theory but overall circumstances needs to be considered depending upon the facts and circumstances in order to weigh the import and the impact of the defective investigation. We find that there are various shortcomings not only in the investigation conducted by the investigating officer but also the fact that the prosecution theory itself appears doubtful for holding appellant's guilty of commission of the charged offence. What is required is a threadbare analysis of the prosecution theory in light of the oral and documentary evidence on record. (Para 38)

Plainly and simply, right from the inception, there appears to be material contradictions not only in the oral testimony of the prosecution witnesses but also the first information report and inquest, which goes to suggest that the entire prosecution theory is botched up sans any credibility. (Para 42)

As regards the theory propounded by the prosecution that since the accused bore enmity with the deceased and the same became the basis of commission of the offence is concerned, the law is well settled in this regard that enmity is a double-edged weapon. (Para 43)

In the present case, we find that though the prosecution has pressed into service the motive for commission of the crime, but looking into the overall circumstances emanating from the depositions of the prosecution witnesses as well as from the FIR, we find that the prosecution has failed to establish the commission of the crime by the accused beyond reasonable doubt. (Para 45)

**Appeal allowed.** (E-14)

**List of Cases cited:**

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

2. Mohd. Muslim Vs St. of U.P., 2023 (7) SCC 350

3. Balvir Singh Vs St. of M.P., 2019 (15) SCC 599

4. Yudhishtir Vs The St. of M.P., 1971 (3) SCC 436

5. Balram Vs St. of M.P., 2023 Live Law (SC) 960

6. Nand Lal Vs St. of Chhattisgarh, AIR 2023 SC

(Delivered by Hon'ble Vikas Budhwar, J.)

1. As these four appeals arise out of a common judgment and order dated 25.07.2019 passed by the Addl. Sessions Judge, Court No.3, Mathura, they are being heard together and are being decided by a composite order.

2. Criminal Appeal Nos. 6632 of 2019, 6501/2019 and 3104 of 2019 and Jail Appeal No.151 of 2019 are against the judgment and order dated 25.07.2019 passed by the Addl. Sessions Judge, Court No.3, Mathura in Sessions Trial nos. 803/2013 and 344/2014, by which the appellants have been convicted under Sections 147, 148, 302 IPC read with Section 149 IPC awarding imprisonment for life with a fine of Rs. 25,000/- and a default sentence of one year three months.

## FACTS

3. The prosecution story in brief is that on 06.01.2013, Bacchu Singh (PW-1) lodged a First Information Report in the Police Station- Refinery, Mathura against the appellants and one Ravi son of Kishani alleging that on 06.01.2013, when his brother Suresh Chandra had gone in the morning hours to answer the nature's call, he was followed by the PW-1 Bacchu Singh, brother of the deceased, Vikram (PW-2) son of the deceased and Lauki, the father of the deceased and when the deceased reached the agricultural field, where mustard (sarson) was sown, then with the pre-determined mind the accused Hakim Singh son of Girraj (A-1), Lauki son of Girraj (A-2), Ajay @ Ajju son of Pooran (A-3), Kishani son of Patiram @ Patti (A-4), Hakim son of Niranjan Singh (A-5) and Ravi son of Kishani (A-6) and who were hiding behind the mustard crop at 08:30 in the morning resorted to gun-shot firing and also by using Farsa and knife, they inflicted injuries on account whereof Suresh Chandra (deceased) succumbed to the injuries and died. The case was registered by the police as Case Crime no.6 of 2013, under Sections 147, 148, 149 IPC read with Section 302 IPC.

4. Post lodging of the FIR, the Investigating Officer was appointed, inquest report was prepared, post mortem was done and after investigation, charge sheet came to be filed against the accused A1, A2, A3, A4 and A5 under Section 147, 148, 149 and 302 IPC on 12.04.2013. However, it has been reported that after filing of the Crimial Appeal No.5907 of 2019, Kishani (A-4) has died. With respect to accused A-5 Kishani, he was found to be juvenile. After taking cognizance of the charge sheet, the case was committed to the Court of Sessions on 18.05.2013, 29.11.2013 and 04.04.2014 and the charges were framed against the appellants under Sections 147, 148, 302 IPC read with Section 149 IPC.

5. During trial, the prosecution examined as many as 7 witnesses, namely Bacchu Singh (informant-PW-1), Vikram (PW-2, witness of fact), Bare Lal (PW3) author of the inquest, Dr. K.K. Gupta (PW-4), witness, who conducted post mortem, Surendra Singh, Head Moharrir (PW-5), who lodged the FIR and Ram Kishan Yadav (PW-6), first Investigating Officer, who conducted investigation for the period from 06.01.2013 to 08.01.2013 and Ashok Kumar (PW-7), second Investigating Officer, who conducted investigation from 12.01.2013 till the submission of charge sheet. Bhagwan Singh son of Lacchi Ram also stepped into the witness box as Defence Witness (DW-1). After prosecution evidence was closed, the Trial Court recorded the statement of the appellant under Section 313 CrPC.

6. All the appellants denied the allegations leveled against them, and stated that they were falsely implicated in the said criminal case. The Trial Court found them guilty and sentenced them under Section 147, 148, 302 IPC read with Section 149 IPC.

**SUBMISSIONS ADVANCED ON BEHALF OF APPELLANTS**

7. Sri Araf Khan, learned counsel for the appellants has sought to argue that the appellants have been falsely implicated in the criminal case, as they are innocent. Elaborating the said submission, it is submitted that even if the prosecution theory is taken to its face-value, then too the appellants cannot be said to be either present at the place of the incident and further the presence of the PW-1 is itself doubtful. Submission is that as per the deposition of Bacchu Singh (PW-1) and PW-2 Vikram, the incident took place in the morning hours at about 08:30 A.M. in the month of January and the place, whereat the incident took place, there was an agricultural field, over which mustard crop was sown and the crop was about 6 ft. and the allegation is that the accused were hiding themselves behind the mustard crop and when the deceased, Suresh Chandra entered the agricultural field, then they resorted to gun-shot fire and inflicted injuries with knife and Farsa. Contention is that as per the deposition of the prosecution witnesses, the PW-1, PW-2 and Lauki, who happens to be the father of the deceased and PW-1 and the grand-father of the PW-2 were about 20-30 steps behind the deceased, thus it was not possible to identify the assailants who were hiding behind the mustard crop.

8. It is also contended that there are material contradictions in the testimony of the PW-1 and PW-2, which shows that the FIR is ante-time, particularly when during the cross-examination of Bacchu Singh by the defence, it was deposed by the

PW-1 that he had gone to the Police Station and thereafter along with Sub-Inspector and the Police Force, they came to the place of incident, where the dead body of the deceased was lying in the agricultural field and the police officials waited there for half an hour and took the corpus to the Police Station- Refinery, where PW-1 waited for half an hour, whereafter the Sub-Inspector procured the signature on the FIR and even the inquest papers were prepared inside the police station, whereas PW-2 Vikram in his cross-examination by the defence deposed that the Sub-Inspector sent the cadavers to the post-mortem house from the place of incident and at the same time, PW-2 was taken to the Police Station and thereafter the FIR was lodged. It is thus contended that the FIR was lodged after post-mortem and the said fact also stands fortified as the details of the FIR are not mentioned in the post-mortem report.

9. Learned counsel for the appellant has also argued that PW-1 has also deposed in the cross-examination that only blank papers for the purpose of preparation of panchayatnama were offered to him and he signed on the blank papers. It is thus contended that the very basis for holding the appellants to be guilty of commission of the said offence is not borne out from the record and it is a clear case of false implication. With respect to the conduct of the prosecution in not asking for any help from the villagers, it is contended that as per the deposition of the prosecution witnesses, they waited for one and half hours at the place of the incident and did not bother to call anybody for help despite the fact that the place of incident was just 100 meters away from the house of the appellants which itself shows that a false prosecution case has been cooked up.

10. Additionally, it has also been argued that the hollowness of the prosecution story is further borne out of the fact that though it is the case of the prosecution that at the time of occurrence of the said incident, the PW-1 and PW-2 and Lauki were about few steps away from the deceased and they were attacked by resorting to gunshot fire, but the said allegation was at no point of time reported to the police when the statements were recorded under Section 161 CrPC and at the time of the statement under Section 164 CrPC, improvements have been made just in order to falsely implicate the appellants. It is thus prayed that the judgment and order of the Trial Court convicting the appellants be set aside and the appeal be allowed in toto.

**SUBMISSIONS OF THE COUNSEL FOR THE STATE (A.G.A.) & INFORMANT**

11. Countering the said submissions, Sri Vikas Goswami, learned A.G.A. as well as Shri Anil Kumar Pandey, learned counsel for the informant have submitted that the Trial Court has rightly convicted the appellants. It is submitted that there was ample evidence available on record including the testimony of the prosecution witnesses, which clearly proves that the appellants had committed the offence. Argument is that it is not a case, wherein there was any fog in the morning hours, when the incident took place, as it has borne out from the record that the prosecution witnesses have come up with the stand that the weather was clear and the distance between the place of incident and the PW-1 and PW-2, who had witnessed the said incident was 10-20 steps. Thus, it is highly inconceivable that there can be any mistake in identifying the assailants. They further submit that there happens to be motive behind commission of the offence

as the accused bore enmity, particularly, when the father of the accused A1 and A2 being Girraj was murdered by the deceased, Suresh and FIR came to be lodged. Thus, the same became the motive behind the commission of offence.

12. Additionally, it has been submitted that in case, there was any inconsistency in the deposition or defect in the investigation, the same would not render the case of the prosecution unreliable as what is to be seen are the evidences available on record, which even otherwise in the facts of the present case points out involvement of the accused in the commission of the offence. It is thus prayed that the appeals be dismissed.

13. In order to establish its case, the prosecution has adduced documentary and oral evidence.

**DOCUMENTARY EVIDENCE**

14. The documentary evidence consists of: -

(i) Written Report (Exbt. Ka.1),

(ii) Panchayatnama (Exbt. Ka.2),

(iii) Police Form No.379 (Exbt. Ka.3),

(iv) Letter written to Chief Medical Officer, Mathura (Exbt. Ka.4),

(v) Police Form No.13 (Exbt. Ka.5),

(vi) Letter written to Reserve Inspector, Police Line, Mathura (Exbt. Ka.6),

(vii) Post Mortem Report of deceased Suresh Chand (Exbt. Ka.7),

(viii) Chik FIR (Exbt. Ka.8),

(ix) Nakal Rapat No.20 Time: 9:40 A.M. (Exbt. Ka.9),

(x) Plain soil and blood stained paper no.4A/7 (Exbt. Ka.10),

(xi) Three empty cartridges 315 bore Paper no.4A/8 (Exbt. Ka.11),

(xii) Site-plan Paper no.4A/3 (Exbt. Ka.12),

(xiii) Charge Sheet No.42/2013 (Exbt. Ka.13) and

(xiv) Charge Sheet no.42A/13 (Exbt. Ka.14).

**TESTIMONY OF PROSECUTION WITNESSES:**

15. **PW-1: Bacchu Singh**, the informant has been examined as PW-1. He is the brother of the deceased. PW-1 in his examination stated that on 06.01.2023, his brother, Suresh Chandra in order to answer the nature's call left his house and the PW-1 along with PW-2 Vikram and his father Lauki left after few minutes and when the deceased reached the agricultural field, where the mustard crop was standing owned by Girraj son of Lakshman Singh, then the accused A-1 to A-6 resorted to gunshot firing and also inflicted injuries by knife and Farsa and the deceased succumbed. In the cross-examination by the defence on 31.10.2014, he has stated that the deceased had left the house for answering the nature's call 1-2 minutes earlier and when he along with PW-2 and Lauki were going to answer nature's call, then several villagers were also present answering the nature's call. The distance between the PW-1 and the deceased was 20 steps and the accused A-1 to A-6 were hiding behind the mustard crop resorted to

gunshot firing and inflicted injuries. The PW-1 also deposed that when after receiving the injuries, deceased fell down, then PW-2 Vikram and his father Lauki caught hold of the deceased and their hand and clothes got stained with blood. However, the sample of the blood-stained clothes was not taken by the police and the clothes was thereafter washed. It is also stated that the report was lodged in the police station and the scribe to the said report was Rajendra Singh who was the brother-in-law of the deceased, he was not called, however, he arrived a day prior to the date of incident and he was staying in the house and he owned a mobile phone, but he did not come to the place of incident and he remained in the house. The police was not informed through the mobile phone of Rajendra and so far as the mobile phone, which was with the deceased, the same did not have any balance. The accused were armed with knife and the Pharsa, but it is not known as to who was holding which weapon. PW-1 stated that he had heard as many as six gunshot fires simultaneously. It was also stated that along with Sub-Inspector, the police force reached the place of incident. The Investigating Officer did not prepare the site-plan in the presence of the PW-1 and the Investigating Officer waited at the place of incident for half an hour and thereafter took the dead body to the Police Station, Refinery where PW-1 along with others waited for one hour and then the written report was signed by PW-1. The inquest was prepared, which was signed in the Police Station. PW-1 showed his ignorance to the fact as to whether he signed inquest or not at the time of sealing the dead body and thereafter, the dead body was sent for post mortem. PW-1 further stated that about 3-4 gunshot fires were made upon PW-1. PW-2 and his father Lauki, who were about 30 steps away from the deceased. However, the same was not reported to the police and no statement to the said effect was made under Section 161 CrPC. He also stated that when the inquest report was forwarded to him, the same was blank on which his signatures were taken. Thereafter signatures of the witnesses to the inquest report, Pooran, Bhoori, Banke Bihari and Siyaram was also taken that too on blank papers.

16. In the cross-examination of the PW-1 by the defence on 26.11.2014, he has stated that Rajendra Singh son of Udai Singh, Scribe of the written report resides in Barsane, which is 50-55 kilometers from the police station and the distance of police station from the place of incident is 10 kilometers. He further stated that PW-1 along with his younger brother Than Singh, Banke Bihari had gone to Police Station on a motorcycle and when the police came to the place of incident, then the dead body was taken to the Police Station. He further deposed that Siyaram had gone to the police station twice, firstly at the time of the loding of the First Information Report and secondly, for signing the inquest report in the police station. PW-1 while answering a question posed to him deposed that after post-mortem, the Investigating Officer asked the alleged witnesses to the inquest to sign the inquest report. He further stated that place of the incident where the accused had hidden themselves, 5-6 feet of mustard crop was standing. PW-1 also stated that another motive for enmity is that Kishan Dei mother of PW-1 had entered into an agreement on 07.12.2010 with the accused Hakim S/o Niranjan, however, the sale deed could not be executed and on account of non-payment of interest, seeds of enmity stood sown. PW-1 in his cross-examination by the defence on 27.11.2015 deposed that the place of incident is about 100 meters

from the house wherein they reside and at the time when the incident took place accused Kishani was holding Farsa and Ravi knife. Further in his cross-examination, he has come up with the stand that when he had gone for answering the nature's call, no villager was found and they were about 20-25 steps away from the deceased when the incident took place.

17. **PW-2:- Vikram** son of Suresh got himself examined as PW-2. He in his examination-in-chief on 03.09.2016 had deposed that the accused A1-A6 had murdered his father and he also with PW-1 and his grandfather Lauki were behind the deceased, who had gone to answer the nature's call. In his cross-examination by the defence on 23.09.2016, he deposed that at the place of incident, there existed 3 and 1/2 feet mustard crop and his father had gone to answer nature's call 1 to 2 minutes earlier and he was 20-25 steps behind the deceased. He in his cross-examination further deposed that the Investigating Officer had sent the cadevers to the post-mortem house, directly from the place of incident and thereafter PW-2 along with others had gone to the police station and thereafter the FIR was lodged. Further in his cross-examination by the defence, PW-2 deposed that his maternal uncle Rajendra Singh lives about 50-60 kilometers away and police arrived after a period of 1 to 1 and half hours at the place of incident and they waited for the said period. He also deposed that certain blank papers were provided to him and he was required to sign them, which he signed.

18. **PW-3:- Bare Lal** is the author of the inquest. He in his examination-in-chief has stated that he had prepared the inquest report on 06.01.2013 at the place of incident. Information was received about the commission of crime at 09:40 A.M. and the proceeding for making the inquest report started at 10:45 A.M. and it concluded at 11:40 A.M. In his cross-examination, he deposed that name of the accused does not find mention in the inquest report. He in his cross-examination dated 06.09.2017 submitted that he had not drawn the samples of blood stained soil and he does not remember that at the place of incident or near the dead body any cartridge or bullets were found and he also does not remember that he had taken photos of the footsteps of the accused.

19. **PW-4:- Dr. K.K. Gupta** had conducted the post mortem. According to him, as many as six injuries were sustained by the deceased about 8 hours earlier and the cause of death is gunshot injuries as well as injuries by hard and blunt object. The autopsy surgeon found following anti-mortem injuries to be the cause of death:

> "1. Firearm entry wound 2.5 cm x 1.5 cm on the chest in the front portion. Contusion 2 cm x 1 cm in the right armpit in which the bullet was found stuck inside.
>
> 2. Firearm entry wound 1 cm x 0.5 cm deep on the left side of the chest.
>
> 3. Incised wound 1 cm x 2 cm deep to bone and incised wound 1 cm x 1 cm deep to bone in the back of the skull.
>
> 4. Incised wound 1 cm x 1 cm deep to bone on left tample.
>
> 5. Incised wound 6 cm x 2 cm deep to bone on the top of the skull.
>
> 6. Lacerated wound 1 cm x 0.5 cm on the right ring finger."

20. **PW-5:- Surendra Singh**, Head Moharrir in his cross-examination

stated that he had recorded the contents of the written report in the G.D. and has proved the Chik report. He is a formal witness.

21. **PW-6:- Ram Kishan Yadav**, the first Investigating Officer, in his examination-in-chief on 06.07.2018 has deposed that on the pointing out of the PW-1 the first informant, he prepared the site-plan. He in his cross-examination by the defence submitted that it is true that for lodging the FIR no person by the name of Vikram or the Scribe, Rajendra had come to the police station, as their name does not find place in the G.D. However, Bacchu (PW-1) had come to lodge the FIR. He in his cross-examination further deposed that while recording of statement under Section 161 CrPC, the PW-1 and PW-2 did not make any disclosure that they also confronted gunshot fires from the accused at the time of the incident. He further deposed that during the investigation he had not perused the inquest report. He further deposed that while preparing the site-plan, he had not marked the places where on the pointing of the PW-1, the accused are stated to have been stationed while committing crime. He also deposed that he has not recorded the statement of any independent witnesses, who had witnessed the said incident.

22. **PW-7:- Ashok Kumar**, the second Investigating Officer, in his examination-in-chief has stated that he had taken the statement of PW-2 Vikram on 19.03.2013, prior to it he was not available. He further deposed that he has not taken any statement of any other person, as nobody had witnessed the said incident.

**TESTIMONY OF DEFENCE WITNESS**

23. **DW-1:- Bhagwan Singh** son of Lacchi Singh appeared as DW-1. According to him, on 06.01.2013 at about 6:00 A.M. to 07:00 A.M. in the morning, he along with Ajju after hearing noises of firing came out of the house. He further stated that Ajay @ Ajju, A-2 has been falsely implicated. He in his cross-examination stated that it is wrong to say that the accused had committed the crime.

**ANALYSIS**

24. We have given a thoughtful consideration to the arguments of the rival parties and have perused the record carefully including the trial court records.

25. The First Information Report alleges that the accused- A1 to A6 resorted to gunshot firing and extended injuries to the deceased by Knife and Farsa resulting in the death of the deceased. The PW1, Bachchu Singh and PW2, Vikram claim themselves to be the eyewitness of the said incident. Though it is alleged that along with them, Lauki, who happened to be the father of the deceased and PW1 and grandfather of PW 2 was also present and he too witnessed the said incident but he did not enter into the witness box on behalf of the prosecution. The incident is stated to have occurred at about 8:30 AM in the morning on 06.01.2023 when the deceased had gone to answer nature's call and when he reached the agriculture field of Girraj son of Lakshman Singh then the accused A1 to A6 who were hiding behind the mustard crop, came out of the bushes and resorted to gunshot fires and also inflicted injuries by Farsa and Knife. As per the deposition of the PW1 and PW2, they identified the accused- A1 to A6 as the distance between the accused and PW1-PW2 was just 20-30. These witnesses had

also gone to answer nature's call after a gap of 1-2 minutes.

26. The first and foremost question which arises for determination is as to whether the first information report is anti-timed or not. In order to address the said issue, it would be apposite to have a bird's eye view of testimony of PW1 and PW2 who are the star witnesses of prosecution and have witnessed the incident. PW1 in his cross-examination dated 31.10.2014 has deposed that he had gone to the police station whereafter the investigating officer along with police force came to the place of the incident where the dead body was lying in the field. As per his deposition, the police waited for half an hour at the place of the incident and took away the body of the deceased to the Police Station, Refinery where the PW1 waited for an hour and the first information report was lodged and thereafter inquest was conducted and his signatures were taken on the blank papers and thereafter the dead body was sent for the postmortem. PW2- Vikram in his cross-examination by the defence on 23.09.2016 has however deposed that the dead body of the deceased was sent directly from the place of the incident by the police for postmortem and thereafter when the PW2 along with PW1 came to the police station then the first information report was lodged. The depositions of PW1 and PW2 clearly go to show that the first information report was lodged after the dead body was taken from the place of incident and brought to the Police Station. The aforesaid circumstances leads to the inference that only after noticing the injuries and postmortem that the first information report came to be lodged on the written report made by the PW1, scribed by Rajendra who happens to be the brother-in-law of the deceased. The F.I.R. however reveals that the written report was made first, by then other processes had not commenced i.e. inquest and postmortem had not taken place. The manner and stage at which F.I.R. came to be lodged is clearly contradicted by the prosecution witnesses of fact. The possibility of F.I.R. having been lodged after deliberation and consultation cannot be ruled out. The argument that the F.I.R. is anti-timed cannot be brushed aside.

27. The Hon'ble Apex Court in the case of ***Meharaj Singh v. State of U.P. 1994 (5) SCC 188*** in para 12 has observed as under:

> *"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at h the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses if any. Delay in lodging the FIR often results in embellishment, which is aa creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded the courts generally look for certain external checks."*

28. Recently in ***Mohd. Muslim v. State of Uttar Pradesh***, 2023(7) SCC 350,

the issue of anti-timing of the FIR was also discussed and it was held as under:

> *"In Meharaj Singh v. State of U.P., it has been opined that on account of the infirmities such an ante-timing of the FIR loses its evidentiary value. Thus, this entitles the accused to be given the benefit of doubt."*

29. Apparently, we also find that there is no reference to the first information report in the Postmortem report. This fact also supports the inference that F.I.R. came into existence, later. Reliance has also been placed upon decision in the case of ***Balvir Singh v. State of Madhya Pradesh, 2019 (15) SCC 599*** that mere non-mention of the credentials of the FIR in the inquest report will not make the prosecution theory doubtful. It has been observed as under:

> *"FIR is a printed format which contains Column 11- "Inquest Report". Column 11 of the FIR, of course, contains Inquest No. 10/98. Merely because the FIR contains inquest number, it cannot be said that the FIR was registered subsequent to the inquest. In State of U.P. v. Ram Kumar, the Supreme Court held that: (SCC p. 619, para 13.4)*
>
> > *"13.4. ... The mere fact that on the inquest report FIR number was written by different ink cannot be the basis for observing that the FIR was ante-timed or antedated."*
>
> *On being questioned, Investigating Officer S.D. Khan (PW 14) has stated that he has registered Inquest Report No. 10/98 with regard to the death of deceased Mohan under Section 174 CrPC. As seen from the evidence of PW 2, after the occurrence, dead body of Mohan was lying twenty yards away from the road and he went to the police station to lodge the complaint via Lallu fourway and Sarvodya fourway. The inquest being done at the spot and FIR being registered at the police station under Sections 302, 506-B, 341, 294, 323, 34 IPC and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, mention of inquest number in the FIR does not affect the prosecution case nor does it affect the credibility of the eyewitnesses."*

30. There is no quarrel to the proposition of law as laid down in the above-noted decision but what is to be seen in the present case is the overall surrounding circumstances which makes the prosecution theory doubtful regarding the timing of lodging F.I.R. for variety of reasons. Firstly, the depositions of PW1 and PW2, as noticed above shows that the first information report had been lodged after the dead body was picked up from the place of the incident and brought to the police station and after noticing the injuries during inquest and the postmortem the first information report came to be lodged, whereas the prosecution case is otherwise, secondly, absence of any reference of the FIR in the postmortem, thirdly, the fact that the inquest was prepared in the police station and, fourthly, the fact that the PW1 in his cross-examination dated 31.10.2014 had deposed that in the police station blank papers were offered to him for signing the inquest report and further at that time when

the PW1 was required to sign the inquest report, it did not bare the signatures of the eye-witnesses to the inquest report. Likewise, PW2 in his cross-examination dated 23.09.2016 had also deposed that he was required by the police to sign on certain blank papers in the police station. The overall circumstances only leads to a conclusion that the story set up by the prosecution implicating the accused is not only doubtful but also sans credibiity.

31. Apart from the same, another question which arises for consideration is that by whom and by which mode the police was informed about the occurrence of the incident. The first information report is stated to have been lodged in the police station on 06.01.2023 at 9:40 AM by PW1, Bachchu Singh on a dictation being made to Rajendra who happened to be the brother-in-law of the deceased. PW1, Bachchu Singh in his cross-examination dated 31.10.2014 had deposed that at the time of the incident on the fateful day only the deceased was having a mobile phone, however, there was no balance available in the mobile phone. The scribe of the first information report, Rajendra Singh was not present at the place of the incident, however, he was at that point of time in the house of the PW1 which is 100 meters from the distance of the place of the incident. He specifically deposed that he had not called the police through the mobile phone of Rajendra. PW2 in his cross-examination dated 13.04.2017 deposed that he is not aware as to who informed the police and he was also present at the place of incident and he had gone to the police station only when the dead body had been sent for postmortem. Besides, the same, the statement of PW1 or PW2 does not spell out that the police was informed through the mobile phone of any third person. Thus, in view of the depositions of the prosecution witnesses, it becomes a mystery as to how and by which mode, the police officials were informed about the incident.

32. It is, thus, not emerging from the deposition of the prosecution witnesses as to how the scriber to the FIR, Rajendra Singh was informed to be present in the police station for taking dictation for lodging of the first information report. Interestingly, the PW6, Ram Kishan Yadav who was the (first) investigating officer who had conducted investigation from 06.01.2013 to 08.01.2013 in his cross-examination dated 06.07.2018, after perusing the GD report had deposed that neither name of PW2 nor Rajendra was mentioned in the GD which may suggest that they had come for the purposes of lodging of the first information report. Not only this, the prosecution for the reasons best known to them, did not produce Rajendra to enter into the witness box to support their prosecution theory. Rajendra could have been confronted with inconvenient questions, which the prosecution apparently wanted to avoid.

33. Notably, PW1 in his cross-examination dated 26.11.2014 in response to a question being posed to him by the defence deposed that after postmortem, the investigating officer asked the alleged witness to the inquest to sign the inquest report. The overall circumstances as apparent from the testimony of the PW1 and PW2 creates a serious doubt upon the prosecution theory and the manner in which the things have been tailored so as to create evidence against the accused.

34. Nonetheless, what is relevant is also the conduct of the PW1 and PW2 in

depicting their presence, which is hard to believe. It is the consistent stand of the PW1 and PW2 that they had witnessed the said incident. The distance between the deceased and the PW1 and PW2 is hardly 20-30 steps. The PW1 and PW2 are also consistant in their stand that they had identified the assailants. Though according to them, gunshots were fired not only on the deceased but they too were confronted with gunshot firings. The said fact came to be deposed by the PW1 in his cross-examination dated 31.10.2014 alleging that when they tried to save the deceased then firing was made upon them. This fact was not either reported in the first information report nor in the statements under Section 161 CrPC. The only excuse taken for not reporting the said fact either in the FIR or in the statement under Section 161 of the CrPC was that they did not remember the said incident. In the opinion of the Court, it is highly inconceivable and improbable that such a vital fact would not be disclosed to the police, particularly, when the PW1 and PW2 could identify the assailants and they were few steps away from the deceased and on account of firing on them, they could not help or save the deceased, who happened to be a blood relative. The said conduct of the prosecution witnesses, PW1 and PW2 itself creates a doubt upon the prosecution theory with regard to their presence at the place of incident and the manner of incident reported by them.

35. In ***Mohammad Mulsim*** (supra), the Hon'ble Apex Court while examininig the conduct and behaviour of the son and the nephew of the deceased victim, who were eye-witnesses to the incident, observed as under:-

> *"17. The deposition of Salim Ahmad (PW-1) reveals that he was at a distance of 20 steps from his father but even then he could not rush to save his father from the assault and could not even caught- hold of any of the accused appellants who conveniently escaped through the jungle. ..."*

36. To be precise, it is nothing but a classic case of improvement. The Hon'ble Apex Court in ***Yudhishtir v. The State of Madhya Pradesh, 1971 (3) SCC 436*** in para 11 observed as under:

> *"The evidence given by P.Ws. 1 and 6 before the Court was sub-stantially in variance with the version given by them in the statements given to the police at the earliest occasion. Before the Court they have considerably improved their statements. Omissions in the statements to the police were of a of a very serious nature making their evidence before the Court false and unacceptable."*

37. Another issue which is of primary importance is that PW-1 in his cross-examination dated 31.10.2014 stated that as soon as the assailants/ accused left the place of incident, they ran towards the deceased who was lying in the agriculture field. PW-2 Vikram and his father Lauki caught hold of the deceased on account whereof their hands and clothes were stained with blood. However, the investigating officer did not draw the samples of the blood-stained clothes and the clothes were thereafter washed. Non-drawing of the samples of blood-stained clothes and allowing them to be washed itself indicates that the manner in which the investigation took place is not only suffering from infirmity but also actuated

by flaws. On a cross-examination of PW7, the first investigating officer, Ram Kishan Yadav, he deposed on 06.07.2018 that for the very first time the statement of PW2-Vikram was taken on 19.01.2013 after a period of about 13 days from the date of the incident. The reasons shown by him in doing so is that prior to 19.01.2013, PW2-Vikram was not available. The aforesaid circumstances leads to the inference that a well-deliberated prosecution theory was allowed to be developed so as to implicate the accused. Though on a cross-examination of PW6, Ram Kishan Yadav, the first investigating officer deposed that he had prepared the site plan on the pointing out of the PW1, Bachchu Singh, however, PW-1 Bachchu Singh clearly deposed in his cross-examination dated 31.10.2014 that the site plan was not prepared in his presence by the investigating officer. More so, the investigating officer, PW6 in his cross-examination dated 06.07.2018 has deposed that though he had prepared the site plan but he had not shown the places whereat the accused were standing at the time of the incident and further, according to him, he was not able to record the statement of any independent witness.

38. Certainly, a defective investigation may not demolish the prosecution theory but overall circumstances needs to be considered depending upon the facts and circumstances in order to weigh the import and the impact of the defective investigation. We find that there are various shortcomings not only in the investigation conducted by the investigating officer but also the fact that the prosecution theory itself appears doubtful for holding appellant's guilty of commission of the charged offence. What is required is a threadbare analysis of the prosecution theory in light of the oral and documentary evidence on record.

39. Apparently, PW3, Bare Lal, author of the inquest in his cross-examination dated 06.09.2017 has deposed that at the time of the inquest, he did not find any cartridges near the dead body of the deceased. Not only this, there is nothing on record to suggest that any gunshot was fired by the accused upon the PW1, PW2 and Lauki, as no evidence worth-consideration has been brought on record to show that any firing was done upon them.

40. Apart from the above, the entire prosecution theory hinges upon the fact that the deceased had left for answering the nature's call 1/2 minutes prior to the PW1 and PW2 and Lauki and they were at a distance of 20-30 steps. The deceased was also staying and had slept with them in their house. However, PW1-Bachchu Singh in his cross-examination on 23.01.2016 deposed that though PW1, Bachchu Singh was living in the new house but the deceased for the past 3 years was living in the old house. The said testimony of the PW1 also creates a doubt upon the presence of the PW-1 and PW-2 who claim to be the eye-witnesses to the said incident.

41. Nonetheless, what is more amazing is the fact that on the one hand in the cross-examination of the PW1, Bachchu Singh dated 31.10.2014, he had deposed that he was not aware as to which of the accused was holding knife and farsa but an improvement was made in the cross-examination on 27.11.2015 that Kishani was holding farsa and Ravi was having a knife. The testimony of the PW1 itself depicts that improvements have been sought to be made just in order to create

evidence against the accused. Normally, much weightage is not to be given to minor improvements but what is to be seen is the over all circumstances cumulatively in order to derive an opinion as to whether the prosecution theory is doubtful or not.

42. Plainly and simply, right from the inception, there appears to be material contradictions not only in the oral testimony of the proseuction witnesses but also the first information report and inquest, which goes to suggest that the entire prosecution theory is botched up sans any credibility.

43. As regards the theory propounded by the prosecution that since the accused bore enmity with the deceased and the same became the basis of commission of the offence is concerned, the law is well settled in this regard that enmity is a double edged weapon. In ***Balram vs. State of Madhya Pradesh, 2023 Livelaw (SC) 960***, the Hon'ble Apex Court observed as under: -

> *"17. As already discussed herein above, previous enmity is a double edged weapon; on the one hand it provides the motive, whereas on the other hand, the possibility of false implication cannot be ruled out."*

44. Recently in ***Nand Lal Vs. State of Chhattisgarh, AIR 2023 SC 1599***, the following was observed: -

> *"We may gainfully refer to the following observations of this Court in the case of Ramesh Baburao Devaskar and Others v. State of Maharashtra MANU/SC/8026/2007: (2007) 13 SCC 501:*
>
> *"19. In a case of this nature, enmity between two groups is accepted. In a situation of this nature, whether the first information report was ante- timed or not also requires serious consideration. First information report, in a case of this nature, provides for a valuable piece of evidence although it may not be a substantial evidence. The reason for insisting on lodging of first information report without undue delay is to obtain the earlier information in regard to the circumstances in which the crime had been committed, the name of the accused, the parts played by them, the weapons which had been used as also the names of eyewitnesses. Where the parties are at loggerheads and there had been instances which resulted in death of one or the other, lodging of a first information report is always considered to be vital."*
>
> *As held by this Court, the FIR is a valuable piece of evidence, although it may not be substantial evidence. The immediate lodging of an FIR removes suspicion with regard to over implication of number of persons, particularly when (2007) 13 SCC 501 the case involved a fight between two groups. When the parties are at loggerheads, the immediate lodging of the FIR provides credence to the prosecution case."*

45. In the present case, we find that though the prosecution has pressed into service the motive for commission of the

crime, but looking into the over all circumstances emanating from the depositions of the prosecution witnesses as well as from the FIR, we find that the prosecution has failed to establish the commission of the crime by the accused beyond reasonable doubt.

46. In view of the discussions made above, we are of the considered view that the testimony of the prosecution witnesses is not trustworthy and it would be unsafe to record conviction, particularly in absence of corroborative evidence available on record. Less to say about credibility of the FIR and the inquest report.

47. In our view, the Trial Court has failed to properly evaluate the evidences available on record, and thus, the appellants are entitled to be accorded benefit of doubt. Consequently, the appeals are allowed. The orders dated 25.07.2019 passed by the Addl. Sessions Judge, Court No.3, Mathura in Sessions Trial nos. 803/2013, 299/2013 and 344/2014, by which the appellants have been convicted under Sections 147, 148, 302 IPC read with Section 149 IPC are set aside. The appellants are acquitted of all the charges, of which they have been tried. They are reported to be in jail. They are set at liberty forthwith if not wanted in any other case, subject to compliance of the provisions of Section 437 of CrPC, 1973/ 481 of Bharatiya Nagrik Suraksha Sanhita, 2023, to the satisfaction of the trial court concerned.

48. Let a copy of the order /judgment and the original record of the lower court be transmitted to trial court concerned forthwith for necessary information and compliance. The office is further directed to enter the judgment in the compliance register maintained for the said purposes of the Court.

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**(2024) 10 ILRA 817**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 16.10.2024**

**BEFORE**

**THE HON'BLE KSHITIJ SHAILENDRA, J.**

Second Appeal No. 596 of 2014

**Surendra Kumar ...Appellant**
**Versus**
**Dr. Aditya Kumar Sharma ...Respondent**

**Counsel for the Appellant:**
Sri R.D. Tiwari, Sri Vibhav Goswami, Sri M.D. Singh Shekhar (Sr. Adv.)

**Counsel for the Respondent:**
Sri Abu Bakht, Sri Bhanu Bhushan Jauhari

**Civil Law – Code of Civil Procedure,1908 - Order 21 - Rule 97 - filed by the appellant rejected by the Executing Court - Code of Civil Procedure,1908 - Order 21 - Rules 97, 98 & 101 and – Code of Civil Procedure,1908 - Section103 -can someone who was not a party to the original suit, could be dispossessed from a property under execution proceedings initiated against his brother - not being a party to the lis giving rise to execution proceedings is not relevant for adjudication of a claim under Order 21 Rule 97 CPC- such objections are filed by non-parties to such lis-joint tenancy rights devolved upon the appellant- decree of eviction passed against joint tenants would also be binding upon the claimants under Order 21 Rule 97 CPC when they are also joint tenants-Order 41 Rule 22 CPC-decree had attained finality-no force in the appeal-Order 41 Rule 11-Appeal dismissed at the admission stage itself.k (paras 10, 13, 14, 15 and 16)**

**HELD:**

Therefore, not being a party to the lis giving rise to execution proceedings is not relevant for adjudication of a claim under Order 21 Rule 97 CPC. Rather, it can be safely said that such objections are filed by non-parties to such lis. Nature of objections under section 47 is altogether different and that are filed by the judgment debtor and not by a third party. Words, "parties to the proceedings" used in S. Rajeswari (supra) mean "parties to proceedings under order 21 Rule 97 CPC and not parties to suit". (para 10)

Placing reliance upon a celebrated judgment of Supreme Court in the case of Harish Tandon Vs A.D.M., AIR 1995 SC 676, a Coordinate Bench of this Court, in the case of Mohd. Ikrail (supra), held that the decree of eviction passed against joint tenants would also be binding upon the claimants under Order 21 Rule 97 CPC when they are also joint tenants. (Para 13)

It is not in dispute that no cross objections were filed by the present appellant, being a respondent in Second Appeal No.819 of 2002, against the finding of the first appellate court regarding joint tenancy rights of the present appellant with Prem Chandra. The said cross objections, if filed, could have been considered on merits irrespective of withdrawal of Second Appeal No. 891 of 2002 as per sub-rule (4) of Rule 22 of Order 41 but, in absence of such cross objections having been filed, no contrary view can be taken as regards the finding recorded in judgment dated 22.04.2002 passed in Civil Appeal No.104 of 2000 inter se parties. (Para 16)

**Appeal dismissed.** (E-14)

**List of cases cited:**

1. Atma Prakash Vs Raghubir Prasad Goel: 1996 (1) JCLR 622 All)

2. Krishna Ram Mahale (dead) by his LRs., Vs Mrs. Shobha Venkat Rao: AIR 1989 SC 2097

3. Mohd. Ikrail & ors. Vs Naushaba A. Sabri & ors.: 2016 (3) ARC 489

4. S. Rajeswari Vs S.N. Kulasekaran & ors.: (2006) 4 SCC 412

5. Ashok Chintaman Juker & ors. Vs Kishore Pandurang

6. Mantri and another: (2001) 5 SCC 1

7. Harish Tandon Vs A.D.M., AIR 1995 SC 676

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. The appeal is listed for admission under Order 41 Rule 11 C.P.C.

2. Heard Sri M.D. Singh Shekhar, learned Senior Counsel, assisted by Sri Vaibhav Goswami, for the appellant and Sri Bhanu Bhushan Jauhari, learned counsel for the respondent.

3. The instant second appeal arises out of adjudication of an application under Order 21 Rule 97 CPC filed by the appellant, that has been rejected by the Executing Court against which a regular civil appeal was filed, which has also been dismissed.

CONTENTION OF APPELLANT

4. Learned Senior Counsel appearing for the appellant submits that an Original Suit No. 323 of 1977 was filed by the respondent against one Prem Chandra claiming a decree for ejectment on the plea of tenancy of the defendant. The said suit was decreed by the trial court and Civil Appeal No. 139 of 1986 arising therefrom was dismissed. The defendant-Prem Chandra filed Second Appeal No.444 of 1996 which is pending before this Court. In so far as the present appellant is concerned, he was plaintiff no.2 in another Original Suit No.216 of 1996 (Nattho Devi and another Vs. Dr. Aditya Kumar Sharma) that was instituted claiming a decree for injunction restraining the defendant from interfering in possession of the plaintiffs

and from dispossessing them except in accordance with law. The trial court dismissed the said suit, however, Civil Appeal No.104 of 2000 was allowed and, consequently, the suit was decreed. Second Appeal No.891 of 2002 filed by the defendant-Dr. Aditya Kumar Sharma has recently been dismissed as withdrawn by order dated 09.09.2024 and, therefore, according to Sri Shekhar, the decree has attained finality and, hence, the respondent cannot dispossess the appellant except in accordance with law.

5. As regards the judgments and decrees impugned in the instant second appeal, it is contended by Sri Shekhar that the same have been passed in execution proceedings arising out of a decree drawn against his real brother Prem Chandra in Original Suit No.323 of 1977 in which the appellant was not a party and, hence, he cannot be dispossessed from the property, particularly when he has his own independent decree against the respondent, as drawn in Original Suit No. 216 of 1996. It is further contended that when the first appellate court, at an earlier point of time, dismissed the Civil Appeal No.130 of 2013 against the order dated 06.07.2013 by which the application under Order 21 Rule 97 CPC had been rejected by the executing court, the appellant filed Second Appeal No.88 of 2014 before this Court which was allowed by order dated 06.02.2014 and it was held that the appellant having raised an independent right in the property, rejection of his objections under Order 21 Rule 97 CPC on the ground of rejection of objections filed by the judgment debtor under Section 47 CPC, was unjustified. Further submission is that the title of respondent having been dislodged in separate proceedings arising from Original Suit No.309 of 1998, he otherwise cannot dispossess the appellant. Sri Shekhar also referred to the written statement filed by the respondent in Original Suit No.216 of 1996 where he did not recognize the appellant herein as tenant in the property but asserted tenancy rights only in Prem Chandra. The submission, therefore, is that the respondent being bound by his admission, he cannot dispossess the appellant in a proceeding launched against the tenant Prem Chandra and, hence, the impugned judgments and decrees are unsustainable.

6. In support of his submissions on the point that a person, may be a trespasser, cannot be dispossessed except through due process of law, learned Senior Counsel for the appellant has placed reliance upon following authorities:-

(i) Atma Prakash Vs. Raghubir Prasad Goel: 1996 (1) JCLR 622 All); and

(ii) Krishna Ram Mahale (dead) by his LRs., Vs. Mrs. Shobha Venkat Rao: AIR 1989 SC 2097.

CONTENTION OF RESPONDENT

7. Per contra, Sri Bhanu Bhushan Jauhari, learned counsel for the respondent submits that, admittedly, one Jethwa was tenant in the property and after his death, he was succeeded by his wife Nattho Devi and two sons, namely, Surendra Kumar (present appellant) and Prem Chandra (judgment debtor in Original Suit No.323 of 1977). As regards the decree drawn in Original Suit No. 216 of 1996, it is contended that the said suit was dismissed and while allowing the civil appeal filed by the appellant, the first appellate court recorded a finding that after the death of

Jethwa, plaintiffs, i.e. Nattho Devi and Surendra Kumar, had succeeded joint tenancy rights alongwith Prem Chandra. The submission is that though Second Appeal No.891 of 2002 filed by the respondent against the said decree has been withdrawn on 09.09.2024, the first appellate court's judgment has attained finality and, therefore, finding on joint tenancy rights has become final inter se parties to this appeal also. He further submits that both the courts below have rightly held that since execution proceedings arising out of decree drawn in Original Suit No.323 of 1977 are the proceedings in accordance with law, the same would remain maintainable against the appellant, despite a decree existing in his favour arising out of proceedings of Original Suit No. 216 of 1996. Further submission is that once tenancy rights have jointly devolved upon all the legal heirs of Jethwa, irrespective of any contrary admission made in the written statement in Original Suit No. 216 of 1996, finality attached to such devolution of joint tenancy rights under the judgment dated 22.04.2002 passed in Civil Appeal No.104 of 2000 arising out of Original Suit No. 216 of 1996, would render every contention of any party as without any force and, consequently, both the courts below have rightly adjudicated the claim under Order 21 Rule 97 CPC. In support of his submissions, learned counsel for the respondent has placed reliance upon following authorities:-

(i) Mohd. Ikrail and 2 others Vs. Naushaba A. Sabri and 7 others: 2016 (3) ARC 489;

(ii) S. Rajeswari Vs. S.N. Kulasekaran and others: (2006) 4 SCC 412;

(iii) Ashok Chintaman Juker and others Vs. Kishore Pandurang Mantri and another: (2001) 5 SCC 1.

ANALYSIS OF RIVAL CONTENTIONS

8. Having heard learned counsel for the parties, first of all, the Court deems it appropriate to refer the provisions of Order 21 Rules 97, 98, 101 and 103 CPC, which are reproduced as under:-

**"97. Resistance or obstruction to possession of immovable property**.- (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

**98. Orders after adjudication**.- (1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),-

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

101. **Question to be determined**.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

103. **Orders to be treated as decrees**.- Where any application has been adjudicated upon under Rule 98 or Rule 100 the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree."

9. In paragraph no.11 of the judgment in **S. Rajeswari (supra)**, the Supreme Court observed as under:-

"11. Having heard learned counsel for the parties, we are satisfied that in a case of this nature, Respondent 1 ought to have filed an application under Order 21 Rule 97 of the Code of Civil Procedure. Order 21 Rule 97 clearly provides that where execution of decree is resisted or obstructed by any person, the decree holder may make an application to the court complaining of such resistance or obstruction, whereupon the court shall proceed to adjudicate upon the application in accordance with provisions contained in the Code. Rules 98 to 100 are the Rules which provide the manner in which such an application has to be dealt with. Under Rule 101, all questions including the questions relating to right, title and interest of property arising between the parties to the proceeding and relevant to the adjudication of the application, have to be determined by the court dealing with the said application. ……."

(emphasis supplied)

10. Therefore, not being a party to the lis giving rise to execution proceedings is not relevant for adjudication of a claim under Order 21 Rule 97 CPC. Rather, it can

be safely said that such objections are filed by non-parties to such lis. Nature of objections under section 47 is altogether different and that are filed by the judgment debtor and not by a third party. Words, "parties to the proceedings" used in S. Rajeswari (supra) mean "parties to proceedings under order 21 Rule 97 CPC and not parties to suit".

(emphasis supplied)

11. There is no dispute about the fact that the appellant was not a party to Original Suit No.323 of 1977 and, therefore, when his claim under Order 21 Rule 97 CPC was earlier rejected by the first appellate court by order dated 13.01.2014 dismissing Civil Appeal No.130 of 2013 on the ground that the objections under Section 47 CPC preferred by judgment debtor-Prem Chandra had been rejected, he rightly assailed the said order by filing Second Appeal No.88 of 2014. This Court set aside the appellate court's judgment and held that Order 21 Rule 97 being a provision dealing with independent rights in respect of the property in dispute, mere rejection of objections under Section 47 CPC preferred by judgment debtor or even dismissal of revision arising therefrom would not come in the way of the appellant. No clear finding on merits of the rights claimed by the appellant was recorded by this Court and the matter was remanded to the first appellate court.

12. After this Court revived Civil Appeal No.130 of 2013, the first appellate court has decided the same on merits. It recorded a finding that, admittedly, the appellant being a successor of Jethwa, who was tenant in the property, joint tenancy rights would devolve upon him along with-Prem Chandra. It also observed that irrespective of appellant not being a party to Original Suit No.323 of 1977, his status being that of a joint tenant in view of authorities referred to in the order, the application under Order 21 Rule 97 did not have any force. As far as the executing court's judgment dated 06.07.2013, though it wrongly emphasized upon rejection of objections of judgment debtor under Section 47 CPC, since the appellate court independently examined the claim raised under Order 21 Rule 97 CPC on merits rightly ignoring the objections under Section 47 CPC, validity of appellate court's judgment dated 07.05.2014 has to be examined in the instant second appeal.

13. Placing reliance upon a celebrated judgment of Supreme Court in the case of **Harish Tandon Vs. A.D.M., AIR 1995 SC 676**, a Co-ordinate Bench of this Court, in the case of Mohd. Ikrail (supra), held that the decree of eviction passed against joint tenants would also be binding upon the claimants under Order 21 Rule 97 CPC when they are also joint tenants. In paragraph no.14 of the report in **Ashok Chintaman Juker (supra)**, the Supreme Court about joint tenancy held as under:-

> "14. This Court in the case of H.C. Pandey vs. G.C. Paul, (1989) 3 SCC 77: AIR 1989 SC 1470 taking note of the settled position that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant, held that it is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereafter and that is the position as

between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. This Court further held that the respondent acted on behalf of the tenants; he paid rent on behalf of his father and he accepted notice on behalf of all; in the circumstances the notice served under section 106 of the Transfer of Property Act on the respondent was sufficient and it was a valid notice."

(emphasis supplied)

14. As far as judgments in **Atma Prakash (supra)** and **Krishan Ram Mahale (supra)** relied upon from the appellant side are concerned, there is no quarrel with the proposition laid down in the said authorities to the effect that a person in settled possession of the property cannot be dispossessed by the owner of the property except by taking recourse of law. However, in the instant case, the appellant shall not be benefited by these authorities, inasmuch as the said cases were decided when the attempts were made to forcibly dispossess the concerned party in possession of the property without taking recourse to law. In the instant case, as discussed above, the appellant, being one of the sons of tenant Jethwa, is being dispossessed in the execution proceedings arising out of decree drawn in Original Suit No.323 of 1977 on the ground that he has succeeded joint tenancy rights alongwith his brother Prem Chandra, i.e. the judgment debtor. Even proceedings under Order 21 Rule 97 CPC are statutory proceedings recognized by the Code where the claim raised by the present appellant has been adjudicated upon by two courts of competent jurisdiction. There is nothing like forcible or unlawful dispossession of the appellant herein and, hence, it cannot be accepted that if the appellant is being dispossessed in the aforesaid execution proceedings, the same is without following due process of law.

15. While above is the settled legal position as regards devolution of joint tenancy rights and there being no dispute that the appellant is son of late Jethwa, this Court cannot take a different view as regards independent rights of the appellant in the property. As far as admission of the respondent contained in the written statement filed in Original Suit No.216 of 1996 that he did not recognize the appellant as his tenant but asserted only Prem Chandra as tenant, the Court may observe that whatever objections are raised before a court of law, it is the decree that prevails upon the contentions and finality attached to adjudication of rights would determine the real controversy. Admittedly, the decree drawn in Civil Appeal No.104 of 2000 has attained finality in terms of dismissal of Second Appeal No.891 of 2002. Therefore, the findings recorded in first appellate court's judgment have also attained finality unless the same are set aside on cross objections preferred by the respondent in the said second appeal, who is the appellant in the instant second appeal. In this regard, reference to Order 41 Rule 22 CPC can be made that reads as under:-

**"22. Upon hearing respondent may object to decree as if he had preferred a separate appeal.-** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any

cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

(2) **Form of objection and provisions applicable thereto**.- Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) xxxx

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions-relating to appeals by indigent persons shall, so far as they can be made applicable apply to an objection under this rule."

(emphasis supplied)

16. It is not in dispute that no cross objections were filed by the present appellant, being a respondent in Second Appeal No.819 of 2002, against the finding of the first appellate court regarding joint tenancy rights of the present appellant with Prem Chandra. The said cross objections, if filed, could have been considered on merits irrespective of withdrawal of Second Appeal No. 891 of 2002 as per sub-rule (4) of Rule 22 of Order 41 but, in absence of such cross objections having been filed, no contrary view can be taken as regards the finding recorded in judgment dated 22.04.2002 passed in Civil Appeal No.104 of 2000 inter se parties.

(emphasis supplied)

17. For all the aforesaid reasons, having found no fault in the judgment dated 07.05.2014 passed in Civil Appeal No.130 of 2013, this Court does not find any merit in the instant second appeal. Consequently, the second appeal stands dismissed at the admission stage itself.

18. Office is directed to send the record of both the courts below to the District Judge, Hapur for being preserved and maintained in accordance with General Rules (Civil), 1957.

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**(2024) 10 ILRA 824**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

**THE HON'BLE AJAY BHANOT, J.**

Criminal Misc. Bail Application No. 30292 of 2024

**Rajendra Prasad ...Applicant**
**Versus**
**State of U.P. & Ors. ...Opposite Parties**

**Counsel for the Applicant:**
M.P. Srivastava, Manoj Kumar Kushwaha

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law-Protection of Children from Sexual Offences Act, 2012 — Sections 16 & 17 — Bail — Role of courts in enforcement of statutory rights of child victims — Entitlements such as support person, legal aid, medical assistance, counselling, and schooling must be ensured by statutory authorities including Child Welfare Committee, police, and legal services — Magistrates and trial courts must call for reports, make relevant inquiries and record satisfaction on compliance — St. and statutory institutions obligated to ensure these safeguards even at bail stage.**

**Criminal Procedure — Bail in POCSO cases — Role of judiciary — Held, courts must oversee compliance of child victim rights under POCSO Act during bail hearings — Directions issued for submission of compliance reports by CWC and police — Judicial officers to ensure enforcement of victim entitlements through legal oversight — Failure to implement statutory safeguards frustrates legislative intent and results in miscarriage of justice.**

**POCSO Act — Institutional safeguards — Directions issued to St. Government and Secretary, Women & Child Development, U.P. to develop reporting formats for CWC and conduct regular training for compliance — Mandate to monitor enforcement of child victim rights throughout legal proceedings- Bail application dismissed — Compliance with statutory rights of victim to be ensured by trial courts. (Paras 7, 8, 9, 10, 11, 13, and 14)**

**HELD:**

Victims under the POCSO Act are entitled for various support systems like support person, legal aid, medical care, counselling services and other beneficial schemes of the St. Government. The child victims of sexual abuse are a most vulnerable class of citizens. The children of the said class are often incapacitated in their search for justice by other disabling circumstances like the trauma of the incident, social marginalization, financial penury, legal illiteracy and the like. Bereft the support systems guaranteed by the statute, child victims of sexual offences under the POCSO Act cannot prosecute their cases effectively before the competent court. (Para 7)

The realization of the statutory rights of child victims of sexual offences under the POCSO Act is the key to empower them to engage with the legal process on a fair footing. The statutory support systems enhance the capacity of the said victims to interface with officials and secure their rights. Empowerment of children who are victims of sexual offences is an imperative necessity to remove the barriers in their search for justice. And the same can be achieved by fruition of their statutory rights. Denial of rights vested in child victims of sexual offences by the POCSO Act during court proceedings will defeat the legislative intent of the statute and result in miscarriages of justice. (Para 8)

The reports depicting compliance of the above parameters and details of the facilities and support systems provided to the child victims as per law shall be submitted by the Child Welfare Committee (CWC) and the police respectively before the court at the hearing of the bail applications. The learned trial courts shall examine the aforesaid reports at the time of hearing of the bail applications and if required shall issue appropriate directions. (Para 13)

The above mandate of POCSO Act has to be rigorously followed and meticulously implemented. Currently the implementation of the POCSO Act in the above St.d manner is deficient, which frustrates the legislative intent. Legislation cannot be reduced to a dead letter by apathy of the statutory authorities. (Para 14)

**Application dismissed.** (E-14)

**List of Cases cited:**

Junaid Vs St. of U.P. & anr., reported at 2021 SCC OnLine All 463

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

1. Matter is taken up in the revised call.

2. Heard Shri M.P. Srivastava, learned counsel for the applicant and Shri Chandan Agrawal, learned AGA-I for the State.

3. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No.516 of 2022 at Police Station-Chaubeypur, District-Varanasi under Sections 376, 120B I.P.C. and Section 16/17 of the POCSO Act. The applicant is in jail since 04.11.2022.

4. The bail application of the applicant was rejected by learned trial court on 06.07.2024.

5. From the records and the submissions of the learned A.G.A., it is evident that the victim has not been apprised of her rights to a support person and a legal counsellor. The records do not depict the appointment of support person or legal aid/counsel for a victim. Status of grant entitlements of the victim under the POCSO Act are also absent in the records of the State. This assumes importance in view of the fact that the victim is the daughter of the applicant.

6. The issue that arises for consideration in the bail application is the need and the manner to realize the rights of child victims under the POCSO Act offences in bail proceedings.

7. Victims under the POCSO Act are entitled for various support systems like support person, legal aid, medical care, counselling services and other beneficial schemes of the State Government. The child victims of sexual abuse are a most vulnerable class of citizens. The children of the said class are often incapacitated in their search for justice by other disabling circumstances like the trauma of the incident, social marginalization, financial penury, legal illiteracy and the like. Bereft the support systems guaranteed by the statute, child victims of sexual offences under the POCSO Act cannot prosecute their cases effectively before the competent court.

8. The realization of the statutory rights of child victims of sexual offences under the POCSO Act is the key to empower them to engage with the legal process on a fair footing. The statutory support systems enhance the capacity of the said victims to interface with officials and secure their rights. Empowerment of children who are victims of sexual offences is an imperative necessity to remove the barriers in their search for justice. And the same can be achieved by fruition of their statutory rights. Denial of rights vested in child victims of sexual offences by the POCSO Act during court proceedings will defeat the legislative intent of the statute and result in miscarriages of justice.

9. Various authorities have been created under the POCSO Act to uphold the rights of victims. The said authorities like police, Child Welfare Committee, District Legal Services Authorities, medical authorities, district administration are enjoined by the statute to provide the entitlements under the POCSO Act to victims like support persons, medical specialists, legal aid, beneficial schemes of the government and so on. Responsibility is cast on the courts/magistrates considering the bail applications in POCSO offences to ensure that entitlements of the victims are provided and the rights conferred by the said enactment are enforced. Faithful execution of the said responsibilities will ameliorate the disadvantages faced by child victims in legal proceedings.

10. The rights and entitlements of the victims under the POCSO Act can be realized at the stage of bails and during the trials only by bringing the concerned statutory authorities like Child Welfare Committee (C.W.C.), medical authorities and the police authorities within the scope of the jurisdiction of the learned magistrates/learned trial courts. The said authorities shall remain accountable to the learned magistrates/trial courts for the purposes of implementing the rights of the aforesaid victims during the course of various legal proceedings including bails. The said authorities have to apprise the trial court about the manner in which the rights of victims under the POCSO Act have been implemented. The learned trial courts are under an obligation of law to consider the said reports, make relevant enquiries from the said competent authorities and record their satisfaction as regards access of victims to their entitlements and support systems under the POCSO Act.

11. The following tabulated chart will depict some of the entitlements of the child victims of sexual offences under the POCSO Act read with POCSO Rules and other provisions of law. The chart also shows the authorities who are required to provide the aforesaid entitlements to the child victims:

| **Sr. No.** | **Nature of entitlements of victims** | **Competent Authorities** |
|---|---|---|
| 1 | Protection | Special Juvenile Police Unit (SJPU)/Local Police Authorities/Child Welfare Committee/Magistrates |
| 2 | Medical Aid | Competent medical authority/ police authorities/Child Welfare Committee |
| 3 | Counselling | Competent medical authority/ Child Welfare Committee |
| 4. | Schooling | Child Welfare Committee/Basic Education Officer/District Inspector of School |
| 5. | Support Person | Child Welfare Committee |
| 6. | Legal Aid | District Legal Services Authority on recommendation of Child Welfare Committee |
| 7. | Government Aid/Beneficial Government Schemes | Child Welfare Committee/District Administration |
| 8 | Any other items under the POCSO Act read with POCSO Rules | Child Welfare Committee/As provided by law. |

12. The narrative and the observations made above can be fortified by the judgement of this Court in **Junaid v. State of U.P. and another**, reported at **2021 SCC OnLine All 463** wherein it was held:

"42. However, the said judgments are not entirely bereft of precedential value for Allahabad High Court. The application has to be nuanced. It has to be stated that the said judgments of Delhi High Court and Bombay High Court enrich legal debate, and elevate the concerns of child rights to the conscience of the court. The judgments have sensitized the process of law and

ameliorated the plight of child victims by acknowledging the responsibilities of the courts and making the CWC, Legal Services Authorities and police officials accountable to courts in bail applications. These recognizable principles of law can be clearly distilled from Reena Jha (supra), Miss G (supra), Arjun Kishanrao Malge (supra)."

13. The reports depicting compliance of the above parameters and details of the facilities and support systems provided to the child victims as per law shall be submitted by the Child Welfare Committee (CWC) and the police respectively before the court at the hearing of the bail applications. The learned trial courts shall examine the aforesaid reports at the time of hearing of the bail applications and if required shall issue appropriate directions.

14. The above mandate of POCSO Act has to be rigorously followed and meticulously implemented. Currently the implementation of the POCSO Act in the above stated manner is deficient, which frustrates the legislative intent. Legislation cannot be reduced to a dead letter by apathy of the statutory authorities.

15. The Secretary, Department of Women and Child Development, Uttar Pradesh Government is directed to ensure that proper formats of reports to be submitted by the CWCs before the courts in bail applications under the POCSO Act are created in line with the observations in this judgement and other requirements as per law. Furthermore, proper training programmes to build the capacity of the CWCs to draw up such reports shall also be undertaken on a regular routine basis. The State Government shall regularly monitor the compliance of the above said directions.

16. The victim is a minor who is 14 years of age. The applicant is the father of the victim. The victim has identified the applicant as the principal offender who trafficked her for money. The victim is vulnerable. The offence is grave. There is likelihood that the applicant had committed the offence. At this stage, no case for bail is made out.

17. Without going into the merits of the case, the bail application is dismissed.

18. A copy of this order be sent to learned Government Advocate for service upon the Director General of Police, Government of U.P. and Additional Director General of Police (Prosecution), Government of U.P., Lucknow as well as Secretary, Department of Women and Child Development, Uttar Pradesh Government for compliance.

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**(2024) 10 ILRA 828**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.10.2024**

**BEFORE**

**THE HON'BLE SAUMITRA DAYAL SINGH, J.**
**THE HON'BLE DONADI RAMESH, J.**

First Appeal No. 213 of 2018

**Sanjay Chaudhary ...Appellant**
**Versus**
**Guddan @ Usha ...Respondent**

**Counsel for the Appellant:**
Anil Kumar Mehrotra, Srijan Mehrotra

**Counsel for the Respondents:**
Anurag Vajpeyi, Bindu Kumari, Gaurav Tripathi

**Civil Law- Family Courts Act, 1989- Section 19 - Declareation sought by the appellant-marriage was void- declined-**

**Prohibition of Child Marriage Act, 2006 — Sections 2(a), 3(1), 3(3), and 9 — Declaration of child marriage as voidable — Limitation — Held, under Section 3(3), limitation of two years for filing a petition to annul child marriage begins from the date of attaining "majority" — For male child, 'majority' means attaining age of 21 years as per Section 2(a) of the Act — Consequently, petition filed by male within two years from his 21st birthday is within limitation — Word "majority" under PCMA must be read in harmony with definition of "child" in Section 2(a), and not with Majority Act, 1875 — Literal interpretation that links majority to age 18 for males leads to anomaly and defeats legislative purpose — Liberal and purposive construction adopted to further object of statute.**

**Family Law — Child marriage — Validity and election — Child marriage is not void but voidable — Unless expressly annulled under Section 3 within limitation, marriage continues as valid — Mere filing of earlier divorce petition does not amount to election or confirmation of marriage — Such election must be clear and voluntary — Appeal allowed, decree of Family Court set aside.**

**Interpretation of Statutes — Harmonious construction — When two provisions appear inconsistent, interpretation that furthers legislative intent and avoids anomaly should prevail — Statute must be read as a whole — Rule of contextual and purposive interpretation applied — Courts must avoid interpretation that renders statute unworkable or defeats legislative object.**

**Held — Appeal allowed — Suit filed under Section 3 PCMA within limitation — Judgment of Family Court reversed. (Paras 36 to 39, 42, 45, 46, 47, 48, 50, 51, 52, 56, 60 to 62, 65, 66, 69, 70, 71, 73 and 75)**

**HELD:**

Having heard learned counsel for the parties and having perused the record, we may first note that the HMA does not contain any provision to declare a "child marriage" void, though it contemplates criminal prosecution of male parties to such transactions. Earlier, HMA prescribed the age of marriage. It is consistent to PCMA, i.e. 18 years for females and 21 years for males. Yet, it stopped short of making any provision as to the legality of "child marriage" performed by underage male or female, or both. (Para 36)

The term "child marriage" is defined under Section 2 (b) of the PCMA. It clearly means a marriage where either of the contracting party is a "child". The word "child" has been defined under Section 2(a) of the PCMA. Clearly, a male below 21 years of age is deemed to be a "child" for the purpose of PCMA. Similarly, a female below 18 years of age is deemed to be a "child". It is admitted to the parties to the dispute that the appellant was about 12 years of age, whereas, the respondent was 9 years of age, at the time of their marriage solemnized on 28.11.2004. That transaction was a "child marriage", admittedly voidable at the option of either party. (Para 37)

What therefore falls for our consideration is whether the remedy available for that declaration was applied for within limitation prescribed by the law. In the first place, PCMA is a complete code. It provides for all – the prescription of age for a valid marriage; the consequences and remedies in the event of an underage marriage and the limitation to seek the remedy against an underage marriage. (Para 38)

The remedy available to both parties to a "child marriage" is to seek a declaration from a competent Court that their marriage was void. However, that effect and remedy is optional i.e. to be availed upon the volition of either party to that marriage, but by no other. Thus, a "child marriage" is voidable but not void. Any party to such transaction must elect to confirm or void it. (Para 39)

Then Section 3(3) of the PCMA provides that a suit may be filed "at any time" but before the "child" filing the suit completes two years of "attaining majority". Thus, the start point of limitation has been prescribed- "at any time". Clearly, that would refer to any time after

solemnization of a "child marriage" and not before. On the other hand, the end of limitation has been prescribed with reference to date of "attaining majority". It has been fixed at the completion of two years therefrom. Therefore, it becomes material to ascertain - what would be the age when a "child" (either male or female), may attain "majority". (Para 42)

The term "majority" and the phrase "attaining majority" have not been defined under the PCMA. At the same time, the word "minor" has been defined under Section 2(f) of the PCMA to mean a person "deemed not to have attained his majority" under the Majority Act. Therefore, the legislature has defined the word "minor" as the opposite of a "major" under the Majority Act. Section 3 of the Majority Act provides for the "age of majority of persons domiciled in India, at 18 years and not before". (Para 43)

In our view, the PCMA uses two concepts. First, to deal with the menace of "child marriage", the legislature devices a concept of "child". In that it creates an artificial distinction between the male and female population in the country. Consistent to the provisions of the Majority Act, it assumes that in our society a female would cease to be a "child" at age 18 years, purely by work of unexplained legal fiction, it artificially assumes that a male would remain a "child" up to the age of 21 years. (Para 45)

We recognize that that legislative prescription also involving legislatively drawn artificial distinction (on the strength of a legal fiction incorporated), may have arisen for two completely different and largely distinct considerations. First, the legislature sought to protect the female population from the vice of "child marriage", inherently involving risks to their life and health upon premature and therefore wholly unhealthy and undesirable exposure sexual intercourse and early childbirth – both leading to serious risks to their health (both physical and physiological), and longevity. It thus prohibits performance of any marriage involving a female below 18 years of age. At the same time, it uses that legislative opportunity to confirm a pre-existing societal concern to allow the male population, three more years to equip itself-educationally and financially, before the responsibilities of a married life may arise. (Para 46)

Therefore, the explicit legislative intent is - to treat a male more than 18 years of age i.e. beginning 18 year and one day, as an "adult". He is prohibited from solemnising a "child marriage". Violation of that prohibition enforced by the law may visit him with penalty of rigorous imprisonment that may extend up to two years, and fine. Therefore, for that reason also we have no doubt that the Parliament clearly intended and provided by way of law, that the male of the society also attain the age of "majority" i.e. the age of discretion and decision making at 18 years of age. There exists no evidence of any other legislative intent -to extend the limitation to institute a proceeding under section 3 of PCMA (by such offenders), by three extra years. (Para 56)

Once such a "male adult" i.e. a male more than 18 years of age would have elected to do so, it would always be recognised in law (on a deemed basis) that he had waived his right to void the transaction of "child marriage" performed by him. A "child marriage" being voidable and not void, we see no difficulty in law, in not recognising any right to a "male adult" i.e. a male more than 18 years of age, to seek relief in a civil proceeding that his marriage was void. (Para 60)

Therefore, no incongruity exists. In all such cases, once a "male adult" i.e. a male who may attain age more than 18 years on the date of occurrence of a "child marriage" may have no limitation to void his such "child marriage", he having elected to perform that prohibited transaction. Also, a male one who may have been a "minor" on the date of occurrence of his "child marriage" and may attain "majority" later, would lose his right to void his marriage if he elects to confirm his "child marriage", after "attaining majority". (Para 62)

In any case, the incongruity if any is seen to be extraneous considering the above discussion. The Parliament has criminalised a "child marriage" performed by a "male adult" i.e. a person more than 18 years of age. PCMA

prescribes punishment – up to two years rigorous imprisonment and fine that may extend to INR one lakh. The transaction entered is an offence. It entails a heavy punishment. In its face, to thereafter give an option to such an offender to void his marriage, would be to give him an unfair bargain against criminal prosecution, if not in all at least in some cases where the offender male may be 18 years of age on the date of occurrence of "child marriage" involving females who may also be 18 years of age or more. In that light, the reasoning of the Madras High Court in T. Shivakumar (Supra) and of the Delhi High Court in Lajja Devi (Supra) may not persuade us to reach that conclusion. Therefore, we remain in respectful disagreement with the reasoning offered by the Madras High Court and the Delhi High Court. (Para 65)

The above observations made by the Supreme Court as emphasized by us leave us with no choice. In spirit, those observations may run parallel to the observation made by the Supreme Court in Independent Thought (supra). Once, the highest Court of the land has ruled that the male may have a right to seek annulment of a "child marriage", up to the age 23, constitutionally, it is not for us to lay another law. Hardev Singh (supra) was noticed in Society for Enlightenment and Voluntary Action (supra). Yet, no different expression of the law is contained in that three-judge bench decision of the Supreme Court. Thus, the present comes across as a case where our judicial conscience may only conform to judicial discipline. We leave the issue at that. (Para 70)

In view of the above, we are unable to sustain the reasoning offered by the learned Court below insofar as it has referred to and related to the conduct of the appellant of filing a divorce suit under section 13 HMA, prior to the institution of the suit under Section 3 of PCMA. No explicit or implicit act of election was proven performed by the appellant, after "attaining majority" as may be read to his having confirmed/legalised the "child marriage" between the parties. Having instituted the later suit within limitation, he had not waived the option to void that transaction. Similarly, it is a fact that the present suit was filed without specific reference to Section 3(3) of PCMA. Yet, upon amendment made and allowed, it must be acknowledged that the amendment relates back to the date of institution of the suit. (Para 71)

No other fact is required to be established or gone into before declaring the transaction of "child marriage", void. First, material fact, that on the date of their marriage both parties to the marriage were "child" within the meaning of that term defined under Section 2(a) of the PCMA, is admitted. Therefore, their marriage was a "child marriage" as defined under Section 2(b) of PCMA. (Para 73)

Then, it not disputed that the suit had been filed by a party to the transaction of "child marriage". It is wholly maintainable. As to the competence and capacity of the appellant to institute the suit proceeding, there is no doubt. The appellant was more than 18 years of age. He alone could have filed that suit in his individual capacity. Last, as to limitation, we have already reached a conclusion considering the decision of the Supreme Court primarily in Independent Thought (supra) read with Hardev Singh (supra), that the appellant had limitation available up to 23 years of age, to institute that suit. Undoubtedly, on the date of institution of the suit by the appellant he was less than 23 years of age. Therefore, the suit was instituted within limitation, it having been instituted before expiry of 2 years from the date the appellant ceased to be a "child" i.e. attained 21 years of age. (Para 74)

No other issue is to be dealt with. The findings recorded by the learned court below to the effect that earlier the appellant had instituted proceedings under Section 13 of the Hindu Marriage Act, that failed or that the present proceedings were originally instituted under Section 12(2) of the Hindu Marriage Act or that the amendment was made later to set-up ground of Section 3 PCMA and the other fact finding with respect to conduct of the parties up to the time the appellant sought a declaration under Section 3 of PCMA fade into insignificance, in view of the foregoing discussion. In any case, it was not proven by the respondent that the appellant had ever elected to confirm his "child marriage" after "attaining majority" or that he ever waived his right to void that transaction. The learned court

below ought to have granted the relief prayed. (Para 75)

**Appeal allowed.** (E-14)

**List of Cases cited:**

1. T. Sivakumar Vs Inspector of Police, (2011) SCC Online Mad 1722

2. Court On its Own Motion (Lajja Devi) Vs St. 2012 SCC OnLine Del 3937

3. Independent Thought Vs U.O.I.& anr., (2017) 10 SCC 800

4. Secundrabad Club Etc. Vs C.I.T.-V & ors., 2023 SCC OnLine SC 1004

5. Association for Social Justice & Research Vs U.O.I.& ors., (2010) 95 AIC 422

6. Girdhari Lal & Sons Vs Balbir Nath Mathur & ors., (1986) 2 SCC 237

7. Kanai Lal Sur Vs Paramnidhi Sadhukhan, AIR 1957 SC 907

8. Osmania University Teachers' Assoc. Vs St. of Andhra Pradesh & anr., (1987) 4 SCC 671

9. Captain Subash Kumar Vs Principal Officer, Mercantile Marine Department, Madras, (1991) 2 SCC 449

10. Philips India Limited Vs Labour Court, Madras & ors., (1985) 3 SCC 103

11. M. Pentiah & ors. Vs Muddala Veeramallappa & ors., AIR 1961 SC 1107

12. Padma Sundara Rao (dead) & ors. Vs St. of T.N. & ors., (2002) 3 SCC 533

13. Harbajan Singh Vs Press Council of India & ors., (2002) 3 SCC 722

14. Dr. Jaishri Laxmanrao Patil Vs Chief Minister (2021) 8 SCC 1

15. Maulavi Hussein Haji Abraham Umarji Vs St. of Gujarat & anr., (2004) 6 SCC 672

16. U.O.I. Vs Elphinstone Spinning & Weaving Company Limited & ors., (2001) 4 SCC 139

17. Komal Vs Mayatran, 2024 SCC Online MP 5315

(Delivered by Hon'ble Saumitra Dayal Singh, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Shri Anil Kumar Mehrotra, assisted by Shri Srijan Mehrotra and Shri Ashwani Kumar Patel, learned counsel for the appellant and Shri Gaurav Tripathi, learned counsel for the respondent.

2. Present appeal has been filed under Section 19 of the Family Courts Act, 1984, arising from the judgement and order dated 23.02.2018 passed by learned Principal Judge, Family Court, Gautam Buddha Nagar, in Suit No. 794 of 2013 (Sanjay Chudhary v. Guddan @ Usha), whereby declaration sought by the appellant, that his marriage with respondent, solemnised on 28.11.2004, was void, has been declined. The suit has been dismissed.

3. According to the facts proven before the learned trial court, the appellant was born on 07.08.1992 whereas the respondent was born on 01.01.1995. On 28.11.2004, the date of their marriage, the appellant was about 12 years of age whereas the respondent was about 9 years of age. They would have attained the age of 18 years in the year 2010 and 2013, respectively. On 05.07.2013, claiming benefit of Section 3 of Prohibition of Child Marriage Act, 2006 (hereinafter referred to as the 'PCMA'), the appellant filed the above-described suit at age 20 years 10 months and 28 days. Initially, the suit was instituted under Section 12 (2) of the HMA. Later, upon amendment being allowed,

direct relief was claimed under Section 3 of the PCMA. Relying on Section 2(a) of PCMA- that defines "child" and thus prescribes the age requirement for a valid marriage (like that provided under Section 5(3) of the Hindu Marriage Act, 1955- hereinafter referred to as the 'HMA'), the appellant claimed that his suit, thus filed, was within the limitation prescribed under Section 3(3) of PCMA. Other fact grounds were also pleaded to allege that the respondent never cohabited, etc.

4. In the objections (filed by the respondent) to that suit, amongst others, it was objected that the appellant had attained the age of majority i.e. 18 years in the year 2010 and therefore, the suit presented after expiry of two years therefrom i.e. beyond 07.08.2012, was barred by limitation prescribed under Section 3(3) of PCMA. Other objections were also raised for reason of earlier divorce suit filed and dismissed, as also for other facts and reasons describing the conduct of the appellant indicating cohabitation as also election to the marriage, after attaining majority etc.

5. The learned Court below has categorically found that the marriage solemnised between the parties was a "child marriage" under PCMA. Yet, it has sustained the objections raised and has dismissed the suit filed by the appellant, primarily on the reasoning that prior to institution of the present proceeding, the appellant had instituted a divorce suit proceeding being Matrimonial Case No. 1110 of 2011, under Section 13 of HMA, on 17.09.2011. Though it was dismissed under Order 9 Rule 8 on 19.05.2012 the learned Court below has reasoned - by filing the divorce suit, the appellant had elected to confirm his "child marriage". Further, no second suit may have been filed thereafter for the declaration sought. Then, conditions prescribed under section 12(2) of HMA have been found, not fulfilled. Also, the suit has been found instituted outside limitation. As to Section 3 PCMA, it has been held on his own showing the appellant had earlier pleaded, he wanted to live in matrimony with the respondent and that the parties cohabited for some time. Hence, their marriage is valid.

6. Shri Anil Mehrotra, learned counsel for the appellant would submit that word "major" and "majority" are not defined under PCMA. The concept of "majority" contained in the Majority Act, 1875 (hereinafter referred to as the Majority Act) has also not been borrowed in PCMA. Referring to Section 2(a) of the PCMA it has been shown that it borrows the age requirement as prescribed under Section 5(iii) of H.M.A. Reference has been made to the phrase "child marriage" and the word "minor" defined under the PCMA. For ready reference provisions of Section 2(a), (b) and (f), read as below:-

***"2. Definitions. In this Act, unless the context otherwise requires,-***

*(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;*

*(b) "child marriage" means a marriage to which either of the contracting parties is a child*

*(c) .....*

*(d) .....*

*(e) .....*

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

7. Then, heavy reliance has been placed on the legislative mandate contained in Section 3 of PCMA that prohibits "child marriage", absolutely. Hence, we consider it appropriate to extract those provisions as below: -

*"**3. Child marriages to be voidable at the option of contracting party being a child.***

*(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:*

*Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.*

*(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.*

*(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.*

*(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:*

*Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed."*

8. On the other hand, learned counsel for the respondent has relied on the language of Section 9 of PCMA. For ready reference that provision is noted as below:

*"**9. Punishment for male adult marrying a child.** - Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both."*

*Pari materia provision exists under Section 18 HMA.*

9. Since the definition of the word "minor" under the PCMA refers to the Majority Act, we consider it appropriate to extract of Section 3(1) of the Majority Act. It reads as below: -

*"3. Age **of majority of persons domiciled in India**.-(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before."*

10. Then, reliance has been placed on a Full Bench decision of the Madras High Court in **T. Sivakumar Vs. Inspector of Police, (2011) SCC Online Mad 1722,** wherein it has been observed as below: -

*"18. A close reading of the above objects and reasons of the Prohibition of Child Marriage Act, would keep things beyond any pale of doubt that the Prohibition of Child Marriage Act is a special enactment for the purpose of*

*effectively preventing the evil practice of solemnisation of child marriages and also to enhance the health of the child and the status of women, whereas, the Hindu Marriage Act is a general law regulating the Hindu marriages. Therefore, the Prohibition of Child Marriage Act, being a special law, will have overriding effect over the Hindu Marriage Act to the extent of any inconsistency between these two enactments. In view of the said settled position, undoubtedly, Section 3 of the Prohibition of Child Marriage Act will have overriding effect over the Hindu Marriage Act.*

*21. From a reading of the above, we infer that probably the Division Bench was of the view that if only a Petition is filed under Section 3 of the Prohibition of Child Marriage Act, the said marriage will be voidable. We are unable to agree with the said conclusion arrived at by the Division Bench. In our considered opinion, the marriage shall remain voidable [vide Section 3] and the said marriage shall be subsisting until it is avoided by filing a Petition for a decree of nullity by the child within the time prescribed in Section 3(3) of the Prohibition of Child Marriage Act. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a Petition is not filed before the District Court under Section 3(1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period as provided in Section 12(3) occurs, the marriage shall continue to remain as a voidable marriage. If the marriage is annulled as per Section 3(1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time.*

*26. But, in cited supra, the Division Bench has held that such a marriage between a boy aged more than 21 years and a girl aged less than 18 years is not voidable. In other words, according to the Division Bench such a child marriage celebrated in contravention of the Prohibition of Child Marriage Act is a valid marriage. With respect, we are of the opinion that it is not a correct interpretation. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. Therefore, we hold that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a Court of law, such voidable marriage, cannot be either stated to be or equated to a "valid marriage" stricto sensu as per the classification referred to above. Accordingly, we answer the first part of the 1st question referred to above."*

*56. A plain reading of sub-section (3) would reflect that a petition under the above Section may be filed at any time but before the child completes two years of attaining majority. When does a child attains the age of majority is not expressly defined in the Act. However, Section 2(f) of the Prohibition of Child Marriage Act denies the term "minor" which reads as follows:*

*"2(f) "minor" means a person who, under the provisions of the Majority*

*Act, 1875 (9 of 1875) is to be deemed not to have attained his majority."*

*As defined in Majority Act, 1875, a minor, either male or female, attains the age of majority on completing eighteen years of age. Keeping in mind the same, if we again look into sub-section (3) of Section 3 of the Prohibition of Child Marriage Act, the anomaly in the Act will emerge to light. In the case of a female, as per sub-section (3) since she attains the age of majority on completing the age of eighteen years, there can be no difficulty in understanding of the said provision to say that a petition for annulment should be filed within two years of attaining majority, i.e. before completing twenty years of age. But, in the case of a male, any marriage solemnised before he completes the age of twenty one years is a child marriage and the same is voidable. Therefore, he can be expected to file a Petition for annulment within two years after attaining the age of twenty-one years. But, sub-section (3) reads that such Petition should be filed when he completes two years of attaining majority which means before completing twenty years of age. For example, if the child marriage of a male takes place on his completing twenty years of age and if a literal interpretation is given to sub-section (3) of the Prohibition of Child Marriage Act, surely, he will not be in a position to file a Petition to annul the marriage. Such literal interpretation in the case of a male would create anomalous situation. It is too well settled that no provision of any law shall be interpreted in such a way to make it either anomalous or unworkable. Therefore, in our considered opinion, sub-section (3) of Section 3 shall be read that in the case of a male, a Petition for annulment of child marriage shall be filed before he completes two years of attaining twenty-one years of age. We are hopeful that the parliament will take note of the above anomaly and make necessary amendment to sub-section (3) to avoid any more complication.*

(emphasis supplied)

11. Reliance has also been placed on similar reasoning offered by the Delhi High Court, in **Court On its Own Motion (Lajja Devi) Vs. State 2012 SCC OnLine Del 3937**, wherein it has been observed as under: -

*"21. On that basis, view of the Full Bench of Madras High Court was that the law was enacted for the purpose of effectually preventing evil practice of solemnisation of child marriages and also to enhance the health of the children and the status of the marriage and therefore, it was a special enactment in contrast with the HM Act, which is a general law regulating Hindu marriages. Thus, the PCM Act, being a special law, will have overriding effect over the HM Act to the extent of any inconsistency between the two enactments. For this reason, the Court took the view that Section 3 of this Act would have overriding effect over the HM Act and the marriage with a minor child would not be valid but voidable and would become valid if within two years from the date of attaining 18 years in the case of female and 21 years in the case of male, a petition is not filed before the District Court under Section 3(1) of the PCM Act for annulling the marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period, the marriage shall continue to remain as a voidable marriage.*

…

*39. As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.*

*40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No. 1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void."*

(emphasis supplied)

12. Next, heavy reliance has been placed on the decision of the Supreme Court in **Independent Thought Vs. Union of India and another, (2017) 10 SCC 800,** wherein it has been observed as below: -

*"136. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18 years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 IPC was amended, post the unfortunate "Nirbhaya" incident and the age of consent under clause Sixthly of Section 375 IPC was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012; the Juvenile Justice (Care and Protection of Children) Act; the Child Marriage Restraint Act, 1929; the Protection of Women from Domestic Violence Act, 2005; the Majority Act, 1875; the Guardians and Wards Act, 1890; the Contract Act, 1872 and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.*

*137. As far as marriage laws are concerned, as far back as 1978, the minimum age of marriage of a girl child was increased to 18 years. The Restraint Act, was replaced by the PCMA wherein also marriage of a girl child aged below 18 years is prohibited. However, Section 3 of the PCMA makes a child marriage voidable at the option of that party, who was a child at the time of marriage. The petition for annulling the child marriage must be filed within 2 years of the child attaining majority. Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age*

*of 23 years. Even when the child is minor, a petition for annulment can be filed by the guardian or next friend of the child along with the Child Marriage Prohibition Officer. Unfortunately, both the number of prosecutions and the number of cases for annulment of marriage filed under PCMA are abysmally low."*

(emphasis supplied)

13. To enforce that reasoning on this Court, the sound principle in favour of observance of judicial discipline has been invoked. Thus, reliance has been placed on the ratio in **Secundrabad Club Etc. Vs. C.I.T.-V and ors., 2023 SCC OnLine SC 1004**, wherein the Supreme Court made the following observation: -

*"... 20. As against the ratio decidendi of a judgment, an obiter dictum is an observation by a court on a legal question which may not be necessary for the decision pronounced by the court. However, the obiter dictum of the Supreme Court is binding under Article 141 to the extent of the observations on points raised and decided by the Court in a case. Although the obiter dictum of the Supreme Court is binding on all courts, it has only persuasive authority as far as the Supreme Court itself is concerned.*

*(emphasis supplied)*

14. As to the purpose and spirit of PCMA, reliance has been placed on decision of Delhi High Court in **Association for Social Justice & Research Vs. Union of India and Others, (2010) 95 AIC 422**, wherein it has been observed as below: -

*9. The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under:*

*(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.*

*(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.*

*(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty*

*(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.*

*(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.*

*Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child bridges, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that 'where these elements are linked with gender inequities and biases for the majority of young girlsa their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore more likely to experience domestic violence themselves. Violent behaviour can take the form of physical harm, physical harm, psychological attacks, threatening behaviour and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband's family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights.* (emphasis supplied)

15. Relying on the above, it has been submitted, the context in which the word "majority" has been used in Section 3(3) of PCMA must be decided by looking at that word through the prism of Section 2(a) of PCMA. To the extent a male may remain a "child" (for the purpose of PCMA), till he completes the age of 21, he may not attain "majority" for the purpose of Section 3(3) of PCMA. Therefore, the period of limitation to file a suit under Section 3 of PCMA may commence for a male only upon his attaining the age of 21 years, and not earlier. Thus, the thrust of his submission is, the word "majority" must be interpreted in contrast to a "child" as defined under PCMA. That concept may alone govern the interpretation to be given to the words "attaining majority" appearing in section 3(3) of PCMA.

16. In that, reliance has been placed on a decision of the Supreme Court in

**Girdhari Lal and Sons Vs. Balbir Nath Mathur and others, (1986) 2 SCC 237** wherein it had been observed as below: -

*"6. It may be worthwhile to restate and explain at this stage certain well-known principles of interpretation of statutes: Words are but mere vehicles of thought. They are meant to express or convey one's thoughts. Generally, a person's words and thoughts are coincidental. ..... But if it is the legislature that has expressed itself by making the laws and difficulties arise in interpreting what the legislature has said, a legislature cannot be asked to sit to resolve those difficulties. The legislatures, unlike individuals, cannot come forward to explain themselves as often as difficulties of interpretation arise. So the task of interpreting the laws by finding out what the legislature meant is allotted to the courts. ..... where the words of statutes are plain and unambiguous effect must be given to them. ..... Intention of the legislature and not the words is paramount. Even where the words of statutes appear to be prima facie clear and unambiguous it may sometimes be possible that the plain meaning of the words does not convey and may even defeat the intention of the legislature; in such cases there, is no reason why the true intention of the legislature, if it can be determined, clearly by other means, should not be given effect. Words are meant to serve and not to govern and we are not to add the tyranny of words to the other tyrannies of the world.*

*7. Parliamentary intention may be gathered from several sources. First, of course, it must be gathered from the statute itself, next from the preamble to the statute, next from the Statement of Objects and Reasons, thereafter from parliamentary debates, reports of committees and commissions which preceded the legislation and finally from all legitimate and admissible sources from where there may be light. Regard must be had to legislative history too.*

*8. Once parliamentary intention is ascertained and the object and purpose of the legislation is known, it then becomes the duty of the court to give the statute a purposeful or a functional interpretation. This is what is meant when, for example, it is said that measures aimed at social amelioration should receive liberal or beneficent construction. Again, the words of a statute may not be designed to meet the several uncontemplated forensic situations that may arise. The draftsman may have designed his words to meet what Lord Simon of Glaisdale calls the "primary situation". It will then become necessary for the court to impute an intention to Parliament in regard to "secondary situations". Such "secondary intention" may be imputed in relation to a secondary situation so as to best serve the same purpose as the primary statutory intention does in relation to a primary situation.*

*9. So we see that the primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the court must then strive to so interpret the statute as to promote or advance the object and purpose of the enactment. For this purpose, where necessary the court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-*

*called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary.*

*16. Our own court has generally taken the view that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices or absurdities, vide K.P. Varghese v. ITO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293] , State Bank of Travancore v. Mohd. M. Khan [(1981) 4 SCC 82] , Som Prakash Rekhi v. Union of India [(1981) 1 SCC 449 : 1981 SCC (L&S) 200] , Ravula Subba Rao v. CIT [AIR 1956 SC 604 : 1956 SCR 577] , Govindlal v. Agricultural Produce Market Committee [(1975) 2 SCC 482 : AIR 1976 SC 263 : (1976) 1 SCR 451] and Babaji Kondaji v. Nasik Merchants Coop. Bank Ltd. [(1984) 2 SCC 50].*

*17 Bearing these broad principles in mind if we now turn to the Delhi Rent Control Act, it is at once apparent that the Act is primarily devised to prevent unreasonable eviction of the tenants and subtenants from demised premises……."*

17. Further, according to Shri Mehrotra, any other interpretation would result in absurdity and an irreconcilable difficulty would arise. If the period of limitation of two years is to be computed for a male upon his attaining the age of 18 years, then, that limitation would expire on his completing the age of 20 years. Consequently, no marriage performed by a male "child" who may have attained age of 20 may ever be voided, though, the statute prohibits that marriage and contemplates such a marriage to be one involving a "child" and therefore voidable, at his instance. In that event, though a statutory remedy would exist - to seek that relief under Section 3(2) of PCMA, yet it may never be availed by a male "child" for lack of limitation available.

18. Reliance has been placed on **Kanai Lal Sur Vs. Paramnidhi Sadhukhan, AIR 1957 SC 907** wherein it has been observed: -

*"6…….. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct. Indeed, Mr Chatterjee himself fairly conceded that he would not be justified in asking the court to put an undue strain on the words used in the section in order that a construction favourable to the thika tenants should be deduced. It is in the light of this legal position that we must now consider Section 5 sub-section (1) of West Bengal Act 2 of 1949, amended by West Bengal Act 6 of 1953."*

19. Further, relying on the rule of interpretation that a statute must be read as a whole, strength has been drawn from

three decisions of the Supreme Court in **Osmania University Teachers' Association Vs. State of Andhra Pradesh and another, (1987) 4 SCC 671, Captain Subash Kumar Vs. Principal Officer, Mercantile Marine Department, Madras, (1991) 2 SCC 449 and Philips India Limited Vs. Labour Court, Madras and others, (1985) 3 SCC 103. In Osmania University Teachers' Association (supra),** it has been observed as below: -

*"25. It is ……. The intention of the legislature has to be gathered by reading the statute as a whole. That is a rule which is now firmly established for the purpose of construction of statutes. The High Court appears to have gone on a tangent. The High Court would not have fallen into an error if it had perused the UGC Act as a whole and compared it with the Commissionerate Act or vice-versa."*

20. In **Captain Subash Kumar (supra),** it has been observed as below: -

*"20. There is not one who does not know that words are to be understood according to their subject matter. The subject matter of Part XII is investigations and inquiries into shipping casualty. Would "in any case" then mean in any case of shipping casualty? We have read the other relevant provisions of the Act. Nemo aliquam partem recti intelligere potest, antequam totum interum atque interum parlegerit. No one can properly understand any part of a statute till he has read through the whole again and again."*

21. Then, in **Philips India Limited (supra),** it has been observed as below: -

*"15. No canon of statutory construction is more firmly established than that the statute must be read as a whole. This is a general rule of construction applicable to all statutes alike which is spoken of as construction ex visceribus actus. This rule of statutory construction is so firmly established that it is variously styled as "elementary rule" [see Attorney General v. Bastow, (1957) 1 All ER 497] and as a "settled rule" [see Poppatlal Shah vs State of Madras, (1953) 1 SCC 492]. The only recognised exception to this well-laid principle is that it cannot be called in aid to alter the meaning of what is of itself clear and explicit. Lord Coke laid down that: "it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers" [Quoted with approval in Punjab Beverages Pvt. Ltd. v. Suresh Chand, (1978) 2 SCC 144]."*

22. Next, it has been submitted - if there are two interpretations possible, that which results in failure of the object of the statute must be discarded. Thus, reliance has been placed on yet another decision of the Supreme Court in **M. Pentiah and others Vs. Muddala Veeramallappa and others, AIR 1961 SC 1107** wherein it has been observed as below: -

*"6. Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well established rules of Construction which would help us to steer clear of the complications created by the Act. Maxwell on the Interpretation of Statutes, 10th Edn., says at p. 7 thus:*

*"… if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the*

*legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result".*

*It is said in Craies on Statute Law, 5th Edn., at p. 82—*

*"Manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly to be avoided."*

*Lord Davey in Canada Sugar Refining Co. v. R. [(1898) AC 735] provides another useful guide of correct perspective to such a problem in the following words:*

*"Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."*

23. Last, it has been submitted, words of a statute must be interpreted with some imagination, keeping in mind the purpose of the statute. The Courts may reject the plain or grammatical sense of words used in a statute if that grammatical sense may defeat the object of the Act. No occasion may arise, to invoke *casus omissus* on part of the legislature, in such a case. Reliance has been placed on a decision of the Supreme Court in **Padma Sundara Rao (dead) and Others Vs. State of T.N. and others, (2002) 3 SCC 533** wherein it has been observed: -

*"12. The rival pleas regarding rewriting of statute and casus omissus need careful consideration. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage [218 FR 547] .) The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama [(1990) 1 SCC 277 : AIR 1990 SC 981] .*

*14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd. [(2000) 5 SCC 515] ) The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in Narasimhaiah case [(1996) 3 SCC 88] . In Nanjudaiah case [(1996) 10 SCC 619] the period was further stretched to have the time period run from date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only clause (i) and/or clause (ii) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent.*

*15. Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well*

*settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou v. Procopiou [(1966) 1 QB 878 : (1965) 3 All ER 539 : (1965) 3 WLR 1011 (CA)] (at All ER p. 544-I), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in Luke v. IRC [1963 AC 557 : (1963) 1 All ER 655 : (1963) 2 WLR 559 (HL)] where at AC p. 577 he also observed : (All ER p. 664-I) "This is not a new problem, though our standard of drafting is such that it rarely emerges."]"*

24. Responding to the above, learned counsel for the respondent has first referred to the 13th Rajya Sabha Report of the Parliamentary Standing Committee dated 29.11.2005. It has thus been indicated that the matter of discrepancy with respect to the age of "majority" of a male and female party to a "child marriage" and its consequences on the remedy of its declaration as void, was debated. The incongruity arising in the facts similar to those involved in this appeal were discussed. At the same time, he would fairly submit that no statutory intervention has been made, in that regard. To that extent that report prepared - post enforcement of PCMA is extraneous to the dispute at hand. For its resolution, we only look at the existing statutory provisions.

25. Coming to the exact controversy involved in the present case, he would submit, preference be given to literal meaning of the words used in PCMA namely, "attaining majority". He has relied on **Harbajan Singh Vs. Press Council of India and others, (2002) 3 SCC 722,** wherein it has been observed as below: -

*"7. ……..... Ordinary, grammatical and full meaning is to be assigned to the words used while interpreting a provision to honour the rule — the legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material — intrinsic or external — is available to permit a departure from the rule."*

*9. ……..The learned author cites three quotations from speeches of Lord Reid in the House of Lords cases, the gist whereof is : (i) in determining the meaning of any word or phrase in a statute, ask for the natural or ordinary meaning of that word or phrase in its context in the statute and follow the same unless that meaning leads to some result which cannot reasonably be supposed to have been the legislative intent; (ii) rules of construction are our servants and not masters; and (iii)*

*a statutory provision cannot be assigned a meaning which it cannot reasonably bear; if more than one meanings are capable you can choose one but beyond that you must not go. (p. 40, ibid) Justice G.P. Singh in his celebrated work — Principles of Statutory Interpretation (8th Edn., 2001) states (at p. 54):*

*"The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided."*

*The learned author states at another place (at p. 74, ibid) that the rule of literal construction whereby the words have to be assigned their natural and grammatical meaning can be departed from but subject to caution. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. A departure is permissible if it can be shown that the legal context in which the words are used or the object of the statute in which they occur requires a different meaning……."*

26. Thus, according to him, PCMA uses two concepts with respect to eligibility or legal capacity to marry and legal capacity to bring a suit to seek annulment of a "child marriage". Thus, PCMA uses the terms "child", "adult", "minor" and "majority". While the word "child" has been defined under Section 2(a) of PCMA, its antonym word "adult" has not been defined. At the same time, under Section 2(f) of the PCMA, the word "minor" has been defined, yet its antonym word "major" has not been specifically defined. Yet, the concept of "majority" as contained in the Majority Act has been consciously incorporated (in PCMA) by employing the well-recognised legislative tool – legislation by reference. According to him, though a male who is a "major" may not acquire the legal capacity to enter into a valid marriage below the age of 21 years, at the same time, by virtue of him ceasing to be a "minor" upon attaining the age of "majority", he may acquire the legal capacity to institute a legal proceeding to seek annulment of a "child marriage" to which he may have been made a party, while he was below that age.

27. In that regard, heavy reliance has been placed on the language of Section 3(2) of the PCMA. It clearly indicates that any person who may be a "minor" may file a suit seeking to void their marriage through their guardian or next friend along with the Child Marriage Prohibition Officer. By necessary implication, a party to a "child marriage" who may later attain the age of 18 years may file such suit only, on his own.

28. Then, the proviso to Section 3(3) of PCMA is only a provision to provide for the period of limitation to bring a suit to declare a "child marriage" void. It applies to the person on whose behalf such suit may be brought may continue to be described as a "child" by virtue of the definition of that term under Section 2(a) of the Act. For Section 3 of PCMA that requirement of the definition may remain relevant only to determine the legal capacity of the person who may institute that suit. By way of elaboration, it has been submitted, the suit to declare a "child marriage" void may be instituted by the parties to a "child marriage" (upon attaining the age of majority) or through their guardian or next kin, if such party be

below the age of 18 years and therefore devoid of legal capacity to institute any legal proceeding. Whether such suit is instituted by the parties themselves or through their guardian or next kin, would have no bearing on the end of limitation to institute that suit. It would remain two years from the date of attaining "majority".

29. Elaborating that submission, reliance has been placed on Section 9 of the PCMA to submit, though the Act uses the twin concepts of "child" and "minor" yet, the artificial concept of "child" under Section 2(a) of the PCMA, exists only to prescribe the legal age of marriage. At the same time, the legislature has consciously provided/prescribed punishment to males entering a "child marriage" though such a male thus be a "child" (at below 21 years of marriage). In that the legislature has acted on the age of "majority" attained by such a male under the Majority Act. In that regard, the legislature clearly treats such a male "child" to be an adult. That requires no elaboration in view of the phraseology ("male adult") employed in Section 9 of the PCMA.

30. Thus, according to him, if the submission being advanced on behalf of the appellant is to be accepted, a conflict would arise in the two provisions namely Sections 3 and 9 of the PCMA. That must be avoided and both provisions must be harmonised. He has relied on **Dr. Jaishri Laxmanrao Patil Vs. Chief Minister (2021) 8 SCC 1** wherein the Supreme Court has observed as below: -

*"206. In the 183rd Report of the Law Commission of India, M. Jagannadha Rao, J. observed that a statute is a will of legislature conveyed in the form of text. It is well-settled principle of law that as a statute is an edict of the legislature, the conventional way of interpreting or construing the statute is to see the intent of the legislature. The intention of legislature assimilates two aspects. One aspect carries the concept of "meaning" i.e. what the word means and another aspect conveys the concept of "purpose" and "object" or "reason" or "approach" pervading through the statute. The process of construction, therefore, combines both liberal and purposive approaches. However, necessity of interpretation would arise only where a language of the statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. He supported his view by referring to two judgments of this Court in R.S. Nayak v. A.R. Antulay [R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183 : 1984 SCC (Cri) 172] and Grasim Industries Ltd. v. Collector of Customs [Grasim Industries Ltd. v. Collector of Customs, (2002) 4 SCC 297] . It was held in R.S. Nayak [R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183 : 1984 SCC (Cri) 172] that the plainest duty of the court is to give effect to the natural meaning of the words used in the provision if the words of the statute are clear and unambiguous."*

31. Therefore, in his submission, the object of the PCMA and the mischief it seeks to address must be given primacy, by giving full play to the literal meaning of the word "majority" used in Section 3(3) of the PCMA. Once a male acquires the legal capacity to institute a legal proceeding (to declare his marriage void) at age 18 years, and simultaneously law may also hold him accountable for the breach of PCMA, he may not be given any relaxation with respect to the start point of limitation to

institute a legal proceeding, beyond that age, too by much more i.e. three years than given to the person belonging to the other gender i.e. the female - who is overtly perceived to be the more vulnerable (by the legislature) and whose life and liberty interests, the legislature seeks to protect more. In that regard reliance has been placed on **Maulavi Hussein Haji Abraham Umarji Vs. State of Gujarat and another, (2004) 6 SCC 672** wherein the Supreme Court has been observed as below: -

*"19. In D.R. Venkatachalam v. Dy. Transport Commr. [(1977) 2 SCC 273 : AIR 1977 SC 842] it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.*

*"21. Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., …….. Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. ……."*

32. The only reason for different age prescribed by the statute in the artificial concept of the "child" introduced by Section 2(a) of the PCMA remains - a social desirability in a typical Indian marriage. Thus, the legislature expects the male to be educationally and financially better equipped than his female partner. Perhaps for that perceived bias prevailing in the society, the legislature recognises the artificial difference of age between male and female in the definition of "child" while prohibiting "child marriage". There is no rationale available to assume that a male is biologically or physically or mentally or psychologically not equipped to be married at the age of 18 years and/or that he acquires such competence at the age of 21 years. The risks to physical and psychological health caused by childbirth at tender age, visit the female population as childbearing has its own effects and consequences on the general health and well-being on an underage female. Risk of death caused by childbirth is faced solely by the female population and never by the males.

33. Thus, according to him the spirit of the statute and its dominant purpose must be given primacy and the incongruency arising from the definition clause-Section 2(a) must be resolved accordingly.

Reliance has been placed on **Union of India Vs. Elphinstone Spinning and Weaving Company Limited and others, (2001) 4 SCC 139,** wherein the Supreme Court has observed as below: -

*"17. ……..While examining a particular statute for finding out the legislative intent it is the attitude of Judges in arriving at a solution by striking a balance between the letter and spirit of the statute without acknowledging that they have in any way supplemented the statute would be the proper criterion. The duty of Judges is to expound and not to legislate is a fundamental rule. There is no doubt a marginal area in which the courts mould or creatively interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. But by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. It is, therefore, a cardinal principle of construction of statutes that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. Applying the aforesaid principle we really fail to understand as to how the learned Judges of the Bombay High Court could come to a conclusion that the mismanagement must necessarily mean an element of fraud or dishonesty. Courts are not entitled to usurp legislative function under the guise of interpretation and they must avoid the danger of determining the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted. Caution is all the more necessary in dealing with a legislation enacted to give effect to policies that are subject to bitter public and parliamentary controversy, for in controversial matters there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable; it is Parliament's opinion in these matters that is paramount. When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy……"*

34. Last, it has been submitted, the original suit was filed under Section 12 of the HMA with no reference to Section 3 of the PCMA. That suit remained pending till after the appellant attained the age of 23 years. Thereafter, for the first time, an amendment application was filed to describe the suit as one filed with reference to Section 3 of the PCMA. Therefore, in his submission, the suit seeking declaration of marriage to be void, was filed after the appellant attained the age of 23 years. It was time barred.

35. That objection has been met by Sri Mehrotra on the strength of the principle that an amendment to the pleading once allowed, would relate back to the date of filing of the original proceeding. Here, the original suit had been filed before the appellant attained the age of 21 years. Therefore, the amendment made would relate back to that point in time. That amendment was never challenged. Therefore, it cannot be said that the suit was filed outside the limitation prescribed.

He has placed reliance on a decision of **Madhya Pradesh High Court in Komal Vs. Mayatran, 2024 SCC Online MP 5315.**

36. Having heard learned counsel for the parties and having perused the record, we may first note that the HMA does not contain any provision to declare a "child marriage" void, though it contemplates criminal prosecution of male parties to such transactions. Earlier, HMA prescribed the age of marriage. It is consistent to PCMA, i.e. 18 years for females and 21 years for males. Yet, it stopped short of making any provision as to the legality of "child marriage" performed by underage male or female, or both. In contrast, Section 3 (1) of PCMA (the later enactment) clearly provides:

(i) every "child marriage";

(ii) whether solemnized before or after commencement of that Act;

(iii) shall be voidable;

(iv) at the option of the contracting party, if they were a "child" at the time of such marriage.

37. The term "child marriage" is defined under Section 2 (b) of the PCMA. It clearly means a marriage where either of the contracting party is a "child". The word "child" has been defined under Section 2(a) of the PCMA. Clearly, a male below 21 years of age is deemed to be a "child" for the purpose of PCMA. Similarly, a female below 18 years of age is deemed to be a "child". It is admitted to the parties to the dispute that the appellant was about 12 years of age, whereas, the respondent was 9 years of age, at the time of their marriage solemnized on 28.11.2004. That transaction was a "child marriage", admittedly voidable at the option of either party.

38. What therefore falls for our consideration is whether the remedy available for that declaration was applied for within limitation prescribed by the law. In the first place, PCMA is a complete code. It provides for all – the prescription of age for a valid marriage; the consequences and remedies in the event of an underage marriage and the limitation to seek the remedy against an underage marriage.

39. The remedy available to both parties to a "child marriage" is to seek a declaration from a competent Court that their marriage was void. However, that effect and remedy is optional i.e. to be availed upon the volition of either party to that marriage, but by no other. Thus, a "child marriage" is voidable but not void. Any party to such transaction must elect to confirm or void it.

40. With respect to the procedure to seek a declaration that a transaction of "child marriage" is void, Section 3(2) of the PCMA provides that a "minor" may file a suit seeking declaration that their marriage was void, through their guardian or next friend along with the Child Marriage Prohibition Officer.

41. Insofar as the PCMA does not make any provision - who may file such a suit (where the plaintiff may have attained the age of "majority"), it naturally follows from Section 3(2) of the PCMA, that such suit may be filed only by the person seeking that declaration, that right accruing to such person from "majority" attained.

42. Then Section 3(3) of the PCMA provides that a suit may be filed "at any time" but before the "child" filing the suit completes two years of "attaining

majority". Thus, the start point of limitation has been prescribed- "at any time". Clearly, that would refer to any time after solemnization of a "child marriage" and not before. On the other hand, the end of limitation has been prescribed with reference to date of "attaining majority". It has been fixed at the completion of two years therefrom. Therefore, it becomes material to ascertain - what would be the age when a "child" (either male or female), may attain "majority".

43. The term "majority" and the phrase "attaining majority" have not been defined under the PCMA. At the same time, the word "minor" has been defined under Section 2(f) of the PCMA to mean a person "deemed not to have attained his majority" under the Majority Act. Therefore, the legislature has defined the word "minor" as the opposite of a "major" under the Majority Act. Section 3 of the Majority Act provides for the "age of majority of persons domiciled in India, at 18 years and not before".

44. Consistent thereto, Section 9 of the PCMA prescribes punishment to any "male adult", who may marry a "child". Thus, any "male adult", "above 18 years of age", who may contract a "child marriage" shall be punished with rigorous imprisonment, that may extend to two years or fine that may extend to one lakh INR, or both. Thus, Section 9 of the PCMA also uses the phrase "male adult" in the context and with reference to age of such person being more than 18 years i.e. such male who may have attained the age of majority under the Majority Act.

45. In our view, the PCMA uses two concepts. First, to deal with the menace of "child marriage", the legislature devices a concept of "child". In that it creates an artificial distinction between the male and female population in the country. Consistent to the provisions of the Majority Act, it assumes that in our society a female would cease to be a "child" at age 18 years, purely by work of unexplained legal fiction, it artificially assumes that a male would remain a "child" up to the age of 21 years.

46. We recognize that that legislative prescription also involving legislatively drawn artificial distinction (on the strength of a legal fiction incorporated), may have arisen for two completely different and largely distinct considerations. First, the legislature sought to protect the female population from the vice of "child marriage", inherently involving risks to their life and health upon premature and therefore wholly unhealthy and undesirable exposure sexual intercourse and early childbirth – both leading to serious risks to their health (both physical and physiological), and longevity. It thus prohibits performance of any marriage involving a female below 18 years of age. At the same time, it uses that legislative opportunity to confirm a pre-existing societal concern to allow the male population, three more years to equip itself-educationally and financially, before the responsibilities of a married life may arise.

47. If we look beyond the surface of things, the artificial distinction drawn by Section 2(a) of PCMA between male and female members of the population, is nothing but a vestige of patriarchy. In making that observation we first appreciate the positive legislative step, to allow three years further time to members of the society to complete their education and gain financial independence. Yet, by

confining that opportunity only to the male population and by deliberately denying and equal opportunity to the female population, the pre-existing patriarchal bias existing in the society and the statutory law has been confirmed. Thus, a legislative assumption appears to exist that in a matrimonial relationship, it is the male who would be elder of the two spouses and would bear the financial burden of running the family expenses while his female partner would remain a child bearer or a second party - not equal to the first, in all respects.

48. Otherwise, the legislature would have necessarily equipped the female population also with time till age 21 - to complete their education and become financially independent. Thus, the higher and more desirable, and in any case the Constitutionally protected and cherished goal of equality enshrined under Article 14 of the Constitution of India, may have remained unaddressed. Yet, this is a statutory appeal proceeding, not involving any issue of validity of PCMA. Hence, we decline to rule on that issue.

49. At the same time, the dominant purpose of the PCMA is to prohibit solemnisation of "child marriages" especially those involving girls of tender age. They may never be prematurely exposed to inherently unhealthy sexual intercourse and to attending risks to their health and early childbirth that may endanger their life and health, especially through institution of marriage. Thus, that legislatively introduced social reform must be enforced scrupulously. The interpretation to Section 3 offered by the appellant does not serve that purpose.

50. At the same time, the interpretation being offered would allow for an unfair and absurd advantage to arise in favour of male adults between 18 and 21 years of age. They may knowingly perform "child marriage" with underage and/or adult females, exposing their spouses to risk of their marriage being declared void at the instance of such "male adult" three years after such a victim female spouse may have crossed age of 20 years. Thus, a male who may be 18 years of age may marry a female 18 years of age and still have that marriage declared void by filing a suit under Section 3 of the PCMA up to age 23, though the victim female may remain helpless and disabled in law in setting up any valid defence. Even where an underage female party to such a "child marriage" may herself elect to confirm such a transaction - at age 18 and in any case loose limitation to institute any suit proceeding to seek a declaration that the transaction was void, at age 20, the male party to that transaction may continue to claim limitation to institute such a suit till age 23 years. No constitutional or legislative or socially justifiable reason may ever exist to accept that scheme of the Act.

51. Thus, the concept of "majority" though not specifically defined, yet provides for the end date of limitation to file a suit under Section 3 of the PCMA. It must be interpreted carefully. Its' opposite i.e. "minor" used in Section 3(2) of the PCMA has been defined under Section 2(f) of the PCMA - to mean a person, who has not attained the age of "majority", within the meaning of the Majority Act. Once the word "minor" used in PCMA refers to a person below 18 years of age, clearly, a person more than 18 years of age would not be a "minor". In absence of any other concept or legislative intent contained in PCMA, the antonym of the word "minor" i.e. "major" appears to have been used to

express the opposite intent i.e. a person who is more than 18 years of age. Only then definition of the word "minor", may make any sense.

52. Second, there is no doubt that no "minor"/person below 18 years of age (whether male or female), may ever file a suit under Section 3 of PCMA, on their own. Section 3(2) of the PCMA would apply universally to males and females. Therefore, any suit under Section 3 of the PCMA may be filed by a person below 18 years of age (whether male or female), only through their guardian or next friend along with the Child Marriage Prohibition Officer. Any doubt in that regard, stands removed by clear use of words "his or her" in Section 3 (2) of the PCMA. Therefore, unlike section 2(a) of PCMA, there the legislature has not employed age based gender distinction while vesting legal capacity on individuals to institute a suit proceeding to seek a declaration that their "child marriage" is void. Whether filed by a male or a female, below age of 18 years, such suit must be filed only through the guardian or next friend, along with the specified statutory authority.

53. By way of necessary corollary to the above, any person whether male or female, who has attained the age of 18 years may file a suit seeking declaration that their marriage is void, only in his own capacity. Once the Parliament has vested that legal capacity to both male and female population alike (at age of 18 years), that person may be deemed to know all - the election to be made; remedy to be applied; the statutory procedure under which it may be applied and the limitation to apply. There is no reason, either explicit or implied, apparent or inherent, necessary or possible, to accept that males would need or may be permitted to seek such discretionary relief within three years extra limitation than provided to the female, for the same purpose.

54. Third, there no justification may exist - based on any biological or legislatively noticed fact or reason of existing societal practice, to infer that a male member of the society may remain a "child" incapacitated to institute a legal proceeding between 18 and 21 years of age. To the contrary, the legislature specifically recognizes that that legal capacity arises also to the male, at the age of 18 years itself. Therefore, the limitation to institute that proceeding is singular, both for males and females.

55. Fourth, there exists intrinsic evidence in Section 9 of PCMA, that indicates that the legislative intent is otherwise. It is an offence for a "male adult" i.e. a male above 18 years of age to solemnise a "child marriage" i.e. a marriage with an underage girl. Such a "male adult" may be penalised with rigorous imprisonment that may extend to two years, and he may also be visited with a fine. Though the word "adult" has not been defined under the PCMA, at the same time, Section 9 itself uses the phrase "male adult" in conjunction to the phrase "above 18 years of age".

56. Therefore, the explicit legislative intent is - to treat a male more than 18 years of age i.e. beginning 18 year and one day, as an "adult". He is prohibited from solemnising a "child marriage". Violation of that prohibition enforced by the law may visit him with penalty of rigorous imprisonment that may extend up to two years, and fine. Therefore, for that reason also we have no doubt that the Parliament

clearly intended and provided by way of law, that the male of the society also attain the age of "majority" i.e. the age of discretion and decision making at 18 years of age. There exists no evidence of any other legislative intent -to extend the limitation to institute a proceeding under section 3 of PCMA (by such offenders), by three extra years.

57. Only for other social practices, and other factors that may have been considered by the Parliament, adult females more than 18 years of age, may rarely solemnize a "child marriage" i.e. with a male below the marriageable age. Hence, they are not exposed to similar criminal prosecution. To us that may have arisen also from an observation of societal realities including - women suffer more from chronic patriarchy (more than males themselves) and are more vulnerable to be coerced or convinced into marriage not out of free will or choice, than their male counterpart.

58. We are conscious, the above construction may be perceived to lead to a minor incongruence as a male who may be married at age 20 years may never seek a declaration that his marriage was void. That would be for reason - two years of limitation would have expired at the age of 20 itself, though, such male would continue to be defined as a "child" within the meaning of Section 2(a) of the PCMA.

59. In our view the legislature presumes that such a person (whether male or female) wholly understands the consequences of his action - of transacting a "child marriage". Therefore, he can never claim ignorance of the law or incapacity in law, after "attaining majority". Being more than 18 years of age, he alone would elect to perform such a transaction, and he alone would have the discretion to make that decision and to perform the transaction prohibited by the law. If he still enters that transaction, he may do so in full knowledge of the law that he shall be prosecuted under Section 9 of PCMA.

60. Once such a "male adult" i.e. a male more than 18 years of age would have elected to do so, it would always be recognised in law (on a deemed basis) that he had waived his right to void the transaction of "child marriage" performed by him. A "child marriage" being voidable and not void, we see no difficulty in law, in not recognising any right to a "male adult" i.e. a male more than 18 years of age, to seek relief in a civil proceeding that his marriage was void.

61. As noted above, where a male "minor" may have been subjected to a "child marriage" transaction, then, by virtue of the express provision of Section 3 (2) of the PCMA, after attaining the age of 18 years, he alone would have the legal capacity to institute a suit to declare that transaction void. In that event as well the cut-off point when the male party to a "child marriage" must elect to opt out or confirm his marriage, would be when he attains the cut-off age of 18 years. In that event, the transaction of "child marriage" would have been performed when such a male was a "minor". Therefore, he would have limitation of two years (from the date of "attaining majority" i.e. 18 years) to institute the suit.

62. Therefore, no incongruity exists. In all such cases, once a "male adult" i.e. a male who may attain age more than 18 years on the date of occurrence of a "child marriage" may have no limitation to void

his such "child marriage", he having elected to perform that prohibited transaction. Also, a male one who may have been a "minor" on the date of occurrence of his "child marriage" and may attain "majority" later, would lose his right to void his marriage if he elects to confirm his "child marriage", after "attaining majority".

63. In the second event, such a "male adult", though may file such a suit proceeding, the fact of election and/or waiver may be pleaded in defence. It would have to be examined on the strength of evidence. Legally, he may be described to have waived the option to get his marriage declared void by electing to confirm it. Only the female "child"/other party to the "child marriage" would have the option to exercise that right.

64. As recorded above, "child marriage" being voidable and not void, we see no legal impediment in reading the waiver (on part of the male adult), as we have. Any other construction if accepted would strengthen the cause of suppressive patriarchy and work against gender equality. There being no basis to the premise that the male acquires age of discretion and decision making at age 21, that interpretation if accepted may lead to absurd in any case wholly unfair and unjust results as may only be counterproductive to the present and future goals of the society and the PCMA legislation itself.

65. In any case, the incongruity if any is seen to be extraneous considering the above discussion. The Parliament has criminalised a "child marriage" performed by a "male adult" i.e. a person more than 18 years of age. PCMA prescribes punishment – up to two years rigorous imprisonment and fine that may extend to INR one lakh. The transaction entered is an offence. It entails a heavy punishment. In its face, to thereafter give an option to such an offender to void his marriage, would be to give him an unfair bargain against criminal prosecution, if not in all at least in some cases where the offender male may be 18 years of age on the date of occurrence of "child marriage" involving females who may also be 18 years of age or more. In that light, the reasoning of the Madras High Court in **T. Shivakumar (Supra)** and of the Delhi High Court in **Lajja Devi (Supra)** may not persuade us to reach that conclusion. Therefore, we remain in respectful disagreement with the reasoning offered by the Madras High Court and the Delhi High Court.

66. At the same time much as we are convinced as above, we find ourselves unable to offer any distinction to the binding reasoning offered by the Supreme Court in **Independent Thought (supra),** even though the issue that arose before the Supreme Court in that decision was "whether sexual intercourse between a man and his wife being a girl between 15 to 18 years of age is rape?", at the same time, the Supreme Court did consider the provisions of the PCMA, at length. In that, it considered the provisions of Sections 3, Section 2 (a) and Section 9 of PCMA and the decision of the Madras High Court in **T. Shivakumar (supra).** Thereafter, it made the following pertinent discussion in paragraph 136. It reads as under: -

*136. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18*

*years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 IPC was amended, post the unfortunate "Nirbhaya" incident and the age of consent under clause Sixthly of Section 375 IPC was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012; the Juvenile Justice (Care and Protection of Children) Act; the Child Marriage Restraint Act, 1929; the Protection of Women from Domestic Violence Act, 2005; the Majority Act, 1875; the Guardians and Wards Act, 1890; the Contract Act, 1872 and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.*

*137……Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age of 23 years….."*

*(emphasis supplied)*

67. Then, in a recent three-judge bench decision of the Supreme Court in **Society for Enlightenment and Voluntary Action and another Vs. Union of India and others**, **2024 INSC 790,** the following issue arose for consideration: -

*"The Petitioner's primary grievance is that despite the enactment of the Prohibition of Child Marriage Act 2006, the rate of child marriages in India is alarming. The Petitioner seeks to address the failure of authorities to prevent child marriages. The Petitioner has sought stronger enforcement mechanisms, awareness programs, the appointment of Child Marriage Prohibition Officers, and comprehensive support systems for child brides including education, healthcare, and compensation, to ensure the protection and welfare of vulnerable minors. Accordingly, the Petitioner prays for the issuance of effective guidelines"*

In that it has been observed as below: -

*"54. Section 9 of the PCMA prescribes that a man above the age of eighteen, who enters into a marriage with a minor girl is liable to be punished with rigorous imprisonment which may extend to two years or with a fine which may extend to one lakh rupees or both. The court is accordingly empowered to penalise an accused under Section 9 with imprisonment or a fine or both. The court is at liberty to exercise its options of imposing punishment based on the gravity of the offence, the circumstance of the marriage and the socio-economic power of the male over his child bride. In many instances, the marriage between a child bride and aged groom occurs at the instance of the groom incentivising the family of the girl to marry her off. The provision deals with such situations but also recognises the relative lack of involvement of a man who may be a young adult and enters into matrimony with a minor. The option of imprisonment and fine is a deviation from the other two penal provisions in the PCMA which mandate both, a fine and imprisonment, to be imposed on guilty convicts. The rationale of this option is to allow the judge a degree of latitude in assessing the culpability of the groom under Section 9 and impose a proportionate criminal sentence.*

*55. Despite the age of majority for a man to enter into a marriage being prescribed as twenty-one under Section 2(a) of the Act, his criminal liability for entering into a child marriage with a minor woman begins at eighteen. Therefore, two*

*positions of law emerge from Section 9. First, a woman, regardless of her age is not liable for entering into a child marriage. Second, a man above the age of eighteen but under the age of twenty one is liable for marrying a girl who is under the age of eighteen. The legislative intent behind making a groom liable for entering child marriage is to recognise the relative control of the agency that a groom may have in relation to his marriage as opposed to a girl. .*

*56. In Hardev Singh v. Harpreet Kaur the appellant was under the age of twenty one and had married a woman who was twenty-three years old. The High Court of Punjab and Haryana directed an FIR to be registered under Section 9 of the PCMA against the wife for entering into a marriage with a man who was a minor under the PCMA. A two-Judge bench of this Court set aside the judgment of the High Court and held that the PCMA does not prescribe any punishment for an adult woman who marries a male child. This Court held that the Act recognises women as a vulnerable class and seeks to punish adult men who marry child brides. The Court further rejected the literal interpretation of Section 9 which would make a man between the ages of eighteen and twenty one who marries an adult woman liable for child marriage. Therefore, no child as defined in Section 2(a) of the PCMA is liable under Section 9 for marrying an adult person.*

*57. Section 10 of PCMA stipulates that a person who performs, conducts, directs or abets any child marriage shall be punished with rigorous imprisonment which may extend to two years and shall be liable to a fine which may extend to one lakh rupees. The provision, unlike Section 9, does not allow the court to choose the option of imposing a fine or sentencing a term of imprisonment or both. A court adjudicating under Section 10 is mandated to impose a sentence of imprisonment as well as impose a fine."*

68. We also note, in **Hardev Singh Vs. Harpreet Kaur and others (2020) 19 SCC 504**, an issue had arisen whether a male "child" about 17 years of age married to a female more than 18 years of age could be penalized under Section 9 of the PCMA. In that the Supreme Court first categorically ruled that there is no provision for prosecution of an adult female marrying a male "child". Then, the Supreme Court made the following pertinent observations: -

*7.3. We are of the view that such an interpretation goes against the object of the Act as borne out in its legislative history. Undoubtedly, the Act is meant to eradicate the deplorable practice of child marriage which continues to be prevalent in many parts of our society. The Statement of Objects and Reasons declares that prohibition of child marriage is a major step towards enhancing the health of both male and female children, as well as enhancing the status of women in particular. Notably, therefore, a significant motivation behind the introduction of this legislation was to curb the disproportionate adverse impact of this practice on child brides in particular.*

*7.6. It is also pertinent in this regard to refer to the Prevention of Child Marriage Bill, 2004 ("the 2004 Bill") which preceded the 2006 Act. Clauses 2(a), 2(b) and 9 of the 2004 Bill are in pari materia with the corresponding sections of the 2006 Act, except insofar as Clause 9 of the 2004 Bill prescribed simple imprisonment, whereas, Section 9 of the 2006 Act*

*prescribes rigorous imprisonment for the offence. The Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, in its Thirteenth Report, on the 2004 Bill, notes that although both men and women are deemed to have attained majority at 18 years of age under other laws, a differential metric has been adopted for the purposes of defining child marriage. A higher age is prescribed for men, based on the prevailing societal notions that the age of 18 years is insufficient for a boy to attain the desired level of education and economic independence, and that an age gap ought to be maintained between the groom and the bride.*

*7.7. However, the 2004 Bill, as also the 2006 Act, treats men who are above the age of 18 as having sufficient maturity to be held responsible for marrying a female child. The Report also notes that the purpose of Clause 9 of the 2004 Bill is to provide adequate penal consequences for a male adult who marries a child.*

*However, an adult woman is exempt from punishment for marrying a male child as, in a society like ours, decisions regarding marriage are usually taken by the family members of the bride and groom, and women generally have little say in the matter. We hasten to emphasise that we do not wish to comment on the desirability of maintaining the aforesaid distinction in culpability. However, the context in which this distinction was considered appropriate by the legislature must be taken into account.*

*7.8. Section 9 of the 2006 Act must be viewed in the backdrop of this gender dimension to the practice of child marriage. Thus, it can be inferred that the intention behind punishing only male adults contracting child marriages is to protect minor young girls from the negative consequences thereof by creating a deterrent effect for prospective grooms who, by virtue of being above 18 years of age are deemed to have the capacity to opt out of such marriages. Nowhere from the discussion above can it be gleaned that the legislators sought to punish a male between the age of eighteen and twenty-one years who contracts into a marriage with a female adult. Instead, the 2006 Act affords such a male, who is a child for the purposes of the Act, the remedy of getting the marriage annulled by proceeding under Section 3 of the 2006 Act. Hence, the male adults between the age of eighteen and twenty-one years of age, who marry female adults cannot be brought under the ambit of Section 9, as this is not the mischief that the provision seeks to remedy.*

*(emphasis supplied)*

69. In paragraph 7.8 quoted above, the Supreme Court clearly recognized that a male by virtue of attaining age of 18 years is deemed to have capacity to opt out of "child marriage". For that reason, the provision for their prosecution in the event of their engaging in "child marriage" was upheld. At first, we were tempted to apply that reasoning, to our benefit. At the same time, in paragraph no.9 of that report, further observation has been made by the Supreme Court. It reads as under: -

*9. Having regard to the above discussion, Section 9 of the 2006 Act does not apply to the present case at all. By the way of abundant caution, we wish to clarify that we are not commenting on the validity of marriages entered into by a man aged between eighteen and twenty- one years and an adult woman. In such cases, the man may have the option to get his marriage annulled under Section 3 of the*

*2006 Act, subject to the conditions prescribed therein.*

(emphasis supplied)

70. The above observations made by the Supreme Court as emphasized by us leave us with no choice. In spirit, those observations may run parallel to the observation made by the Supreme Court in **Independent Thought (supra).** Once, the highest Court of the land has ruled that the male may have a right to seek annulment of a "child marriage", up to the age 23, constitutionally, it is not for us to lay another law. **Hardev Singh (supra)** was noticed in **Society for Enlightenment and Voluntary Action (supra).** Yet, no different expression of the law is contained in that three-judge bench decision of the Supreme Court. Thus, the present comes across as a case where our judicial conscience may only conform to judicial discipline. We leave the issue at that.

71. In view of the above, we are unable to sustain the reasoning offered by the learned Court below insofar as it has referred to and related to the conduct of the appellant of filing a divorce suit under section 13 HMA, prior to the institution of the suit under Section 3 of PCMA. No explicit or implicit act of election was proven performed by the appellant, after "attaining majority" as may be read to his having confirmed/legalised the "child marriage" between the parties. Having instituted the later suit within limitation, he had not waived the option to void that transaction. Similarly, it is a fact that the present suit was filed without specific reference to Section 3(3) of PCMA. Yet, upon amendment made and allowed, it must be acknowledged that the amendment relates back to the date of institution of the suit.

72. Thus, mere incorrect section description may have no bearing on the scope of the statutory suit proceedings. Substantive rights claimed by the appellant must be tested on the strength of pre-existing statutory law in light of the amended pleadings. The suit was instituted before a competent court. Therefore, the learned court below has erred in dismissing the suit instituted by the appellant.

73. No other fact is required to be established or gone into before declaring the transaction of "child marriage", void. First, material fact, that on the date of their marriage both parties to the marriage were "child" within the meaning of that term defined under Section 2(a) of the PCMA, is admitted. Therefore, their marriage was a "child marriage" as defined under Section 2(b) of PCMA.

74. Then, it not disputed that the suit had been filed by a party to the transaction of "child marriage". It is wholly maintainable. As to the competence and capacity of the appellant to institute the suit proceeding, there is no doubt. The appellant was more than 18 years of age. He alone could have filed that suit in his individual capacity. Last, as to limitation, we have already reached a conclusion considering the decision of the Supreme Court primarily in **Independent Thought (supra)** read with **Hardev Singh (supra),** that the appellant had limitation available up to 23 years of age, to institute that suit. Undoubtedly, on the date of institution of the suit by the appellant he was less than 23 years of age. Therefore, the suit was instituted within limitation, it having been instituted before expiry of 2 years from the date the appellant ceased to be a "child" i.e. attained 21 years of age.

75. No other issue is to be dealt with. The findings recorded by the learned court below to the effect that earlier the appellant had instituted proceedings under Section 13 of the Hindu Marriage Act, that failed or that the present proceedings were originally instituted under Section 12(2) of the Hindu Marriage Act or that the amendment was made later to set-up ground of Section 3 PCMA and the other fact finding with respect to conduct of the parties up to the time the appellant sought a declaration under Section 3 of PCMA fade into insignificance, in view of the foregoing discussion. In any case, it was not proven by the respondent that the appellant had ever elected to confirm his "child marriage" after "attaining majority" or that he ever waived his right to void that transaction. The learned court below ought to have granted the relief prayed.

76. What last survives for our consideration is, provision for maintenance and residence of the respondent. In that, counsel for the respondent has (in the alternative), pressed for INR 50,00,000/- towards permanent alimony and a residential house for the residence of the respondent. On his part, the appellant has offered to pay permanent alimony @ INR 15,00,000/-, at most. Insofar as the respondent has continued to reside with her parents the prayer for residential accommodation made by the respondent is declined. As to permanent alimony, we peg the amount at INR 25,00,000/-.

77. Accordingly, the order of the learned court below cannot be sustained. It is set-aside. The transaction of "child marriage" performed between the parties is declared void. Let INR 25,00,000/- be paid to the respondent within a period of one month. Failing that, the awarded amount shall carry interest @ 8% after one month till the date of its actual payment. No other relief has been pressed under Section 3(4) of the PCMA or otherwise.

78. Appeal is **allowed** as above. No order as to costs.

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**(2024) 10 ILRA 859**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 23.10.2024**

**BEFORE**

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

Criminal Misc. Writ Petition No. 11036 of 2024

**Maya Tiwari ...Petitioner**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Petitioner:**
Kirti Chaurasia, Man Bahadur Singh, Sarvjeet Kumar, Suresh Chandra Pandey, Vikrant Pandey

**Counsel for the Respondents:**
Akhilesh Kumar Tiwari, G.A., Jitendra Kumar Maurya

**Criminal Law — Bail — Criminal Procedure Code, 1973 — Sections 406, 420, 419, 467, 468, 471 & 120-B – Indian Penal Code, 1860 - Section 66-D of Information Technology Act, 2000-Bail not to be withheld as punishment — Long incarceration without framing of charge — Presumption of innocence — Applicant a lady — No likelihood of absconding or tampering with witnesses — no allegation of the applicant attempting to tamper with evidence, flee, or threaten witnesses-Co-accused already granted bail — Refusal of bail would violate Article 21 of Constitution — Entitlement to bail upheld. (Paras 8, 9, 10, 14 and 15)**

**HELD:**
The Apex Court in the case of GudiKanti Narasimhulu Vs Public Prosecutor, High Court of Andhra Pradesh reported in 1971 (1) SCC 240 had observed that bail is not to be withheld as a punishment as the requirement of bail is merely to secure the attendance of prisoners at trial. The Apex Court again in the case of Nikesh Tara Chand Shah Vs U.O.I.reported in (2018) 11 SCC 1 observed in paragraph no.19 that purpose of object to bail is to secure the attendance of the accused at the trial and the proper test to apply in the solution of the question whether a bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is undisputed that the bail is not to be withheld as a punishment. (Para 8)

The innocence of a person, accused of an offence, is presumed through a legal fiction, pressing the onus on the prosecution to prove the guilt before the court and presumption of innocence has been acknowledged throughout the world. The Apex court also observed in the number of cases that bail is rule and jail is exception. (Para 9)

From perusal of above legal position, it is clear, while considering the bail application then apart from seriousness of the charges and severity of punishment, paramount consideration should be given to whether there are chances of absconding or tampering with the witnesses or intimidation to victim or witnesses on the part of the accused. The bail application of an unconvicted person should not be rejected for the purpose of giving him a taste of imprisonment as a lesson or as a mark of disapproval of his conduct. (Para 14)

Reverting to the present case, there is no averment from prosecution's side that there are chances of absconding or tampering with the witnesses or intimidation of victim or witnesses on the part of the applicant who is a lady and she is also in jail since 12.10.2023 and till date charge has not been framed and there is no likelihood for early conclusion of trial and coaccused persons have already been granted bail by this court. In such circumstances, refusing the bail will amount to travesty of justice and will also be in violation of Article 21 of the Constitution of India. (Para 45)

**Application allowed.** (E-14)

**List of Cases cited:**

1. Manish Sisodia Vs Directorate of Enforcement reported in 2024 SCC OnLine SC 1920

2. GudiKanti Narasimhulu Vs Public Prosecutor, High Court of Andhra Pradesh reported in 1971 (1) SCC 240

3. Nikesh Tara Chand Shah Vs U.O.I. reported in (2018) 11 SCC 1

4. Sanjay Chandra Vs Central Bureau of Investigation reported in 2012 (1) SCC 40

5. Satender Kumar Antil Vs Central Bureau of Investigation & anr., reported in (2022) 10 SCC 51

6. Jalaluddin Khan Vs U.O.I. in Criminal Appeal No.3173 of 2024

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

1. Counter affidavit filed today by the first informant is taken on record.

2. Second supplementary affidavit filed today by the applicant is also taken on record.

3. Heard Sri Saurabh Pandey, learned counsel holding brief of Sri Suresh Chandra Pandey, learned counsel for the applicant; Sri Akhilesh Kumar Tiwari, learned counsel for the first informant as well as Sri Pankaj Saxena, learned AGA for the State and perused the material placed on record.

4. The instant bail application has been filed on behalf of the applicant - Maya Tiwari with a prayer to release her on bail in **Case Crime No. -0234 of 2023, under Sections -406, 420, 419, 467, 468, 471, &**

**120-B I.P.C., Section-66-D of I.T. Act, Police Station - Sarai Khwaja, District - Jaunpur,** during pendency of trial.

5. Contention of learned counsel for the applicant is that as per the allegation in the FIR as well as statement of first informant, amount about Rs.10,00,000/- was transferred in the account of the applicant as well as her husband and daughter, but major part of that amount, amounting to Rs.8,70,000/- had already been transferred in the account of the first informant. It is further submitted that though in the agreement between the applicant and the first informant, total amount of four cheques is about Rs.5,20,500/- but the applicant has transferred more amount than the amount of cheque. It is further submitted that applicant was herself cheated by co-accused Santosh Kumar Semwal, who during investigation was found to be main accused and who had prepared the forged work order alleged to be issued from PMO and sent to the Whatsapp number of the applicant which applicant bonafidely forwarded to the first informant. Further, it has been submitted that applicant is a lady and she has been in jail since 12.10.2023 and in support of his contention, applicant has submitted that the Apex Court in the case of **Manish Sisodia Vs Directorate of Enforcement** reported in **2024 SCC OnLine SC 1920** observed that object of bail is to secure the attendance of prisoner at trial and the bail is not to be withheld as a punishment. Lastly, it has been submitted that the co-accused Santosh Kumar Semwal, Abhishek Tiwari and Brijesh Srivastava, have already been released on bail by this Hon'ble Court, therefore, she is also entitled to be released on bail.

6. However, learned counsel for the opposite party no.2 as well as learned AGA have vehemently opposed the prayer and submitted that it is undisputed that the forged work order was sent from the Whatsapp number of the applicant and amount of Rs.10,00,000/- was transferred in her account as well as in the account of her husband and her daughter and she misrepresented the applicant as Higher Officer in PMO. It is further submitted that if the applicant was duped by co-accused Santosh Kumar Semwal then the applicant should have filed police complaint against him.

7. Considering the rival submission of parties and on perusal of record, it appears that an amount of about Rs.8,70,000/- has already been transferred in the account of first informant prior to lodging the FIR and in the agreement entered into between the applicant and the first informant, the amount of cheque is only Rs.5,20,500/- against which the applicant transferred more than Rs.8,70,000/- in the account of first informant.

8. The Apex Court in the case of **GudiKanti Narasimhulu Vs. Public Prosecutor, High Court of Andhra Pradesh** reported in **1971 (1) SCC 240** had observed that bail is not to be withheld as a punishment as the requirement of bail is merely to secure the attendance of prisoners at trial. The Apex Court again in the case of Nikesh Tara Chand Shah Vs. Union of India reported in **(2018) 11 SCC 1** observed in paragraph no.19 that purpose of object to bail is to secure the attendance of the accused at the trial and the proper test to apply in the solution of the question whether a bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is undisputed that the bail is not to be withheld as a punishment.

9. The innocence of a person, accused of an offence, is presumed through a legal fiction, pressing the onus on the prosecution to prove the guilt before the court and presumption of innocence has been acknowledged throughout the world. The Apex court also observed in the number of cases that bail is rule and jail is exception. The Apex Court again in the case of Sanjay Chandra Vs. Central Bureau of Investigation reported in 2012 (1) SCC 40 observed that courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. It is further observed by the Apex Court, apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before the conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of the former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. Article 14(2) of the International Covenant on Civil & Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights, 1948 also acknowledges the presumption of innocence, as a cardinal principle of law until the person is proven guilty. Paragraph nos.21, 22 and 23 of the **Sanjay Chandra's case (supra)** is being quoted as under:

"*21.In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*

*22.From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, ?necessity? is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.*

*23.Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."*

10. In India, it has been consistent stand of the court regarding presumption of innocence being the facet of Article 21 of the Constitution of India. Both in the Australia and Canada, prima facie right to a reasonable bail is recognized based on the

gravity of offence. In United States, it is a common practice for bail to be a cash deposit. In the United Kingdom, the bail is more likely to consist of a set of restriction though in India there is no specific Act providing the bail but in UK there is specific Act known as Bail Act, 1976. It also provides bail as a matter of right except under certain cases. Relevant extract of Section 4 of Bail Act, 1976 of United Kingdom is being quoted as under:

"***4. General right to bail of accused persons and others.***

*(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.*

*(2) This section applies to a person who is accused of an offence when-*

*(a) he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence, or*

*(b) he applies to a court for bail [or for a variation of the conditions of bail] in connection with the proceedings.*

*This subsection does not apply as respects proceedings on or after a person's conviction of the offence ... "*

11. The Apex Court in Satender Kumar Antil vs Central Bureau of Investigation and another, reported in (2022) 10 SCC 51 has also observed that bail is rule and jail is exception. Paragraph nos. 18, 19 and 20 of Satender Kumar Antil's case (supra) is being quoted as under:

*"18.We may only state that notwithstanding the special provisions in many of the countries world-over governing the consideration for enlargement on bail, courts have always interpreted them on the accepted principle of presumption of innocence and held in favour of the accused.*

*19.The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.*

*"An uncontrolled power is the natural enemy of freedom."*

*----Harold Laski in ?Liberty in the Modern State"*

*20. The Code of Criminal Procedure, despite being a procedural law, is enacted on the inviolable right enshrined under Articles 21 and 22 of the Constitution of India. The provisions governing clearly exhibited the aforesaid intendment of Parliament."*

12. The Apex Court again reiterated in **Jalaluddin Khan Vs. Union of India in Criminal Appeal No.3173 of 2024** that bail is a rule and jail is exception is also applicable in the cases where act itself provides stringent conditions for grant of bail. Paragraph no.21 of the aforesaid judgment is being quoted as under:

*"21. Before we part with the Judgment, we must mention here that the Special Court and the High Court did not consider the material in the charge sheet*

*objectively. Perhaps the focus was more on the activities of PFI, and therefore, the appellant's case could not be properly appreciated. When a case is made out for a grant of bail, the Courts should not have any hesitation in granting bail. The allegations of the prosecution may be very serious. But, the duty of the Courts is to consider the case for grant of bail in accordance with the law. ?Bail is the rule and jail is an exception? is a settled law. Even in a case like the present case where there are stringent conditions for the grant of bail in the relevant statutes, the same rule holds good with only modification that the bail can be granted if the conditions in the statute are satisfied. The rule also means that once a case is made out for the grant of bail, the Court cannot decline to grant bail. If the Courts start denying bail in deserving cases, it will be a violation of the rights guaranteed under Article 21 of our Constitution."*

13. In another judgement of Apex Court in **Manish Sisodia Vs Directorate of Enforcement (supra**) again observed that keeping a person in jail during a trial over a period of time is not proper and while keeping a person in a trial for long time, the court has forgotten very well settled principles of law that bail is not to be withheld as a punishment. Paragraph no.53 of the aforesaid judgement is being quoted as under:

*"53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that ?bail is rule and jail is exception."*

14. **From perusal of above legal position, it is clear, while considering the bail application then apart from seriousness of the charges and severity of punishment, paramount consideration should be given to whether there are chances of absconding or tampering with the witnesses or intimidation to victim or witnesses on the part of the accused. The bail application of an unconvicted person should not be rejected for the purpose of giving him a taste of imprisonment as a lesson or as a mark of disapproval of his conduct.**

15. Reverting to the present case, there is no averment from prosecution's side that there are chances of absconding or tampering with the witnesses or intimidation of victim or witnesses on the part of the applicant who is a lady and she is also in jail since 12.10.2023 and till date charge has not been framed and there is no likelihood for early conclusion of trial and co-accused persons have already been granted bail by this court. In such circumstances, refusing the bail will amount to travesty of justice and will also be in violation of Article 21 of the Constitution of India.

16. In view of the above, without expressing any detail opinion on the merit of the case, court is of the view that applicant is entitled to be released on bail.

17. Let the applicant- **Maya Tiwari** involved in the aforementioned crime be released on bail, on her furnishing a personal bond and two sureties each in the like amount, to the satisfaction of the court concerned, with the following conditions:-

i. The applicant shall not tamper with the prosecution evidence by intimidating/pressurizing the witnesses, during the investigation or trial.

ii. The applicant shall cooperate in the trial sincerely without seeking any adjournment.

iii. The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

18. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

19. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

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**(2024) 10 ILRA 865**

**ORIGINAL JURISDICTION**

**CIVIL SIDE**

**DATED: LUCKNOW 01.10.2024**

**BEFORE**

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

Writ-A No. 5724 of 2024
Connected with other cases

**University College Ret. Teachers Welfare Assc. Lko. Thru Its President Dr. S.S. Chauhan & Anr. ...Petitioners**

**Versus**

**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Dwijendra Mishra

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

**A. Service Law – Gratuity – Present petition answers two questions: Whether the petitioners would be covered under definition of the term 'employee' u/s 2(e) of the Act, 1972 and would now be entitled for gratuity?**

A perusal of the amending Act (Section 2(e)) will make it evident that teachers as a class have been brought under the definition of 'employee' by means of the Amending Act and would form a single class irrespective of whether they belong to Primary, Secondary or Degree College etc. (Para 30)

Since the amendment incorporated in the Act of 1972 has been notified w.e.f. 03.04.1997, it has been made retrospective in nature and would cover all such teachers who are covered by the Amending Act of 2009. (Para 31)

**B. Whether, even if covered under the aforesaid definition, they are liable to be excluded in terms of option already availed of u/GO dated 30.03.1983 upon applicability of principles of acquiescence/estoppels?**

**Principles of acquiescence and estoppels w.r.t. exercise of options by teachers cannot prevail over statutory conditions.** (Para 43)

In view of the statutory provisions of the Act, 1972, particularly Ss. 5 and 14 thereof, the Act would prevail over the GO dated 30.03.1983. The aspect of option would also lose any relevance since principles of acquiescence and estoppels do not apply against statute. (Para 40, 41)

GOs dated 30.03.1983 and 04.02.2004 are hereby quashed to the extent of denial of

gratuity benefits to such Teachers who exercised their option to continue in service for the extended period. Hon'ble Court has directed to ensure payment of gratuity to the petitioners along with interest @6% per annum on such arrears w.e.f. the date of superannuation till the date of actual payment. (Para 46, 47)

**Writ petition allowed.** (E-4)

**Precedent followed:**

1. St. of U.P. Vs University Colleges Pensioners' Association, (1994) 2 SCC 729 (Para 5)

2. Ahmedabad Private Primary Teachers' Association Vs Administrative Officer & ors., (2004) 1 SCC 755 (Para 6)

3. Avdhesh Kumar Singh & ors. Vs St. of U.P. & ors., Special Leave Petition (Civil) No. 23788 of 2014 (Para 9)

4. Independent Schools' Federation of India Vs U.O.I. & anr., 2022 SCC OnLine SC 1113 (Para 22)

5. Birla Institute of Technology Vs St. of Jharkhand & ors., Civil Appeal No. 2530 of 2012 (Para 24)

6. St. of U.P. Vs U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti & ors., (2008) 12 SCC 675 (Para 41)

7. G.B. Pant University Vs Appellate Authority & ors., Writ Petition No. 395 of 2017 (M/S) upheld by the Hon'ble Supreme Court in Special Leave to Appeal (C) No(s). 1803 of 2018 (Para 42)

**Present petitions seek a direction to opposite parties for payment of gratuity to the Teachers/Members of Petitioner's Association, who were denied gratuity at the time of their superannuation. Interest on the same has also been sought. In Writ-A No. 2001072 of 2011, a further prayer for quashing GOs dated 30.03.1983 and 04.02.2004 as being repugnant to the provisions of Payment of Gratuity Act, 1972 has also been sought.**

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

1. Heard Mr. Sandeep Dixit, learned Senior Counsel assisted by Mr. Dwijendra Mishra alongwith Mr. Amol Dixit, Mr. Gibran Akhtar Khan, Varadraj Shreedutt Ojha and other learned counsel for petitioners in other connected matters, learned State Counsel for opposite parties.

2. Petitions have been filed seeking a direction to opposite parties for payment of gratuity to the Teachers/ Members of Petitioner's Association, who were denied gratuity at the time of their superannuation in terms of then existing judgment and order passed by the Hon'ble Supreme Court on the aforesaid aspect. Interest on the same has also been sought.

3. In writ petition Service Bench No.1072 of 2011 i.e. Writ-A No.2001072 of 2011, a further prayer for quashing Government Orders dated 30.03.1983 and 04.02.2004 as being repugnant to the provisions of the Payment of Gratuity Act, 1972 [hereinafter referred to as Act, 1972] has also been sought.

4. It has been submitted that earlier, in terms of the Government Order dated 30.03.1983, teachers employed in various Colleges affiliated to Universities were segregated into two classes with one belonging to those who superannuated at the age of 58 years and those who opted to continue in service up till the age of 60 years. It is submitted that in case of those teachers who opted to retire at the age of 58 years, provisions of the Act, 1972 were made applicable, which was denied to those who opted to continue in service up till the age of 60 years, ostensibly for the reason that in the latter case,two years additional service benefits were opted for.

5. It is submitted that the aforesaid aspect was considered by the Hon'ble Supreme Court in the case of ***State of U.P. versus U.P. University Colleges Pensioners' Association, (1994) 2 SCC 729*** in which the Government Order dated 24.08.1980 was under consideration, whereby a new scheme of pension and provident fund for employees of aided degree colleges of the State was notified. The segregation so made was upheld in the said judgment.

6. It is submitted that the aforesaid aspect was thereafter reconsidered by the Hon'ble Supreme Court in the case of ***Ahmedabad Private Primary Teachers' Association versus Administrative Officer and others, (2004) 1 SCC 755***, whereunder judgment of the High Court of Gujarat was under consideration that teachers as a class do not fall within the definition of 'employee' as contained in Section 2(e) of the Act, 1972. In the aforesaid judgment, while it was held that teachers would not come within the definition of the term 'employee', it was also indicated that the said conclusion should not be misunderstood that teachers although engaged in the noble profession should not be given any gratuity benefit. It was left open for the wisdom of legislature to take cognizance of such a situation and to think of a separate legislation for them in this regard.

7. It is submitted that thereafter, in terms of aforesaid judgment, Parliament amended the definition of 'employee' under Section 2(e) of the Act, 1972 by amending it vide Payment of Gratuity (Amendment) Act, 2009 (No.47 of 2009) [hereinafter referred to as Amending Act No.47 of 2009] notified on 31.12.2009 with retrospective effect from 03.04.1997. It is submitted that the statement of objects and reasons clearly indicated that the aforesaid amendment was being incorporated to give effect to anxiety expressed by the Hon'ble Supreme Court in the case of ***Ahmedabad Private Primary Teachers' Association (supra).***

8. It is therefore submitted that now with the advent of amendment in the Act, 1972, teachers have also been included under the definition of 'employee' with retrospective effect from 03.04.1997 and are, therefore, entitled for such benefit under the Act, 1972.

9. Learned counsel has also placed reliance on judgment rendered in the case of ***Avdhesh Kumar Singh and others versus State of U.P. and others, Special Leave Petition (Civil) No.23788 of 2014*** in which vide order dated 30.04.2024, directions with regard to payment of gratuity and interest have been issued.

10. Learned State Counsel has refuted submissions advanced by learned counsel for petitioners with the submission that admittedly, the Government Order dated 30.03.1983 is applicable upon petitioners, whereunder a distinction had clearly been made for payment of gratuity to those teachers who opted to superannuate at the age of 58 years with such benefit not being made applicable upon those teachers who opted to superannuate at the age of 60 years. It is submitted that such a distinction was a reasonable classification in view of the fact that in the latter case, two years' extended service with salary was available.

11. It is therefore submitted that once petitioners had already opted to continue with a further two years of

service, grant of such benefit to them would be arbitrariness with regard to those who opted to superannuate at the age of 58 years.

12. Learned counsel has further submitted that the petitioners, even otherwise, do not deserve any consideration since they come within the category of fence-sitters. It is also submitted that the amendment made in the Act, 1972 would be inapplicable upon petitioners since it was incorporated in terms of judgment rendered by the Hon'ble Supreme Court which was not applicable upon petitioners since the aforesaid petition before the Hon'ble Supreme Court was filed by teachers of primary schools and not by those employed in degree colleges.

13. Learned counsel has further submitted that the amendment incorporated in the Act, 1972, even otherwise, was applicable only in those cases where teachers were not covered by any provision for gratuity while in the present case, such a facility was already available to petitioners in terms of Government Order dated 30.03.1983 and petitioners specifically opted not to take advantage of the same.

14. In continuation of aforesaid submissions, it is further submitted that once option has been exercised by petitioners in terms of the Government Order dated 30.03.1983 for continuation in service for a further period of 2 years, they would now be barred from the said benefit in terms of principles of acquiescence and estoppel.

15. Upon consideration of submissions advanced by learned counsel for parties, the following questions arise for consideration:-

***Question No. 1-***

16. Whether the petitioners would be covered under definition of the term 'employee' under Section 2(e) of the Act, 1972 and would now be entitled for gratuity?

Question No. 2-

17. Whether, even if covered under the aforesaid definition, they are liable to be excluded in terms of option already availed of under Government Order dated 30.03.1983 upon applicability of principles of acquiescence/ estoppel?

18. The aforesaid questions are being answered as follows:-

***Answer No. 1-***

19. With regard to the said question, it is evident that by Government Order dated 30.03.1983, provisions of pension and gratuity were made applicable upon teachers of Colleges affiliated to Universities. The said order indicated a provision for payment of gratuity and certain other benefits to those teachers who opted to superannuate at the age of 58 years but the provisions of gratuity were declined for those teachers who opted to continue in service for a further two years uptill the age of 60 years. The said aspect was considered in the case of (***U.P. University Colleges Pensioners' Association*** *(supra)* and exclusion of payment of gratuity to optees, who continued in service till the age of 60 years was upheld.

20. Subsequently, the aspect of exclusion of teachers as a class from the definition of 'employee' as contained in Section 2(e) of the Act, 1972 was considered by the Hon'ble Supreme Court in the case of **Ahmedabad Private Primary Teachers' Association** *(supra)* but while upholding the aspect of their exclusion from the aforesaid definition, the following was held:-

*"26. Our conclusion should not be misunderstood that teachers although engaged in a very noble profession of educating our young generation should not be given any gratuity benefit. There are already in several States separate statutes, rules and regulations granting gratuity benefits to teachers in educational institutions which are more or less beneficial than the gratuity benefits provided under the Act. It is for the legislature to take cognizance of situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard. That is the subject-matter solely of the legislature to consider and decide."*

21. Since intention of the Hon'ble Supreme Court could be garnered in the aforesaid judgment, the Act, 1972 was thereafter amended vide Amending Act No.47 of 2009 to include teachers in the definition of the term 'employee' in terms of Section 2(e) thereof. It is noticeable that the aforesaid amendment was applied retrospectively w.e.f. 03.04.1997. The retrospective applicability is directly referable to the notification issued on 03.04.1997 bringing educational institutions in which ten or more persons were employed, as a class of establishment to which the Act, 1972 was applicable.

22. The aforesaid amendment to Section 2(e) of the Act, 1972 was thereafter challenged before various High Courts and the dispute was thereafter adjudicated upon by the Hon'ble Supreme Court in the case of ***Independent Schools' Federation of India versus Union of India and Another, 2022 SCC OnLine SC 1113*** and the amendment was upheld primarily on the ground that a lacuna in the definition of the term 'employee' has been rectified so as to achieve the object and purpose behind issuance of notification making the Act, 1972 applicable to all educational institutions. It was also held that marginal inconvenience in the form of financial outgo or difficulty is of little weight when curing of an inadvertent defect is made retrospectively in public interest particularly in the light of observations of the Court in ***Ahmedabad Private Primary Teachers' Association*** *(supra).* The relevant portion of the judgment is as follows:-

*"18. The second ground is again devoid of any merit and substance. The legislature, vide the Amendment Act, 2009, has given retrospective effect to the amended provision of Section 2(e) and the newly inserted Section 13A with effect from 3rd April 1997, which is also the date of the notification issued by the Government under Section 1(3)(c), making the PAG Act applicable to the educational institutions with ten or more employees. The amendment enforces and gives effect to what was intended by the notification, but could not be achieved on account of the technical and legal defect. The lacuna, a distortion in the language that had the unwitting effect of leaving out teachers, has been rectified so as to achieve the object and purpose behind the issuance of the notification, making the PAG Act*

*applicable to all educational institutions. The argument of the educational institutions that they have been taken by surprise is incorrect and unacceptable as the legislation had cured the inadvertent defect in a statute, as pointed out by this Court, through legislative repair. Private schools, when they claim a vested right arising from the reason of defect, should not succeed, for acceptance would be at the expense of teachers who were denied and deprived of the intended benefit. Marginal inconvenience in the form of financial outgo or difficulty is of little weight, when curing of an inadvertent defect is made retrospectively in greater public interest, which consideration will overrule the interest of one or some institutions [see paragraph 69 in Ujagar Prints (II) v. Union of India, (1989) 3 SCC 488]. We find little merit in this argument also for the reason, that the observations of this Court in Ahmedabad Private Primary Teachers' Association (supra) in paragraph 26 were sufficient to indicate that a legislation should intervene to grant the benefit of gratuity to teachers. The contention that the private schools were sure to succeed as to deny the teachers the benefit of the Notification No. S-42013/1/95-SS.(II) dated 3rd April 1997, is questionable and farfetched to be accepted. The challenge was contested and had remained pending before the High Courts and then this Court. The private schools had relied on some judgments of this Court, but these judgments have interpreted the word "employee" under other enactments. The law is subject to uncertainty ex-ante when two or more views are possible, but there may be certainty ex-post litigation in view of the law of precedents, which reduces uncertainty.*

*23. The provisions of the PAG Act, even post the retrospective amendments, will apply only to those teachers who were in service as on 3rd April 1997, and at the time of termination have rendered service of not less than 5 years. The period of 5 years may be partly before 3rd April 1997, as the date on which the person was employed does not determine the applicability of the PAG Act. The date of termination of service, in the form of superannuation, retirement, or resignation, or death or disablement due to accident or disease, should be post the enforcement date, which in the present case is 3rd April 1997. The entire length of service, including the service period prior to 3rd April 1997, is to be counted for the purpose of computing the entitlement condition of 5 years of service. This is the correct effect of the ratio and decision in Management of Goodyear India Limited (supra) and the decisions explaining retroactive effect of a statute. This legal position would be equally true and correct when the PAG Act was first enforced with effect from 16th September 1972, and when Notification No. S- 42013/1/95-SS.(II) under Section 1(3)(c) of the PAG Act was issued and enforced with effect from 3rd April, 1997. It would be the position in case of all notifications issued under Section 1(3)(c) of the PAG Act, unless a contrary intention is expressed, which is not the situation in the present case and thus need not be examined."*

23. It is thus apparent that the provisions of the Act, 1972 with retrospective amendment would apply to those teachers who were in service as on 03.04.1997 and had rendered service of not less than five years.

24. It appears that subsequently, the Hon'ble Supreme Court in the case of Birla Institute of Technology versus State of Jharkhand and Others, Civil Appeal No.2530 of 2012 passed an order without noticing the amendment in Section 2(e) of the Act, 1972 and therefore, suo motu took up the appeal and by means of judgment and order dated 07.03.2019, considered the aspect of the aforesaid amendment with its retrospectivity and held that the effect of amendment made in the Act, 1972 made the teachers entitled to claim gratuity under the Act, 1972 from their employer w.e.f. 03.04.1997.

25. It appears that subsequently, some of the teachers of affiliated Colleges gave a representation to the Director of Education, Higher Education, U.P., Allahabad regarding payment of gratuity, which was rejected vide order dated 16.08.2012, placing reliance on the Government Order dated 30.03.1983 and option exercised by such teachers for superannuation at the age of 62 years. The said order was challenged before this Court in Writ Petition No.31 (SB) of 2013, which was dismissed vide judgment and order dated 06.02.2014 again reiterating the exclusion in terms of option exercised by petitioners therein.

26 . The said judgment was thereafter challenged in the Hon'ble Supreme Court in Special Leave Petition (Civil) No.23788 of 2014 and judgment rendered by High Court was set aside with benefit of gratuity being extended to the said petitioners alongwith interest.

27. From a consideration of the aforesaid facts and circumstances, it is thus evident that subsequent to the Government Order dated 30.03.1983, the situation underwent a sea change with amendment being incorporated in Section 2(e) of the Act, 1972, whereunder teachers as a class were brought under definition of the term 'employee".

28. The statement of objects and reasons of the Amending Act No.47 of 2009 is relevant for purposes of adjudication of this dispute and is as follows:-

*"STATEMENT OF OBJECTS AND REASONS*

The Payment of Gratuity Act, 1972 provides for payment of gratuity to employees *engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishment and for matters connected therewith or incidental thereto. Clause (c) of subsection (3) of section 1 of the said Act empowers the Central Government to apply the provisions of the said Act by notification in the Official Gazette to such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day preceding twelve months. Accordingly, the Central Government had extended the provisions of the said Act to the educational institutions employing ten or more persons by notification of the Government of India in the Ministry of Labour and Employment vide number S.O. 1080, dated the 3rd April, 1997.*

*2. The Hon'ble Supreme Court in its judgment in Civil Appeal No. 6369 of 2001, dated the 13th January, 2004, in Ahmedabad Private Primary Teachers' Association vs. Administrative Officer and others [AIR 2004 Supreme Court 1426] had held that if it was extended to cover in*

*the definition of 'employee', all kind of employees, it could have as well used such wide language as is contained in clause (f) of section 2 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 which defines 'employee' to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment. It had been held that non-use of such wide language in the definition of 'employee' under clause (e) of section 2 of the Payment of Gratuity Act, 1972 reinforces the conclusion that teachers are clearly not covered in the said definition.*

*3. Keeping in view the observations of the Hon'ble Supreme Court, it is proposed to widen the definition of 'employee' under the said Act in order to extend the benefit of gratuity to the teachers. Accordingly, the Payment of Gratuity (Amendment) Bill, 2007 was introduced in Lok Sabha on the 26th November, 2007 and same was referred to the Standing Committee on Labour which made certain recommendations. After examining those recommendations, it was decided to give effect to the amendment retrospectively with effect from the 3rd April, 1997, the date on which the provisions of the said Act were made applicable to educational institutions.*

*4. Accordingly, the Payment of Gratuity (Amendment) Bill, 2007 was withdrawn and a new Bill, namely, this Payment of Gratuity (Amendment) Bill, 2009 having retrospective effect was introduced in the Lok Sabha on 24th February, 2009. However, due to dissolution of the Fourteenth Lok Sabha, the said Bill lapsed. In view of the above, it is considered necessary to bring the present Bill.*

*5. The Bill seeks to achieve the above objectives.*

*NEW DELHI;*

*The 12th November, 2009" MALLIKARJUN KHARGE."*

29. The said fact was noticed by the Hon'ble Supreme Court in the case of **Birla Institute of Technology** (supra), which thereafter held as follows:-

*"28. In the light of the amendment made in the definition of the word "employee" as defined in Section 2(e) of the Act by Amending Act No. 47 of 2009 with retrospective effect from 03.04.1997, the benefit of the Payment of Gratuity Act was also extended to the teachers from 03.04.1997.*

*29. In other words, the teachers were brought within the purview of "employee" as defined in Section 2(e) of the Payment of Gratuity Act by Amending Act No. 47 of 2009 with retrospective effect from 03.04.1997."*

30. In view of aforesaid facts and circumstances, it is discernible that no distinction being indicated in the amendment to Section 2(e) of the Act, 1972 pertaining to teachers of affiliated Colleges or Primary and other Schools, no such distinction as is being advocated by learned counsel for opposite parties can be construed. A perusal of the Amending Act will make it evident that teachers as a class have been brought under the definition of 'employee' by means of the Amending Act and would form a single class irrespective of whether they belong to Primary, Secondary or Degree Colleges etc.

31. It is also noticeable that since the amendment incorporated in the Act of 1972 has been notified with effect from 03.04.1997, it has been made retrospective in nature and would cover all such teachers who are covered by the aforesaid Amending Act of 2009.

32. The submission of learned State Counsel pertaining to petitioners being fence-sitters and therefore not liable to be granted any benefit also does not behove any consideration since the judgment pronounced by Supreme Court was with intention to provide benefit to teachers as a class, whether they approached the court or not and therefore in such circumstances, the aforesaid judgments would, in the considered opinion of this Court come within the realm of judgment in rem and not judgment in personam as has been held by Supreme Court in the case of **State of Uttar Pradesh and others versus Arvind Kumar Srivastava and others (2015) 1 SCC 347** in the following manner:-

*"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.*

*22.1. The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*

*22.2. However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*

*22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma v. Union of India [K.C. Sharma v. Union of India, (1997) 6 SCC 721 : 1998 SCC (L&S) 226] ). On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the*

*judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."*

33. Considering aforesaid facts and discussions, the question no.1 is answered in favour of petitioners that they would be covered in the definition of 'employee' under Section 2(e) of the Act, 1972.

**Answer No.2**

34. With regard to aforesaid question, it is quite evident that at the time of notification of Government Order dated 30.03.1983, teachers as a class were not included in the definition of 'employee' under Section 2(e) of the Act, 1972 and therefore, they were sought to be brought within the aforesaid scope for payment of gratuity with a rider that such provision of gratuity would be applicable only in case teachers opted to superannuate at the age of 58 years with such benefit being declined to those who opted to continue in service till the age of 60 years.

35. It is admitted that petitioners were covered under the latter provision with option being exercised to continue upto the age of 60 years in service.

36. Once it is admitted that petitioners had opted to continue in service upto the age of 60 years, it followed that they were not covered by any provision for payment of gratuity.

37. As indicated here-in-above, the situation underwent a sea change with the advent of Amending Act No.47 of 2009 whereby the Government Order dated 30.03.1983 lost all significance since teachers were now covered statutorily under the Act, 1972 w.e.f. 03.04.1997.

38. It is also worth noticing that exemption from applicability of the Act, 1972 is contemplated under Section 5 of the aforesaid Act, particularly in view of non-obstante Clause under Section 14 of the aforesaid Act, which clearly states that the provisions of Act would continue to be in force irrespective of anything contained which is inconsistent with any other provisions. Sections 5 and 14 of the Act, 1972 are as follows:-

*"**5. Power to exempt**.- [(1)] [ Section 5 renumbered as sub-Section (1) thereof by Act 26 of 1984, Section 5 (w.e.f. 18.5.1984).] The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.*

*(2) [Inserted by Act 26 of 1984, Section 5 (w.e.f. 18.5.1984).]The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate*

*Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.]*

*(3) [Inserted by Act 22 of 1987, Section 6 (w.e.f. 1.10.1987).][ A notification issued under sub-section (1) or sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of this Act, but no such notification shall be issued so as to prejudicially, affect the interests of any person.]*

***14. Act to override other enactments, etc.*** *-The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."*

39. It is not the case of opposite parties that they have been exempted from applicability of the Act, 1972 in terms of Section 5 thereof and therefore, in the considered opinion of this Court, the mandatory conditions of Section 14 of the Act, 1972 would automatically apply. It is also worth stating that in terms of statutory provisions under Section 5 read with Section 14 of the Act, 1972, the provisions of Government Order dated 30.03.1983 would become redundant since it is a settled law that provisions of statute would have primacy over any executive instruction such as a Government Order.

40. In view of specific statutory provisions of the Act, 1972, particularly Sections 5 and 14 thereof, the Act would prevail over the Government Order dated 30.03.1983.

41. In the considered opinion of this Court, the aspect of option therefore also would lose any relevance since principles of acquiescence and estoppel do not apply against statute as has been held by the Hon'ble Supreme Court in the case ***of State of U.P. versus U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti & others*** (2008) 12 SCC 675.

42. The said aspect has also been considered by the High Court of Uttarakhand in the case of ***G.B. Pant University versus Appellate Authority and Others, Writ Petition No.395 of 2017 (M/S)*** and was upheld by the Hon'ble Supreme Court in ***Special Leave to Appeal (C) No(s).1803 of 2018*** vide judgment and order dated 18.11.2021 in the following manner:-

*"Having heard learned counsel for the petitioner and having perused the material placed on record, we are at one with the view taken by the High Court that mere exercise of option by an employee, to avail the benefit of extension of age of retirement to 60 years, could not have operated against his entitlement to gratuity; and exercising of such an option will not deprive the private respondents to gratuity unless and until the establishment i.e., the petitioner-University, was exempted in strict compliance of Section 5 of the Payment of Gratuity Act, 1972, after prior approval of the State Government. There being no such exemption availed by the petitioner-University, the High Court has rightly not interfered with the principal part of the orders passed by the Controlling Authority and the Appellate Authority.*

*On the other hand, the High Court has been rather considerate to the petitioner in reducing the rate of interest awarded to the private respondents from 10% to 6% p.a.*

*In view of the above, no case for interference is made out.*

*Hence, these special leave petitions stand dismissed.*

*All the pending applications stand disposed of."*

43. Considering aforesaid facts and circumstances, it is thus evident that principles of acquiescence and estoppel with regard to exercise of option by teachers cannot prevail over statutory conditions.

44. The aforesaid aspects have also been considered by the Hon'ble Supreme Court in the case of ***(A) Nagar Ayukt Nagar Nigam Kanpur versus Mujib Ullah Khan and others, (2019) 6 SCC 103 as well as in the case of (B) Allahabad Bank & another versus All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44***. The relevant portion of the judgments are as follows:-

(***A) Nagar Ayukt Nagar Nigam Kanpur versus Mujib Ullah Khan and others, (2019) 6 SCC 103***

*"12. In view of Section 14 of the Act, the provision in the State Act contemplating payment of gratuity will be inapplicable in respect of the employees of the local bodies.*

*14. The entire argument of the appellant is that the State Act confers restrictive benefit of gratuity than what is conferred under the Central Act. Such argument is not tenable in view of Section 14 of the Act and that liberal payment of gratuity is in fact in the interest of the employees. Thus, the gratuity would be payable under the Act. Such is the view taken by the Controlling Authority."*

***(B) Allahabad Bank & another versus All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44***

*"19. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation, etc. being a statutory right cannot be taken away except in accordance with the provisions of the Act whereunder an exemption from such payment may be granted only by the appropriate Government under Section 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act.*

*35. In the present case the real question that arises for our consideration is whether the employees having exercised their option to avail the benefits under the pension scheme are estopped from claiming the benefit under the provisions of the Act?*

*36. The appellant being an establishment is under the statutory obligation to pay gratuity as provided for under Section 4 of the Act which is required to be read along with Section 14 of the Act which says that the provisions of the Act shall have effect notwithstanding anything inconsistent therein contained in*

*any enactment or in any instrument or contract having effect by virtue of any enactment other than this Act. The provisions of the Act prevail over all other enactments or instruments or contracts so far as the payment of gratuity is concerned. The right to receive gratuity under the provisions of the Act cannot be defeated by any instrument or contract."*

45. In view of aforesaid discussion, the question no.2 is also answered in favour of petitioners.

46. Considering aforesaid answers to the questions, Government Orders dated 30.03.1983 and 04.02.2004 are hereby quashed to the extent of denial of gratuity benefits to such Teachers who exercised their option to continue in service for the extended period.

47. Opposite parties are directed to ensure payment of gratuity to the petitioners alongwith interest @ 6% per annum on such arrears with effect from the date of their superannuation till the date of actual payment. Compliance of the aforesaid directions shall be made by the opposite parties positively within a period of six months from the date a certified copy of this order is served upon the concerned authorities.

48. Resultantly, the petition succeeds and is **allowed**. Parties to bear their own costs.

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**(2024) 10 ILRA 877**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

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

Writ-C No. 11091 of 2024

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

**Counsel for the Petitioner:**
Sri Anurag Tripathi, Ms. Garima Chauhan, Sri Jainendra Pandey, Sri Rahul Kumar Mishra

**Counsel for the Respondents:**
C.S.C., Sri Madan Mohan Srivastava

**A. Revenue Law – Alternative remedy – Uttar Pradesh Municipalities Act, 1916 - Section 3 - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950: Section 1(2) - U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956 - U.P. Land Revenue Act, 1901 - The writ petition is not entertained on the ground of the availability of the statutory alternative remedy of a revision u/s 27 of the Revenue Code.**

In the case at hand, the village in question, having been included within the municipal limits, in terms of a notification dated 31.12.2019, issued under the provisions of the Uttar Pradesh Municipalities Act, 1916, and the provisions of the Z.A. Act, 1950, being applicable to it as on the date of enforcement of the U.P. Revenue Code, 2006, which is February 11, 2016, in terms of Section 2 thereof, the provisions of the U.P. Revenue Code, 2006, would apply to the area, in its entirety. (Para 28)

An area which was included in the municipal limits after July 7, 1949 and to which Z.A. Act, 1950 continued to be applicable by virtue of the provisions contained u/s 1(2) thereof, would be governed by the provisions of the U.P. Revenue Code, 2006, in its entirety, after the repeal of the Z.A. Act, 1950 by the Revenue Code. (Para 27)

The provisions of the Revenue Code shall apply to the whole of Uttar Pradesh, except: (i) Chapter VIII which deals with management of land and other properties of Gram Panchayat or other local authorities, and (ii) Chapter IX which deals with tenures. (Para 26.1)

The provisions of Chapters VIII and IX, together with the provisions under the remaining chapters of the Revenue Code, shall apply to the areas to which the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956, were applicable on the date immediately preceding their repeal by the Revenue Code. (Para 26.2)

There is no manner of doubt w.r.t. the applicability of the provisions u/Ss 25, 26 and 27 of the Revenue Code under Chapter V thereof to the area in question. The objection raised by the petitioner w.r.t. the jurisdiction of the concerned respondent authority in passing of the order exercising powers u/s 25, is therefore held to be legally untenable. The order dated 03.01.2023 passed by the respondent No. 4 exercising powers u/s 25 of the Revenue Code, having been held to be unassailable on the ground of lack of jurisdiction, the contention raised by the petitioner w.r.t. the bar of the availability of the statutory alternative remedy u/s 27 being not applicable, cannot be sustained. (Para 29, 30)

**Writ Petition disposed of**. (E-4)

**Present petition assails the order dated 03.01.2023, passed by the respondent No. 4, the Tahsildar, Tehsil Manjhanpur, District Kaushambi, in proceedings u/s 25 of the U.P. Revenue Code, 2006, and also praying for certain ancillary reliefs.**

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

1. Heard Sri Anurag Tripathi, learned counsel for the petitioner, Sri J.N. Maurya, learned Chief Standing Counsel appearing along with Sri Satyendra Nath Srivastava and Sri Abhishek Shukla, learned Additional Chief Standing Counsel, and Sri Amresh Kumar Tewari learned Standing Counsel, for the State respondents, and Sri Madan Mohan Srivastava, learned counsel appearing for the respondent No. 5.

2. The present petition has been filed seeking to assail the order dated 3.1.2023, passed by the respondent No. 4, the Tahsildar, Tehsil Manjhanpur, District Kaushambi, in Case No. 559 of 2022, (Computerized Case No. T202202420300559), [Rajesh Kumar Pandey Vs. Hari Prasad Pandey], in proceedings under Section 25 of the U.P. Revenue Code, 20061, and also praying for certain ancillary reliefs.

3. An objection has been raised by the counsel appearing for the State respondents with regard to the entertainability of the writ petition by pointing out that the order passed under Section 25 of the Revenue Code, would be subject to the statutory alternative remedy of a revision under Section 27 of the Revenue Code.

4. In response to the aforesaid objection, counsel for the petitioner has sought to urge that the land in question which is situate in village "Purabsharira", Tehsil Manjhanpur, District Kaushambi, is part of the notified area of the Nagar Panchayat, Purab-Paschimsharira, and in view thereof the provisions of the Revenue Code would not be applicable, and therefore the order impugned being without jurisdiction, the plea of a statutory alternative remedy, would not create a bar to the writ petition being entertained.

5. Attention of the Court has been drawn to a notification bearing Notification No. 2875/IX-10-2019-28T.A./-19, dated 31.12.2019, issued by the Uttar Pradesh

Shasan, Nagar Vikas Anubhag – 1, exercising powers under Clause (2) of Article 243-Q of the Constitution read with Section 3 of the Uttar Pradesh Municipalities Act, 1916. In terms of above, it has been specified that the local area with limits as given in the Schedule, shall be a transitional area for the purpose of Part - IX-A of the Constitution, and a Nagar Panchayat shall be constituted for the same, which would be known as Nagar Panchayat, Purab-Paschim Sharira in District Kaushambi.

6. To examine the issue relating to the jurisdiction of the respondent authority which has passed the order impugned, the question relating to the applicability of the provisions of the Revenue Code to an area notified under the Uttar Pradesh Municipalities Act, 1916, would be required to be considered.

7. The U.P. Revenue Code, 2006, has been described as an Act to consolidate and amend the law relating to land tenures and the land revenue in the State of Uttar Pradesh, and to provide for matters connected therewith and incidental thereto.

8. The provision relating to extent of the Act is contained under Section 1 of the Revenue Code. The applicability of the Revenue Code is provided for, under Section 2, whereas Section 3 contains the provision for extension of the Code to new areas.

9. For ease of reference, the aforesaid statutory provisions contained in Sections 1, 2 and 3, are being extracted below:

**"1. Short title, extent and commencement**.—(1) This Act may be called the Uttar Pradesh Revenue Code, 2006.

(2) It extends to the whole of Uttar Pradesh.

(3) It shall come into force on such date as the State Government may, by notification, appoint and different dates may be appointed for different areas or for different provisions of this Code.

**2. Applicability of the Code**.—The provisions of this Code, except Chapters VIII and IX shall apply to the whole of Uttar Pradesh, and Chapters VIII and IX shall apply to the areas to which any of the enactments specified at serial numbers 19 and 25 of the First Schedule was applicable on the date immediately preceding their repeal by this Code.

**3. Extension of the Code to new areas**.—(1) Whereafter the commencement of this Code, any area is added to the territory of Uttar Pradesh, the State Government may, by notification, extend the whole or any provision of this Code, to such area.

(2) Where any notification is issued under sub-section (1), the provisions of any Act, rule or regulation in force in the area referred to in the said sub-section, which are inconsistent with the provisions so applied, shall be deemed to have been repealed.

(3) The State Government may, by a subsequent notification, amend, modify or alter any notification issued under sub-section (1)."

10. The enactment of the Revenue Code has resulted in repeal of certain

enactments, which have been specified in the First Schedule of the Act. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and the U.P. Land Revenue Act, 1901, are amongst the various enactments which have been repealed.

11. In terms of sub-section (2) of Section 1, as aforestated, the Revenue Code extends to the whole of Uttar Pradesh.

12. Section 2 of the Revenue Code which relates to its applicability, declares that the provisions of the Revenue Code shall apply to the whole of Uttar Pradesh, except:

(i) Chapter VIII which deals with management of land and other properties of Gram Panchayat or other local authorities, and

(ii) Chapter IX which deals with tenures.

13. The aforesaid Chapters VIII and IX of the Revenue Code have been stated to apply to the areas to which any of the enactments specified at Serial Nos. 19 and 25 of the First Schedule, was applicable on the date immediately preceding its repeal by the Revenue Code. The enactment Specified at Serial No. 19 is the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19502, and the enactment specified at Serial No. 25 is the U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 19563.

14. Section 25 of the Revenue Code, which pertains to "rights of way and other easements" and under which the order impugned has been passed, is part of Chapter IX of the Code, and in terms thereof, in the event of any dispute arising as to the route by which a tenure-holder or an agricultural labourer, shall have access to his land or to the waste or pasture land of the village (other than by the public roads, paths or common land) or as to the source from or course by which he may avail himself of irrigational facilities, the Tahsildar may, after such local inquiry as may be considered necessary, decide the matter with reference to the prevailing custom and with due regard to the convenience of all the parties concerned.

15. Section 26 relates to "removal of obstacles" and in its terms if the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water course or source of water, he may direct the removal of such obstacle.

16. The powers exercisable by the Tahsildar under Section 25 or Section 26, are subject to the revisional power of the Sub Divisional Officer, under Section 27 of the Revenue Code.

17. The aforesaid provisions, under Sections 25, 26 and 27, are part of Chapter IX of the Revenue Code, and as per the terms of Section 2 thereof, the said provisions would be applicable to the whole of the Uttar Pradesh, without any exception.

18. For ready reference, Sections 25, 26 and 27 are being reproduced below:

"**25. Rights of way and other easements**.- In the event of any dispute arising as to the route by which a tenure-holder or an agricultural labourer shall have access to his land or to the waste or pasture land of the village (other than by the public

roads, paths or common land) or as to the source from or course by which he may avail himself of irrigational facilities, the Tahsildar may, after such local inquiry as may be considered necessary, decide the matter with reference to the prevailing custom and with due regard to the convenience of all the parties concerned. He may direct the removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed.

**26. Removal of obstacle.** –-If the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water-course or source of water, he may direct the removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed.

**27. Revisional powers of Sub-Divisional Officer**. – The Sub-Divisional Officer may call for the record of any case decided by the Tahsildar under section 25 or 26, for the purpose of satisfying himself as to the legality or propriety of such decision, and may, after affording opportunity of hearing to the parties concerned, pass such orders as he thinks fit:

Provided that no application under this section shall be entertained after the expiry of a period of thirty days from the date of the order sought to be revised."

19. The applicability of the provisions contained under Chapters VIII and IX of the Revenue Code, have been made subject to the applicability of any of the enactments specified at Serial Nos. 19 and 25 of the First Schedule, immediately preceding their repeal by the Code.

20. It would therefore be necessary to examine the extent of the Z.A. Act, 1950, and for the purpose, the provisions contained under sub-section (2) of Section 1 of the said Act would be required to be adverted. For ease of reference, Section 1 of the Z.A. Act, is being reproduced below:

"**1. Short title, extent and commencement**. (1) This Act may be called the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

(2) It extends to the whole of the Uttar Pradesh except the areas which, on the 7th day of July, 1949, were included in a municipality or a notified area under the provisions of the United Provinces Municipalities Act, 1916 (U.P. Act II of 1916) or a Cantonment, under the provisions of the Cantonment Act, 1924 (U.P. Act II of 1924) or a Town Areas under the provisions of the United Provinces Town Areas Act, 1914 (U.P. Act I of 1914)

Provided that in relation to areas included in the Rampur Municipality, this sub-section shall have effect as if for the words and figures '7th day of July, 1949' the words and figures' 31st day of July, 1949, were substituted therein

Provided further that where any area which on July 7, 1949, was included in a Municipality, Notified Area, Cantonment or Town Area, cease to be so included therein at any time after that date and no notification has been made in respect thereof under Section 8 of the Uttar

Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956—

(i) in case it has ceased to be so included at any time before June 29, 1971, this Act shall extend to such area from June 29, 1971; and

(ii) in any other case, this Act shall extend to such area from the date on which the area ceases to be so included.

(3) It shall come into force at once except in the areas mentioned in clauses (a) to (f) of sub-section (1) of Section 2, where it shall, subject to any exception or modification under sub-section (1) of Section 2, come into force on such date as the State Government may by notification in the Gazette appoint and different dates may be appointed for different areas and different provisions of this Act."

21. In terms of sub-section (2) of Section 1, as aforesaid, the Z.A. Act, 1950 extended to the whole of Uttar Pradesh except the areas which, on the 7th day of July, 1949 were included in a municipality or a notified area under the provisions of the United Provinces Municipalities Act, 1916 or a cantonment under the provisions of the Cantonment Act, 1924, or a town area under the provisions of the United Provinces Town Areas Act, 1914.

22. Sub-section (2) of Section 1, of the Z.A. Act carves an exception in respect to the areas to which the Town Areas Act, Cantonment Act or the Municipalities Act, were applicable. The extent of this exclusion is in reference to the cut off date of July 7, 1949. The date is significant because it was on this day that Uttar Pradesh Zamindari Abolition and Land Reforms Bill was first introduced in the legislature. The provision makes it clear that if on July 7, 1949 a particular area was outside the limits of a municipality or a notified area or a cantonment, the Z.A. Act would be applicable, and would continue to apply. The Act would also continue to apply to the area which was subsequently included in a municipality or a notified area, under the United Provinces Municipalities Act, 1916 or a cantonment under the provisions of the Cantonment Act, 1924, or a town area under the provisions of the United Provinces Town Areas Act, 1914.

23. Section 1(2) of the Z.A. Act makes it clear that the inclusion has to be as on the date July 7, 1949, and any subsequent inclusion of the area within the limits of a municipality, notified area, a cantonment area or town area would not be material and would be of no consequence for the purpose.

24. It would therefore follow that in respect of an area which was not included in the limits of a municipality, under the United Provinces Municipalities Act, 1916, as on July 7, 1949, the provisions of the Z.A. Act, 1950 applied, and the subsequent inclusion of such an area within the limits of a municipality after July 7, 1949 would be inconsequential.

25. A conjoint reading of the aforementioned provisions contained under Section 1(2) of the Z.A. Act with the provisions contained under Section 2 of the Revenue Code, would lead to the inference that the provisions under Chapters VIII and IX of the Revenue Code shall apply to such areas, in addition to the provisions under the remaining Chapters being applicable.

26. Having regard to the foregoing discussions, the principles with regard to the applicability of the U.P. Revenue Code, 2006, may be summarized as follows:

26.1. The provisions of the Revenue Code shall apply to the whole of Uttar Pradesh, except: (i) Chapter VIII which deals with management of land and other properties of Gram Panchayat or other local authorities, and (ii) Chapter IX which deals with tenures.

26.2. The provisions of Chapters VIII and IX, together with the provisions under the remaining chapters of the Revenue Code, shall apply to the areas to which the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956, were applicable on the date immediately preceding their repeal by the Revenue Code.

27. As a corollary to the aforesaid principles, it may be stated that an area which was included in the municipal limits after July 7, 1949 and to which Z.A. Act, 1950 continued to be applicable by virtue of the provisions contained under Section 1(2) thereof, would be governed by the provisions of the U.P. Revenue Code, 2006, in its entirety, after the repeal of the Z.A. Act, 1950 by the Revenue Code.

28. In the case at hand, the village in question, having been included within the municipal limits, in terms of a notification dated 31.12.2019, issued under the provisions of the Uttar Pradesh Municipalities Act, 1916, and the provisions of the Z.A. Act, 1950, being applicable to it as on the date of enforcement of the U.P. Revenue Code, 2006, which is February 11, 2016, in terms of Section 2 thereof, the provisions of the U.P. Revenue Code, 2006, would apply to the area, in its entirety.

29. There is thus no manner of doubt with regard to the applicability of the provisions under Sections 25, 26 and 27 of the Revenue Code under Chapter V thereof to the area in question. The objection raised by the petitioner with regard to the jurisdiction of the concerned respondent authority in passing of the order exercising powers under Section 25, is therefore held to be legally untenable.

30. The order dated 03.01.2023 passed by the respondent No. 4 exercising powers under Section 25 of the Revenue Code, having been held to be unassailable on the ground of lack of jurisdiction, the contention raised by the petitioner with regard to the bar of the availability of the statutory alternative remedy under Section 27 being not applicable, cannot be sustained.

31. The writ petition is therefore not entertained on the ground of the availability of the statutory alternative remedy of a revision under Section 27 of the Revenue Code.

32. The petition stands **disposed of,** leaving it open to the petitioner to take recourse to the statutory alternative remedy.

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**(2024) 10 ILRA 883**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 04.10.2024**

**BEFORE**

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

Writ-C No. 11317 of 2020

**U.P. Bhumi Sudhar Nigam Thru. Managing Director ...Petitioner**

**Versus**

**Appellate Authority Under P.G. Act Lko. & Ors. ...Respondents**

**Counsel for the Petitioner:**

Anurag Tripathi

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

**A. Service Law – Gratuity - Gratuity will have to be paid to all those persons whose employment came to an end after the coming into force of the Act for that period during which he came within the definition of an employee within the meaning of Section 2(e) of the Payment of Gratuity Act.** To hold otherwise may render a whole class of persons who all their lives got wages of less than Rs.1000/- per month, but on the eve of their retirement started getting wages of Rs.1000/- per month. Surely that could not have been the intention of Parliament. **The only reasonable way of construing Section 4 in the light of the definition of employee in Section 2(e) is to hold that a person whose services are terminated for any of the reasons mentioned in Section 4(1), after the coming into force of the Act is entitled to the payment of gratuity, if he has rendered continuous service for not less than five years, for that period during which he has satisfied the definition of employee u/s 2(e) of the Act.** (Para 19)

Terms and conditions of employment of the private respondents are evident by means of various agreements entered into between the parties from time to time. Act of 1972 does not talk of salary but the Payment of Gratuity Act, 1972 has cautiously used the word "wages" and has linked the same with the terms and conditions of employment. (Para 16)

The terms and conditions of employment are evident from the contract. Thus, the services of opposite party no.3 would be deemed to be a fixed service as contemplated u/s 2A of the Act of 1972 and the fixed amount paid to him would be included within the ambit of "wages" as described u/s 2(s) of the Act. (Para 17)

The term "completed year of service" and "continuous service" as defined u/s 2(b), 2(c) and 2A of the Act of 1972 also lead to only one interpretation that the employment of the opposite party no.3 has to be treated as continuous employment. (Para 18)

**Writ petition dismissed.** (E-4)

**Precedent followed:**

Ahmedabad Pvt. Primary Teachers' Assn Vs Administrative Officer & ors., (2004) 1 SCC 755 (Para 19)

**Present petition challenges the orders dated 08.02.2019 and 07.09.2020, passed by the Prescribed Authority and the Appellate Authority under the provisions of the Payment of Gratuity Act, 1972.**

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

1. The petitioner which is a corporation of the State of U.P. has filed the present writ petition challenging the orders dated 22.01.2019 and 24.01.2020 passed by the Prescribed Authority and the Appellate Authority under the provisions of the Payment of Gratuity Act, 1972.

2. The facts in brief are that the respondent no.3 was employed with the petitioner on the basis of contract entered into between the parties on consolidated salary w.e.f 09.06.1996 He had worked with the petitioner for a period of 11 years and his services were dispensed with on 02.01.2007 after working for 11 years.

3. Respondent no.3 had filed an application for grant of gratuity as per provisions of the Payment of Gratuity Act, 1972. He has stated that he has continuously worked with the petitioner and he was covered within the definition of "employee" as provided in the Act of 1972 but despite his application the amount of gratuity was not paid by the petitioner, accordingly, he filed an application for Payment of Gratuity before the controlling

authority/ Assistant Labour Commissioner, Lucknow.

4. The Assistant Labour Commissioner/ Prescribed Authority considered the arguments and the averments made by the opposite party no.3 and came to the conclusion that he had worked for more than 5 years continuously and was entitled for gratuity irrespective of the fact that his employment was of contractual nature.

5. With regard to the petitioner he concluded that the petitioner is a Corporation and falls within a definition of Section 2 (f) of the Act of 1972 wherein it has been provided that :-

*"employer? means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop –*

*i. belonging to, or under the control of the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the Head of the Ministry or the Department concerned."*

6. Considering the aforesaid provision he concluded that there was no doubt that the petitioner falls under the aforesaid provisions of the Act of 1972 and ?wages? have been defined to be all emoluments which are carried by the employee while on duty or on leave and in accordance with the terms and conditions of the employment and held that the respondent no.3 was entitled to receive gratuity under the Act of 1972.

7. The petitioner being aggrieved by the order of the Prescribed Authority dated 22.01.2019 preferred an appeal before the Appellate Authority. The Appellate Authority also affirmed the findings recorded by the controlling authority and rejected the appeal by means of the judgment dated 24.01.2020.

8. It has been submitted that prior to filing of the said appeal the petitioner had deposited amount of gratuity payable to the private respondents before the controlling authority and after judgment of the appellate authority the said amount was duly withdrawn by the private respondents.

9. It has been submitted by the learned counsel for the petitioner that both the orders are illegal and arbitrary inasmuch as it has been presumed that the private respondents has been in continuous services for more than five years inasmuch as there was no specific term in the agreement or the contract that they would be allowed to continue for such a period. It has further been stated that the appointment of the private respondents was for a specific period and whenever the said period came to an end a fresh contract was entered into and, accordingly, it cannot be said that the private respondents has been under continuous service as defined under Section 2 (A) of the Act of 1972 to hold that the respondents have been in continuous service.

10. It has further been stated that the respondents were contractual employees and the services were governed by the specific terms and conditions and, consequently, provisions of Payment of Gratuity Act, 1972 could not be attracted and, hence, have assailed the impugned orders.

11. Learned counsel for the private respondents have on the other hand submitted that the Prescribed Authority as well as the Appellate Authority has dealt with these objections raised by the petitioner in detail and also relied upon the various case laws in the matter and rejected the conditions holding that the petitioner has been in continuous service for more than five years and was fully covered by the provisions of the Payment of Gratuity Act, 1972 and the petitioner also falls within the definition of "employee" and, hence, concluded that there is no infirmity in the impugned orders and prays for dismissal of the writ petition.

12. We have considered the submissions of the learned counsel appearing for the parties and perused the record.

13. It is noticed that the respondent no.3 was appointed on contract basis by the petitioner and the said contract period was extended on the expiry of the previous contract period and in this regard he continued to work for 11 years.

14. Neither before the authorities below or in the present writ petition is there any averment or material which may indicate that after expiry of the period of contract, the employee was out of job and on the contrary it has been demonstrated that on expiry of the contract a fresh contract was entered into and, accordingly, he continued into services continuously since 1996-2007. It could not be demonstrated that there was any break in service or that period of 11 years in employment were not covered by "continuous service" as described in Section 2 A of the Act of 1972.

15. Continuous service has been defined under Section 2 (A). Continuous Service - For the purpose of this Act, -

*1. An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;*

*2. Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1) , for any period of one year or six months, he shall be deemed to be in continuous service under the employer –*

*a. For the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than -*

*i. One hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and*

*ii. Two hundred and forty days, in any other case;*

*b. For the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than*

*i. Ninety five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and*

*ii. One hundred and twenty days, in any other case.*

*Explanation - For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which –*

*i. He has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;*

*ii. He has been on leave with full wages, earned in the previous year;*

*iii. He has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and*

*iv. In the case of a female, she has been on maternity leave, so, however, that the total period of such maternity leave does not exceed such period as may be notified by the Central Government from time to time;*

*3. Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of on year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than on which the establishment was in operation during such period."*

*While Section 2 (f) describes "employer" which is as under : -*

*`2 (f) "employer" means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop –*

*(i) belonging to, or under the control of, the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the Head of the Ministry or the Department concerned,*

*(ii) belonging to, or under the control of, any local authority, the person appointed, the chief executive officer of the local authority,*

*(iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port railway company or shop, and where the said affairs are entrusted to any other persons, whether called a manager, managing director or by any other name, such person;*

16. Terms and conditions of employment of the private respondents are evident by means of various agreements entered into between the parties from time to time. Act of 1972 does not talk of salary

but the Payment of Gratuity Act, 1972 has cautiously used the word "wages" and has linked the same with the terms and conditions of employment.

17. The terms and conditions of employment are evident from the contract. Thus, the services of opposite party no.3 would be deemed to be a fixed service as contemplated under Section 2 A of the Act of 1972 and the fixed amount paid to him would be included within the ambit of "wages" as described under Section 2 (s) of the Act.

18. The term "completed year of service" and "continuous service" as defined under Section 2 (b), 2 (c) and 2 A of the Act of 1972 also lead to only one interpretation that the employment of the opposite party no.3 has to be treated as continuous employment.

19. The Apex Court in the case of **Ahmedabad Pvt. Primary Teachers' Assn Vs. Administrative Officer and Others, (2004) 1 SCC 755**, has ruled as under :-

*"6. The Act is a piece of social welfare legislation and deals with the payment of gratuity which is a kind of retiral benefit like pension, provident fund etc. As has been explained in the concurring opinion of one of the learned Judges of the High Court ?gratuity in its entymological sense is a git, especially for services rendered, or return for favours received?. It has now been universally recognized that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work due to invalidity, old age etc. For the wage- earning population, security of income, when the worker becomes old or infirm, if of consequential importance. The provisions contained in the Act are in the nature of social security measures like employment insurance, provident fund and pension. The Act accepts, in principle, compulsory payment of gratuity as a social security measure to wage- earning population in industries, factories and establishments.*

*7. Thus, the main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of rules of superannuation or physical disablement or impairment of vital part of the body. The expression ?gratuity? itself suggests that it is a gratuitous payment given to an employee on discharge, superannuation or death. Gratuity is an amount paid unconnected with any consideration and not resting upon it, and has to be considered as something freely, voluntarily or without recompense. It is a sort of financial assistance to tide over post retiral hardships and inconveniences."*

*In the case of Management of Goodyear India Limited (supra), the Apex Court has ruled as under :-*

*"..... Gratuity will have to be paid to all those persons whose employment came to an end after the coming into force of the Act for that period during which he came within the definition of an employee within the meaning of Section 2 ( e ) of the Payment of Gratuity Act. To hold otherwise may render a whole class of persons who all their lives got wages of less than Rs.1000/- per month, but on the eve of their retirement started getting wages of Rs.1000/- per month. Surely that could not have been the intention of Parliament. We think the only reasonable way of construing*

*Section 4 in the light of the definition of employee in Section 2 ( e ) is to hold that a person whose services are terminated for any of the reasons mentioned in Section 4 (1), after the coming into force of the Act is entitled to the payment of gratuity, if he has rendered continuous service for not less than five years, for that period during which he has satisfied the definition of employee under Section 2 (e ) of the Act."*

*Having considered the aforesaid dictum of the Apex Court as well as the provisions of the Act, the inevitable conclusion is that opposite party no.3 is entitled for gratuity as he has rendered more than five years of continuous service. I find no illegality in the orders passed by the Prescribed Authority as well as by the Appellate Authority. Learned counsel for the petitioner could not raise any substantial legal point to indicate that the order suffers from any illegality in any manner.*

*The writ petition is devoid of merit. It is accordingly dismissed."*

20. Learned counsel for the respondent have also relied upon the judgment of this Court passed in the **Writ Petition No.310 (MS) of 2010; U.P. Bhumi Sudhar Nigam T.C./19-B Vibhuti Khand, Gomti Nagar, Lucknow vs. Appellate Authority and Others** where similar controversy had arisen and the orders of the controlling authority and appellate authority were assailed and this Court after considering the facts had dismissed the writ petition.

21. Parties have not disputed that the facts are similar and, hence, the ratio of the said case would duly apply to the facts of the present case also.

22. Accordingly, this Court is of the considered view that there is no infirmity in the impugned orders passed by the controlling authority or by the Appellate Authority which may require interference of this Court under Article 226 of the Constitution of India.

23. It is noticed that once the judgment was available before the authorities as rendered by this Court in **Writ Petition No.310 (MS) of 2010 [U.P. Bhumi Sudhar Nigam T.C./19-B Vibhuti Khand, Gomti Nagar, Lucknow vs. Appellate Authority and Others]** then on the same facts multiple writ petitions against the employees without any discernible facts or law should not have been filed. Such a practice has already been deprecated by the Hon?ble Apex Court where such petitions have been held to be mere certificate proceedings only to obtain stamp of the Court and, accordingly, the petition is **dismissed.**

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**(2024) 10 ILRA 889**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

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

Writ-A No. 12638 of 2024

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

**Counsel for the Petitioner:**
Atipriya Gautam, Jay Vishwanath Pandey, Sr. Adv., Vinod Kumar Mishra

**Counsel for the Respondents:**
G.A.

**A. Service Law – Cancellation of candidature/selection - Uttar Pradesh Police Constables & Head Constables Service Rules, 2015 -** This case is one of utter lack of application of mind because the Superintendent of Police has relied upon paragraph No.38.7 of the principles in *Avtar Singh* to hold the petitioner disentitled to appointment. As **a reading of paragraph No.38.7 would show the said paragraph or the principle carried therein, so to speak is applicable to a case of deliberate suppression w.r.t. multiple pending cases, which a candidate does not disclose. This, by no means, is a case where multiple cases were pending against the petitioner. It is a case where a solitary crime was registered by the Police and did not go an inch beyond the registration, so far as the petitioner is concerned.** Now to invoke the principle in paragraph No.38.7 and act on its basis to cancel the petitioner's candidature or selection, is a glaring case of non-application of mind. (Para 20)

**B. Merely, because someone has chosen to falsely nominate a person in a crime, about which the Police too on investigation do not find any evidence, cannot lead to the conclusion that non-disclosure of the offence must invite cancellation of candidature.**

**Paragraph No.38.8** of the principles in *Avtar Singh* may have some relevance because the principle there postulates that **even if a criminal case pending against a candidate was not known to him at the time he filled up his application form, it may still have adverse impact and the Appointing Authority would take a decision after considering the seriousness of the crime.** In the present case, while technically the principle in paragraph No.38.8 might have relevance as remarked, this Court is of clear opinion that on facts, it would not apply. The reason is that **there was absolutely not a shred of evidence ever forthcoming against the petitioner in the crime at any stage of the matter. If there were some material against the petitioner, with credibility attached to it, the petitioner would have been charge-sheeted like the other four accused nominated alongside him.** The fact that the charge-sheeted accused were acquitted by the Court shows that the prosecution was not able to establish its case at all against men, who were accused alongside the petitioner in the crime. But, the fact that the Police could not lay its hands on any evidence relating to the petitioner's complicity in the crime, even as much as to warrant his joining investigation or seeking bail, as a person wanted in the crime, inevitably shows that the petitioner's nomination was nothing more than a false script on a piece of paper. Indeed, a conclusion of this kind, given the nature of the offence, the proceedings during investigation, the non-complicity for the petitioner found by the Police and the acquittal of the co- accused, all read together, would be a disproportionate measure to take on the respondents' part. In fact, on this state of things for the S.P. to think that this is a case where the petitioner's candidature ought be cancelled is a perverse conclusion. (Para 21)

The impugned order dated 08.07.2024 passed by the Superintendent of Police, Mainpuri is hereby quashed. A mandamus is issued to the Superintendent of Police, Mainpuri, ordering him to consider the petitioner's case for appointment as a Constable, without reference to the case once registered against him and pass necessary orders, granting him notional seniority with his batch, within a period of six weeks of receipt of a copy of this judgment. (Para 22)

**Writ Petition allowed.** (E-4)

**Precedent followed:**

1. Avtar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 11)

2. Commissioner of Police & ors. Vs Sandeep Kumar, (2011) 4 SCC 644 (Para 15)

3. Ram Kumar Vs St. of U.P. & ors., (2011) 14 SCC 709 (Para 17)

**Present petition is directed against an order of the Superintendent of Police, Mainpuri dated 08.07.2024, cancelling the petitioner's selection/candidature as a Constable in the Uttar Pradesh Police on**

**ground of his involvement in a criminal case.**

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

1 This writ petition is directed against an order of the Superintendent of Police, Mainpuri dated July the 8th, 2024, cancelling the petitioner's selection/ candidature as a Constable in the Uttar Pradesh Police on ground of his involvement in a criminal case.

2. The petitioner was selected as a Constable in the Constable Civil Police and Constable PAC, Direct Recruitment, October, 2018-II, held pursuant to an advertisement dated 16.11.2018 issued by the Deputy Inspector General of Police, Establishment/ Personnel, Office of the DGP, Police Headquarters, Lucknow. The petitioner says that pursuant to the advertisement last mentioned, he applied for the post of a Constable in the category of OBC Male. He says that he was eligible and fulfilled all the requisite qualifications and conditions mentioned in the advertisement dated 16.11.2018. The application form was submitted online. A total number of 49568 posts of Constables Civil Police and PAC were advertised through the advertisement under reference. The petitioner says that 31360 posts advertised were earmarked for the Civil Police whereas 18208 for the Provincial Armed Constabulary (PAC) Establishment.

3. Shorn of unnecessary detail, the process of selection under the Uttar Pradesh Police Constables & Head Constables Service Rules, 2015 (for short, 'the Rules of 2015') involves a process of selection where for the posts of Constables, there is provision for a written examination, followed by document verification, a physical standard test and a physical efficiency test. Those candidates, who come out successful through all these tiers of selection, find their name in the final select list. Those who figure in the final select list have then to undergo a medical examination, besides a character verification. After the written examination, the cut-off merit was published by a notification dated 20.11.2019 and those selected in the written examination were called to appear in the next stage of selection, to wit, document verification and the physical standard test. The petitioner qualified the written examination and secured marks higher than the cut-off. He was called for document verification and the physical standard test. The petitioner went through the document verification and physical standard test successfully as well as the physical efficiency test. This was followed by declaration of final select list vide notification dated 02.03.2020, issued by the Chairman/ Secretary, Uttar Pradesh Police Recruitment & Promotion Board, Lucknow, where a total of 49568 candidates were declared selected for various posts pursuant to the Direct Recruitment of 2018-II.

4. A call letter was issued to the petitioner, asking him to appear in the medical examination, scheduled to be held at the Reserve Police Lines, Ghaziabad. The petitioner appeared in the medical examination at the appointed time and venue, where he was declared medically fit. He was then allotted District Mainpuri to join his training. The petitioner's papers were sent to the Superintendent of Police, Mainpuri for followup action, as the petitioner says, but at Mainpuri, he was not allowed to join training by the S.P. Going back a little in point of time, the petitioner says that at the time he went through his

medical examination and document verification, the petitioner was required to furnish personal information in the form of a notarized affidavit and the petitioner submitted his notarized affidavit before the competent Authority on 10.09.2020, where the petitioner did not disclose that any criminal case was pending against him. It is pleaded by the petitioner that at the time he submitted the notarized affidavit before the competent Authority on 10.09.2020, there was no criminal case against the petitioner, and, therefore, he was not obliged to say that one was pending against him. The petitioner, however, was not permitted to join training by the S.P., Mainpuri on ground that a criminal case was registered against him.

5. The petitioner says that an FIR was lodged against the petitioner on 21.07.2019, giving rise to Crime No.0615 of 2019, under Sections 147, 323, 504 IPC and Section 3(2)(v) of the SC/ST Act, Police Station Muradnagar, District Ghaziabad. The said FIR was lodged by one Brijesh Kumar against five accused men, to wit, Rinku (a nick name for the petitioner), Punit, Vinit, Pradeep and Ravinder. This FIR was registered, the petitioner says, behind his back with the petitioner not knowing anything about the occurrence, where he was not present. At the time of the incident shown in the FIR, the petitioner was preparing to write his competitive examinations. He says that he was deliberately implicated to harm him in his career. The petitioner was never arrested in connection with the crime under reference nor was he ever called upon to furnish bail or secure an order of bail from the Court of competent jurisdiction. In fact, the petitioner was never summoned in connection with the case by the Court. It is true that the petitioner was named in the FIR, as it later transpired, but the Police, after collecting evidence, submitted a charge-sheet on 19.10.2019, under Sections 323, 504 IPC and Section 3(2)(v) of the SC/ST Act against four persons, to wit, Punit, Vinit, Pradeep and Ravinder, but not the petitioner. He was exculpated. The petitioner was also not summoned by the Court at any stage, whereas the charge-sheeted accused were tried and acquitted by the learned Special Judge (SC/ST Act)/ Additional Sessions Judge, Ghaziabad vide judgment and order dated 11.03.2024.

6. A notice of motion was issued by a detailed order dated 23.09.2024 passed by this Court, in response whereto a personal affidavit has been filed by the Superintendent of Police, Mainpuri. It is taken on record and shall be read as a counter affidavit to this petition. The respondents do not seek opportunity to file any further affidavit and the learned Counsel for the petitioner waives his opportunity to file a rejoinder.

7. Admit.

8. Heard forthwith.

9. Heard Mr. Rishabh Kesarwani, learned Counsel for the petitioner and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the State.

10. What this Court finds is that the impugned order, cancelling the petitioner’s candidature, has been passed rather mechanically for the mere registration of a case that the petitioner did not disclose in his affidavit. The non-disclosure has been blamed upon the petitioner as a relevant fact, disentitling him to be appointed. This is not a case

where the registration of the FIR led to anything against the petitioner. He was never arrested in the crime nor did he secure bail from any Court. He was never summoned in relation to the case at any stage. Therefore, when he filled up the form, the petitioner was not aware of the fact that a crime had been registered against him, which was pending investigation. Now, the Superintendent of Police says that he has left Clause 11, sub-Clauses 1, 2 and 3 blank in the application form or the affidavit, whatever the Superintendent of Police is referring to in paragraph No.8 of the affidavit, and further says that according to the report of the Circle Officer, Sadar, Ghaziabad, the crime was under investigation on 19.12.2020, when the Circle Officer made his report. There is no pleading to the effect that the petitioner had been summoned in connection with the crime by the Police or the Court or that he was aware of it by any such step as the seeking of bail or joining investigation. The contents of paragraph No.34 of the writ petition, where it is said that he never was arrested or secured bail or summoned, have not been denied or dispelled in the Superintendent of Police's affidavit. It can well, therefore, be inferred that the petitioner never came to know about the registration of the crime, which ultimately led to a final report in his favour and a charge-sheet against the other accused. The petitioner says that he was studying for his competitive examinations and was not in the locale. It is quite plausible, as it happens, that the petitioner being selected in government service, his name was introduced in the FIR along with some others, who were somehow suspected of the crime. The petitioner was exculpated by the Police whereas the other co-accused were charge-sheeted, tried and acquitted. In these circumstances, if the petitioner did not mention registration of the crime in the application form or the affidavit furnished during the recruitment process, it cannot be regarded blameworthy conduct. The circumstances do show that the petitioner might be utterly unaware of the case registered with the Police, as he asserts. In the affidavit, the stand taken by the Superintendent of Police, Mainpuri is that the Senior Superintendent of Police, Ghaziabad by his letter dated 15.03.2024 forwarded the petitioner's recruitment documents to the District Magistrate, recommending a thorough evaluation of his suitability for recruitment as a Constable in accordance with the guidelines carried in the Government Order dated 28.04.1958. The District Magistrate *vide* letter dated 08.04.2024 sent the original documents relating to the petitioner's recruitment to the Additional Commissioner of Police, Ghaziabad, indicating the following opinion- *"In mine opinion, the provisions concerning character verification under the paragraph no. 8 of the government order dated 26.04.1958 and in para 38(7) of the Supreme Court's pronouncement in Avatar Singh vs. Union of India stipulate that deliberate suppression of facts, with respect to multiple pending case such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating service as appointment of a person against whom multiple criminal cases were pending may not be proper".*

11. To say the least, the District Magistrate's opinion or that of the Superintendent of Police, Mainpuri in writing the impugned order, betrays utter lack of application of mind, both as to the terms of the Government Order dated 28.04.1958 and the law laid down by the Supreme Court in **Avtar Singh v. Union of**

**India and others, (2016) 8 SCC 471.** It is not the purpose of the Government Order or the law that the Courts have laid down that capable persons of good character should be deprived of public employment, because they have had the accident of a case being registered against them, where nothing of complicity was ever found. The purpose of all laws that disentitle from recruitment to government service persons, against whom criminal cases are registered, is to eliminate from public employment men of criminal and shady antecedents. It is the object, purpose and spirit of the principle that has to be understood and not a mathematical formula applied mechanically to every case where the Government find that a case was registered against a candidate for public service, irrespective of its nature, result or the aspirant's involvement therein.

12. So far as the issue of suppression is concerned, it must be remembered that suppression is blameworthy conduct if the concerned candidate is aware about the registration of a case. Suppression in itself postulates awareness about a fact. A person, who does not know a fact or is unaware of it, cannot be blamed with suppression thereof merely because he has not stated it. To infer from a blank column, the petitioner's awareness of the case registered against him is too far fetched a conclusion to draw, or at least, not a reasonable one. There could be many inexplicable reasons for a candidate to miss out on filling up a column and not every column left unfilled, tells the story of hidden truths. Sometimes omissions are accidental and sometimes the outcome of oppressively perplexing detail, which may lead to such omissions. Sometimes it is pure doubt and the fear or hesitation of committing a mistake and suffering a technical rejection by the less human eye of a computer device.

13. The petitioner has given a very logical explanation about the fact of not mentioning the registration of a case against him in paragraph No.34 of the writ petition and we need not repeat it. The substance of it is that there was just the registration of a crime against the petitioner in a virtually a petty offence, where he was exculpated by the Police and never charge-sheeted. Those, who were, came to be acquitted. At this stage, it would be relevant to refer to the relevant part of the Government Order dated 28.04.1958, on which much reliance has been placed by the respondents. It reads:

"3. (a) Every direct recruit to any service under the Uttar Pradesh Government will be required to produce:

(i) A certificate of conduct and character from the head of the educational institution where he last studied (if he went to such an institution).

(ii) Certificates of character from two persons. The appointing authority will lay down requirements as to kind of persons from whom it desires these certificates.

b) In cases of doubt, the appointing authority may either ask for further references, or may refer the case to the District Magistrate concerned. The District Magistrate may then make further enquiries as he considers necessary.

Note(a) A conviction need not of itself involve the refusal of a certificate of good character. The circumstances of the conviction should be taken into account

and if they involve on moral turpitude or association with crimes of violence or with a movement which has its object to overthrow by violent means of Government as by law now established in free India the mere conviction need not be regarded as disqualification. (Conviction of a person during his childhood should not necessarily operate as a bar to his entering Government service. The entire circumstances in which his conviction was recorded as well as the circumstances in which he is now placed should be taken into consideration. If he has completely reformed himself on attaining the age of understanding and discretion, mere conviction in childhood should not operate as a bar to his entering Government service).

(b) While no person should be considered unfit for appointment solely because of his political opinions, care should be taken not to employ persons who are likely to be disloyal and to abuse the confidence placed in them by virtue of their appointment. Ordinarily, persons who are actively engaged in subversive activities including members of any organization the avowed object of which is to change the existing order of society by violent means should be considered unfit for appointment under Government. Participation in such activities at any time after attaining the age of 21 years and within three years of the date of enquiry should be considered as evidence that the person is still actively engaged in such activities unless in the interval there is positive evidence of change of attitude.

(c) Persons dismissed by the Central Government or by a State Government will also be deemed to be unfit for appointment to any service under this Government.

2(d) In the case of direct recruits to the State Services under the Uttar Pradesh Government includes requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above. The appointing authority shall refer all cases simultaneously to Deputy Inspector General of Police, intelligence and the District Magistrate (of the home district and of the district(s) where the candidate has resided for more than a year within five years of the date of the inquiry) giving full particulars about the candidate. The District Magistrate shall get the reports in respect of the candidates from the Superintendent of Police who will consult District Police Records and records of the Local Intelligence Unit. The District Police or the District Intelligence Unit shall not make any enquiries on the spot, but shall report from their records whether there is anything against the candidate, but if in any specific case the District Magistrate at the instance of the appointing authority ask for an enquiry on the spot the Local Police or the Local Intelligence Units will do so and report the result to him. The District Magistrate shall then reports his own views to the appointing authority. Where the District Police or the Local Intelligence Units report adversely about a candidate the District Magistrate may give the candidate a hearing before sending his report.

(e) In the case of direct recruits (who are lower in rank than that of a State Service Officer) of:

(i) the police (including ministerial staff of Police Officers).

(ii) the Secretariat.

(iii) the staff employed in the government factories,

(iv) power houses and dams.

besides requiring the candidates to submit the certificates mentioned in paragraph 3 (a) above, the appointing authorities shall refer all cases simultaneously to the Deputy Inspector General, C.I.D. and the District Superintendent of Police (of the home district and of the district(s) where the candidate has resided for more than a year within five year of the date of the inquiry) giving full particulars about the candidate. The Superintendents of Police will send his report direct to the appointing authority if there is nothing adverse against the candidate. In cases where the report is unfavourable the Superintendent of Police will forward it to the District Magistrate who will send for the candidate concerned, give him a hearing and then, form his own opinion. All the necessary papers (the Superintendent of Police's report the candidate's statement and the District Magistrate's finding) will there after be sent to the appointing authority.

4. It will be seen that in cases of direct recruit to services other than those mentioned in paragraphs 3 (c) and 3 (d) above, verification shall not be necessary as a matter of routine except in cases of doubt when the procedure mentioned in paragraph 3 (b) shall be followed.

5. In the case of a candidate for services mentioned in paragraphs 3 (c) and 3 (d) above-

(i) if at the time of enquiry the candidate is residing in a locality situated outside Uttar Pradesh or if he has resided in such a locality at any time within five years of the date of enquiry for a period of one year or more it shall be the duty of the deputy Inspector General, C. I. D. to consult also the C. I. D. D. of the State concerned in which the locality is situated before making his verification report.

(ii) if the candidate was residing before partition in area now comprising Pakistan the Deputy Inspector General, C. I. D. shall also make a reference to the Director of Intelligence Bureau, Ministry of Home Affairs, Government of India, in addition to the usual enquires as indicated above.

6. It has also been observed that where the District Magistrates are required to send the attestation forms they sometimes do not sign the forms themselves, Government consider it very desirable that the attestation forms should invariably be signed by the District Magistrates them selves in all such cases."

14. A perusal of the Government Order dated 28.04.1958 would show that the District Magistrate was entrusted with the process of character verification in order to secure a balanced opinion about the suitability of a candidate for government service based on all relevant facts. It was never the employment policy of the State to exclude from consideration for public employment every person against whom a crime had been registered. Of course, a heinous and serious crime involving moral turpitude and some proceeding showing involvement would always be a criterion to exclude a candidate unless subsequent proceedings demonstrate him/her to be utterly innocent and not involved at all. But a host of other offences, trivial or not so trivial, or cases of utter false accusation, where nothing turned out against a person, would have to be gauged by the District Magistrate for the purpose of verifying a candidate's character and

suitability for employment under the State. If this were not the policy of the State, there was no need for an elaborate provision where the Collector, the Superintendent of Police and in certain cases, the CID, have to be involved before a conclusion was reached, if a candidate is suitable for public employment, registration of a crime notwithstanding.

15. This matter came up before the Supreme Court much earlier in the day than **Avtar Singh (supra) in Commissioner of Police and others v. Sandeep Kumar, (2011) 4 SCC 644**. The facts in **Sandeep Kumar** *(supra)* are described thus in report:

"2. The respondent herein, Sandeep Kumar applied for the post of Head Constable (Ministerial) in 1999. In the application form it was printed:

"12(a) Have you ever been arrested, prosecuted, kept under detention or bound down/fined, convicted by a court of law for any offence, debarred/disqualified by any Public Service Commission from appearing at its examination/selection or debarred from any examination, rusticated by any university or any other education authority/institution."

Against that column the respondent wrote: "No".

3. It is alleged that this is a false statement made by the respondent because he and some of his family members were involved in a criminal case being FIR No. 362 under Sections 325/34 IPC. This case was admittedly compromised on 18-1-1998 and the respondent and his family members were acquitted on 18-1-1998.

4. In response to the advertisement issued in January 1999 for filling up of certain posts of Head Constables (Ministerial), the respondent applied on 24-2-1999 but did not mention in his application form that he was involved in the aforesaid criminal case. The respondent qualified in all the tests for selection to the post of temporary Head Constable (Ministerial). On 3-4-2001 he filled the attestation form wherein for the first time he disclosed that he had been involved in a criminal case with his tenant which, later on, had been compromised in 1998 and he had been acquitted.

5. On 2-8-2001 a show-cause notice was issued to him asking the respondent to show cause why his candidature for the post should not be cancelled because he had concealed the fact of his involvement in the aforesaid criminal case and had made a wrong statement in his application form. The respondent submitted his reply on 17-8-2001 and an additional reply but the authorities were not satisfied with the same and on 29-5-2003 cancelled his candidature."

16. Their Lordships of the Supreme Court on the above mentioned facts held:

"8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often be condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor

indiscretions made by young people rather than to brand them as criminals for the rest of their lives.

11. As already observed above, youth often commits indiscretions, which are often condoned.

12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter."

17. Also relevant to the issue under consideration in the present case is the guidance of the Supreme Court in **Ram Kumar v. State of U.P. and others, (2011) 14 SCC 709**. The facts in **Ram Kumar** *(supra)*, as these appear in the report of their Lordships' judgment read:

"2. The facts very briefly are that pursuant to an advertisement issued by the State Government of U.P. on 19-11-2006, the appellant applied for the post of Constable and he submitted an affidavit dated 12-6-2006 to the recruiting authority in the pro forma of verification roll. In the affidavit dated 12-6-2006, he made various statements required for the purpose of recruitment and in Para 4 of the affidavit he stated that no criminal case was registered against him. He was selected and appointed as a male constable and deputed for training.

3. Thereafter, Jaswant Nagar Police Station, District Etawah, submitted a report dated 15-1-2007 stating that Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC was registered against the appellant and thereafter the criminal case was disposed of by the Additional Chief Judicial Magistrate, Etawah on 18-7-2002 and the appellant was acquitted by the court. Along with this report, a copy of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate was also enclosed.

4. The report dated 15-1-2007 of Jaswant Nagar Police Station, District Etawah, was sent to the Senior Superintendent of Police, Ghaziabad. By order dated 8-8-2007, the Senior Superintendent of Police, Ghaziabad, cancelled the order of selection of the appellant on the ground that he had submitted an affidavit stating wrong facts and concealing correct facts and his selection was irregular and illegal.

5. Aggrieved, the appellant filed Writ Petition No. 40674 of 2007 under Article 226 of the Constitution before the Allahabad High Court but the learned Single Judge dismissed the writ petition by his order dated 30-8-2007 [ WP (C) No. 40674 of 2007, order dated 30-8-2007 (All)] . The learned Single Judge held that since the appellant had furnished false information in his affidavit in the pro forma verification roll, his case is squarely covered by the judgment rendered by this Court in Kendriya Vidyalaya Sangathan v. Ram Ratan Yadav [(2003) 3 SCC 437 : 2003 SCC (L&S) 306] and that he was rightly terminated from service without any inquiry. The appellant challenged the order of the learned Single Judge in Special Appeal No. 924 of 2009 but the Division Bench of the High Court did not find any merit in the appeal and dismissed the same

by the impugned order dated 31-8-2009 [ Special Appeal (Defective) No. 924 of 2009, order dated 31-8-2009 (All)]."

18. In **Ram Kumar**, it was held by the Supreme Court:

"9. We have carefully read the Government Order dated 28-4-1958 on the subject "Verification of the character and antecedents of government servants before their first appointment" and it is stated in the government order that the Governor has been pleased to lay down the following instructions in supersession of all the previous orders:

"The rule regarding character of candidate for appointment under the State Government shall continue to be as follows:

The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be the duty of the appointing authority to satisfy itself on this point."

10. It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.

11. In the facts of the present case, we find that though Criminal Case No. 275 of 2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18-7-2002 by the Additional Chief Judicial Magistrate, Etawah.

12. On a reading of the order dated 18-7-2002 of the Additional Chief Judicial Magistrate it would show that the sole witness examined before the court, PW 1, Mr Akhilesh Kumar, had deposed before the court that on 2-12-2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC. On these facts, it was not at all possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable.

13. The order dated 18-7-2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15-1-2007 of Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 8-8-2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the

appellant was illegal and irregular because he did not furnish in his affidavit in the pro forma of verification roll that a criminal case has been registered against him.

14. As has been stated in the instructions in the Government Order dated 28-4-1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment."

19. Of course, now the most comprehensive treatment of the law on the issue is to be found in **Avtar Singh**, which by all means is the locus classicus. In **Avtar Singh**, the following principles have been summarized by the Supreme Court:

38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

20. For all that we have said about the impugned order and the stand taken in the affidavit filed by the Superintendent of Police, we find this case to be one of utter lack of application of mind, apart from other reasons, because the Superintendent of Police has relied upon paragraph No.38.7 of the principles in Avtar Singh to hold the petitioner disentitled to appointment. As a reading of paragraph No.38.7 would show the said paragraph or the principle carried therein, so to speak is applicable to a case of deliberate suppression with regard to multiple pending cases, which a candidate does not disclose. This, by no means, is a case where multiple cases were pending against the petitioner. It is a case where a solitary crime was registered by the Police and did not go an inch beyond the registration, so far as the petitioner is concerned. Now to invoke the principle in paragraph No.38.7 and act on its basis to cancel the petitioner's candidature or selection, is a glaring case of non-application. Of course, paragraph No.38.8 of the principles in Avtar Singh may have some relevance because the principle there postulates that even if a criminal case pending against a candidate was not known to him at the time he filled up his application form, it may

still have adverse impact and the Appointing Authority would take a decision after considering the seriousness of the crime.

21. In the present case, while technically the principle in paragraph No.38.8 might have relevance as remarked, this Court is of clear opinion that on facts, it would not apply. The reason is that there was absolutely not a shred of evidence ever forthcoming against the petitioner in the crime at any stage of the matter. If there were some material against the petitioner, with credibility attached to it, the petitioner would have been charge-sheeted like the other four accused nominated alongside him. The fact that the charge-sheeted accused were acquitted by the Court shows that the prosecution was not able to establish its case at all against men, who were accused alongside the petitioner in the crime. But, the fact that the Police could not lay its hands on any evidence relating to the petitioner's complicity in the crime, even as much as to warrant his joining investigation or seeking bail, as a person wanted in the crime, inevitably shows that the petitioner's nomination was nothing more than a false script on a piece of paper. Merely, because someone has chosen to falsely nominate a person in a crime, about which the Police too on investigation do not find any evidence, cannot lead to the conclusion that non-disclosure of the offence must invite cancellation of candidature. Indeed, a conclusion of this kind, given the nature of the offence, the proceedings during investigation, the non-complicity for the petitioner found by the Police and the acquittal of the co-accused, all read together, would be a disproportionate measure to take on the respondents' part. In fact, on this state of things for the S.P. to think that this is a case where the petitioner's candidature ought be cancelled, in our considered opinion, is a perverse conclusion.

22. In the result, this writ petition succeeds and is allowed. The impugned order dated 08.07.2024 passed by the Superintendent of Police, Mainpuri is hereby quashed. A mandamus is issued to the Superintendent of Police, Mainpuri, ordering him to consider the petitioner's case for appointment as a Constable, without reference to the case once registered against him and pass necessary orders, granting him notional seniority with his batch, within a period of six weeks of receipt of a copy of this judgment.

23. Costs shall be easy.

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**(2024) 10 ILRA 902**
**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 25.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Application U/S 482 Nos. 9566 of 2024

**Kaisar Jaha ...Applicant**
**Versus**
**The S.P.,Distt. Sultanpur & Ors. ...Respondents**

**Counsel for the Applicant:**
Manoj Kumar Nishad

**Counsel for the Respondents:**
G.A.

**A. Criminal Law – Maintainability – Jurisdiction – Bharatiya Nagrik Suraksha Sanhita (BNSS) – Section 175(3) - The inherent power can be invoked to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice** -

When a statutory remedy of filing a revision before this Court itself is available to the applicant which revision will also be placed before an Hon'ble Single Judge Bench of this Court, although the application u/s 528 of BNSS would be maintainable, it would not be proper for this Court to exercise it discretion of invoking its inherent powers when the petitioner has got a statutory remedy available u/s 438 BNSS, which remedy lies before this Court itself. Although the application u/s 528 BNSS would be maintainable, it would not be entertainable in view of the peculiar facts and circumstances of the case. (Para 12, 15)

The order under challenge has been passed by a Sessions Court and, therefore, the revision would lie before this Court itself. The revision as well the application u/s 528 BNSS, both are assigned to Single Judge Benches of this Court. The scope of enquiry and interference in both the proceedings would also be the same. Therefore, the functionality of an application u/s 528 BNSS and a revision u/s 438 BNSS would be the same. The only difference in the two proceedings would be that the application u/s 528 BNSS has been placed today before Judge 'A' and the revision u/s 438 BNSS would be placed on some other day before Judge 'B'. (Para 13)

Accordingly, the application is dismissed leaving it open to the applicant to avail the statutory remedy u/s 438 BNSS available to her.

**Application dismissed.** (E-4)

**Precedent followed:**

1. Vipin Sahaiand & anr. Vs Central Bureau of Investigation, 2024 SCC OnLine SC 511 (Para 3)

2. Prabhu Chawla, Vs St. of Raj.& anr., (2016) 16 SCC 30 (Para 4)

3. Mohit Vs St. of U.P., (2013) 7 SCC 789 (Para 8)

4. U.O.I. Vs Cipla Ltd., (2017) 5 SCC 262 (Para 14)

**Present petition filed u/s 528, BNSS, has challenged the validity of an order dated 28.08.2024 passed by learned Special Judge, P.O.C.S.O. Act/Additional Sessions Judge in Criminal Misc. Case No.360 of 2024 whereby an application u/s 175(3) of BNSS has been rejected by the trial Court.**

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

1. Heard Sri Abhyudaya Mishra, learned counsel for the petitioner and Sri Alok Kumar Tiwari, the learned AGA for the State.

2. By means of the instant writ petition filed under 528 of the Bharatiya Nagrik Suraksha Sanhita (hereinafter referred to as BNSS), the petitioner has challenged the validity of an order dated 28.08.2024 passed by learned Special Judge, P.O.C.S.O. Act/Additional Sessions Judge in Criminal Misc. Case No.360 of 2024 whereby an application under Section 175(3) of BNSS [comparable to Section 156 (3) of Cr.P.C.] has been rejected by the trial Court.

3. Sri Alok Kumar Tiwari, the learned A.G.A. has raised a preliminary objection that the petitioner has got a statutory remedy of filing a revision against the aforesaid order and, therefore, the inherent powers of this Court cannot be invoked by the applicant. He has relied upon a decision of the Hon'ble Supreme Court in the case of **Vipin Sahni & Anr. v. Central Bureau of Investigation**; 2024 SCC OnLine SC 511 wherein the Hon'ble Supreme Court has held that the where a specific remedy of filing a revision was available, a petition under Section 482 Cr.P.C. could not be filed.

4. Replying to the aforesaid preliminary objection of the learned A.G.A., Sri Abhyudaya Mishra, learned

counsel for the petitioner has relied upon a judgment of the Hon'ble Supreme Court in the case of **Prabhu Chawla v. State of Rajasthan & Anr**.; (2016) 16 SCC 30, wherein it has been held that the availability of statutory remedy of revision is not an absolute bar against maintainability of an application under Section 482 Cr.P.C.

5. Section 528 of BNSS provides as follows: -

> *"528. Nothing in this Sanhita shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Sanhita, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

6. The aforesaid provision is in pari materia to the provision contained in Section 482 Cr.P.C., which was as follows: -

> *"482. Saving of inherent powers of High Court.— Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

7. Therefore, the law as explained through various precedents regarding scope of exercise of the inherent power under Section 482 would also apply to Section 528 BNSS.

8. **Vipin Sahni** (Supra) relies upon an earlier decision in the case of **Mohit versus State of U.P.:** (2013) 7 SCC 789, wherein it was held that: -

> *"28. So far as the inherent power of the High Court as contained in Section 482 CrPC is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that the inherent power of the Court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged."*

9. However, in **Prabhu Chawla v. State of Rajasthan & Anr.**; (2016) 16 SCC 30, a three Judge Bench of the Hon'ble Supreme Court overruled the decision in **Mohit** (Supra) by stating that *"the Division Bench, particularly in para 28, in Mohit in respect of inherent power of the High Court in Section 482 CrPC does not state the law correctly. We record our respectful disagreement."* The Hon'ble Supreme Court further held that: -

> *"6. ... A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J.*

> *"abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more". (Raj Kapoor v. State, (1980) 1 SCC 43, para 10)*
>
> *We venture to add a further reason in support. Since Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable."*

10. The two Judge Bench of the Hon'ble Supreme Court which decided **Vipin Sahni** (Supra) after relying upon the earlier two Judge Bench decision in the case of **Mohit(**Supra), did not take note of the three Judge Bench decision in the case of **Prabhu Chawla** (Supra), which will prevail over the two Judge Bench decision. Thus the law as it exists now is that there are no absolute restrictions on the inherent powers of this Court and availability of a remedy of filing a revision would not create an absolute bar against the inherent powers of this Court being invoked. However, the inherent power can be invoked only *to make such orders as may be necessary to give effect to any order under this Sanhita, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*

11. The learned Counsel for the petitioner agrees that the petitioner has the option to file a revision under Section 438 of BNSS, but he insists that when the petitioner has got two remedies available, he has the discretion to choose any one of the two remedies available to him.

12. Although availability of a statutory remedy under Section 438 of BNSS may not be an absolute bar against exercise of the inherent powers of this Court, it is certainly a factor which has to be taken into consideration by this Court to ascertain as to whether it is necessary to exercise the inherent power of this Court. The inherents power can be invoked to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

13. The order under challenge has been passed by a Sessions Court and, therefore, the revision would lie before this Court itself. The revision as well the application under Section 528 BNSS, both are assigned to Single Judge Benches of this Court. The scope of enquiry and interference in both the proceedings would also be the same. Therefore, the functionality of an application under Section 528 BNSS and a revision under Section 438 BNSS would be the same. The only difference in the two proceedings would be that the application under Section 528 BNSS has been placed today before Judge 'A' and the revision under Section 438 BNSS would be placed on some other day before Judge 'B'.

14. In **Union of India v. Cipla Ltd**., (2017) 5 SCC 262, the Hon'ble Supreme Court held that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not. The facts stated above clearly establish that it is a typical example

of forum shopping, which practice has always been deprecated by the Courts.

15. Having considered the aforesaid facts and circumstances of the case, this Court is of the considered view that when a statutory remedy of filing a revision before this Court itself is available to the applicant which revision will also be placed before an Hon'ble Single Judge Bench of this Court, although the application under Section 528 of BNSS would be maintainable, it would not be proper for this Court to exercise it discretion of invoking its inherent powers when the petitioner has got a statutory remedy available under Section 438 BNSS, which remedy lies before this Court itself. For the aforesaid reasons, this Court finds that although the application under Section 528 BNSS would be maintainable, it would not be entertainable in view of the peculiar facts and circumstances of the case.

16. Accordingly, the application is ***dismissed*** leaving it open to the applicant to avail the statutory remedy under Section 438 BNSS available to her.

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**(2024) 10 ILRA 906**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 20 of 2023

**Shashi Pal ...Appellant**
**Versus**
**Sachin Kumar Pal ...Respondent**

**Counsel for the Appellant:**
Anup Kumar Mishra

**Counsel for the Respondent:**
Manjeet Singh

**Civil Law- Appeal under Section 19 (1) of the Family Court Act, 1984-Hindu Adoptions and Maintenance Act, 1956 — Section 18 — Maintainability of claim for maintenance under Section 18 despite parallel proceedings under Section 125 Cr.P.C. — Held, proceedings under Section 125 Cr.P.C. are summary in nature and do not bar a separate suit under Section 18 of the 1956 Act — Claim under Section 18 maintainable when prior maintenance under Cr.P.C. has been disclosed — Directions in *Rajnesh v. Neha*, (2021) 2 SCC 324, followed.**

**Code of Criminal Procedure, 1973 — Section 125 — Proceedings under Section 125 Cr.P.C. do not preclude a subsequent claim for maintenance under personal law statutes — Principles of adjustment and set-off to apply to avoid overlapping maintenance orders- Maintenance must be realistic and meet basic sustenance- Appeal partly allowed. (Paras 12, 16, 17, and 21)**

**HELD:**
Having regard to the rival submissions of the learned Counsel for the parties and going through the record available before this Court, the point of consideration before us is twofold, (I) whether suit filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act, 1956 is maintainable especially in view of the order of maintenance granted under Section 125 of the Cr.P.C.?; and (ii) whether quantum of maintenance granted by the Family Court vide impugned order is adequate, if no, then what reliefs. (Para 12)

Later on, the Apex Court in its celebrated judgment in Rajnesh v. Neha & anr. : (2021) 2 SCC 324 has laid down comprehensive guidelines pertaining to overlapping jurisdiction among courts when concurrent remedies for grant of maintenance are available under the Special Marriage Act, 1954, Section 125 Cr.P.C., the Protection of Women from Domestic Violence Act, 2005, Hindu Marriage Act, 1955 and Hindu Adoptions and Maintenance Act,

1956, and Criteria for determining quantum of maintenance, date from which maintenance is to be awarded, enforcement of orders of maintenance including fixing payment of interim maintenance. (Para 16)

From perusal of the record of the Family Court, we find that the appellant has filed additional affidavit dated 17.10.2022, wherein at para-6, the factum of granting maintenance under Section 125 Cr.P.C. has been narrated. Therefore, there is full disclosure of the maintenance having been awarded under section 125 of the Cr. P.C. Thus, in view of the Rajneesh case ( mentioned supra), we are of the view that the suit filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act, 1956 was very much maintainable and the Family Court has rightly entertained the suit filed by the appellant. Point no.1 is answered in affirmative in favour of the appellant. (Para 17)

This Court finds that even if this meagre amount of Rs. 1000/-, when added to the maintenance amount as granted under Section 125 Cr.P.C to the appellant, the said amount cannot be termed as adequate or commensurate to maintain a living in today's society. The Court should not forget that any maintenance awarded should not be merely ornamental or defeat the very purpose for which it has been provided for under the statute. The learned Family Court was expected to be more realistic and pragmatic in awarding the maintenance amount and should not be oblivious to the daily basic needs required for sustaining in today's world, keeping in mind that the sheer object of granting maintenance under any law is to afford the weaker party with sufficient means to sustain herself/ himself. (Para 21)

**Appeal partly allowed.** (E-14)

**List of Cases cited:**

1. Nagendrappa Natikar Vs Neelamma, (2014) 14 SCC 452

2. Rajnesh Vs Neha & anr., (2021) 2 SCC 324

3. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Anup Kumar Mishra, learned Counsel representing the appellant and Shri Manjeet Singh, learned Counsel representing the respondent.

(2) This appeal under Section 19 (1) of the Family Court Act, 1984 has been filed by the wife/appellant, **Shashi Pal**, seeking enhancement of the quantum of maintenance *inter alia* on the grounds that merely Rs.1000/- has been granted by the Additional Principal Judge, Family Court, Pratapgarh (hereinafter referred to as the '**Family Court**') vide order dated 16.11.2022 in Original Suit No. 737 of 2017 filed by her under Section 18 of the Hindu Adoptions and Maintenance Act, 1956.

(3) The factual matrix of the case at hand, which has been highlighted by the appellant, is that marriage of appellant and respondent was solemnized on 09.05.2006 in accordance with Hindu rites and rituals. In the said marriage, appellant's father gave dowry including household goods as per his capacity to the respondent. Out of their wedlock, one child, namely, Sauryapal, was born on 03.08.2008. In the year 2008, the father of respondent/husband, who was working in the railway department, died, as a consequence of which, the respondent/ husband got appointment in the railway department on compassionate ground in the year 2008 itself. After getting job in the railway department, the respondent/husband became careless towards his marital life and on 26.06.2012, he solemnized a second marriage illegally with one Nilam Pal son of Gyan Prakash Pal, residence of Naya Mal Godam Road, P.S. Kotwali Nagar, district Pratapgarh and eventually the appellant was thrown out of her matrimonial home in September, 2017.

(4) Based on the aforesaid facts/allegations, the wife/appellant instituted Original Suit No.737 of 2017 under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 on 27.10.2017 before the Family Court, claiming half of the appellant's salary towards maintenance. In the said suit, notice was issued to the defendant/husband. In response thereof, the defendant/husband filed his objection, denying all the allegations made in the plaint. It has been stated by the defendant/husband that plaintiff/appellant herself left him (defendant/husband) and the children on 10.03.2005 and has started living at her father's residence and since then, marital relationship has not been established between them. It has been stated in para-21 and 22 of the objection that it was only after husband's sincere persuasion, the appellant got ready to dissolve the marriage subject to payment of Rs.15,00,000/- in one lump sum and also returning the *stridhan* to her. Thereafter, the husband/ respondent has returned *stridhan* to the appellant/wife and also handed over a Demand Draft No. 002398 amounting to Rs.5,00,000/- to the wife/appellant on the date of institution of a suit under Section 13-B of the Hindu Marriage Act, 1955, which was filed seeking Divorce on mutual consent, however, subsequently, the said suit filed under Section 13-B of the Hindu Marriage Act, 1955 was dismissed due to non-presence and non-participation of the wife/appellant.

(5) The learned Counsel has drawn attention of this court towards the factum of the wife/appellant having instituted Case No. 240 of 2020 under Section 125 Cr.P.C. seeking maintenance. It has also been stated in para-27 of the objection by the husband/ respondent that the only child born out of the wedlock is in his custody and he is spending about Rs.10,000/- per month on his education, health and food. In para-28, it has been stated that the suit instituted by the plaintiff/appellant is contrary to the object of Section 18 of the Hindu Adoptions and Maintenance Act, 1956. Furthermore, as the plaintiff/appellant herself has instituted a suit under Section 125 Cr.P.C. before the Court seeking maintenance, the present suit filed under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 ought to had been held non-maintainable and rejected.

(6) On the contrary, in support of her case, the wife/appellant (P.W.1) has filed her oral depositions on affidavit (marked as 17Ka2) and also filed her brother's depositions (P.W.2-Pramod Kumar) on affidavit (marked as 18Ka 2) before the Family Court. Apart from it, wife/appellant has also filed pay-slip of her husband/respondent (marked as 14Ga/2) along with the list of document (marked as 14Ga1) before the Family Court.

(7) The record of the learned Family Court reveals that after filing of objection to the plaint, the husband/responded did not respond and as such, vide order dated 07.12.2021, the Family Court proceeded ex parte against the husband/defendant/ respondent.

(8) The Family Court, on appraising the depositions of appellant P.W.1-Shashipal (appellant) and her brother P.W.2-Pramod and also going through the income of the defendant/husband and also the fact that in a proceeding under Section 125 Cr.P.C., Rs.5000/- per month was ordered to be paid to the appellant towards maintenance, partly allowed the instant suit ex parte vide order dated 16.11.2022 and

directed the defendant/ husband/respondent to pay Rs.1000/- per month from the date of institution of the suit i.e. w.e.f. 27.10.2017 to his wife/appellant towards maintenance.

(9) Not satisfied with the aforesaid quantum of maintenance granted vide order dated 16.11.2022, the wife/appellant has filed the instant appeal.

(10) Learned Counsel representing the wife/appellant has argued that the Family Court had passed the impugned order in a very cursory manner without rightfully appreciating the conduct of the respondent during the proceedings before the Family Court. He submitted that the version of the appellant-wife, who had stepped into the witness box, as also the version of the other witnesses examined by her had remained unchallenged, as the Family Court had proceeded ex parte against the respondent because he did not appear before the Family Court and, therefore, there was no reason for the Family Court not to believe the version of the appellant-wife which was deposed by her on oath. However, the Family Court, without there being any evidence on record adduced by the respondent, has only granted a meagre amount of Rs.1000/- per month as maintenance to the appellant by means of the impugned order.

(11) The learned counsel for the respondent, on the other hand, besides reiterating the objections already taken by the husband before the learned Family Court, has also argued that the appellant had made various complaints against the respondent relating to his second marriage before his employer-Northern Railway Lucknow, which resulted in instituting an inquiry against him, leading to a punishment under Rule 21 of the Railway Services (Conduct) Rules, 1966, by virtue of which the payment of the respondent has been reduced from basic pay of Rs.32900/- to Rs.19900/-. The learned counsel, in this regard has drawn the attention of this court to the punishment order dated 23.09.2020, which is Annexure No.2 to the objection. According to the learned counsel, after the aforesaid punishment order, the respondent is now getting total salary of Rs.23078/- after deduction of Rs.11644/-. He submits that the appellant's son is studying in 10th class and his monthly fees is Rs.2000/- and Tuition Fee is also Rs.2000/- per month and daughter of the respondent is studying in KG Nursery and her monthly fee is Rs.1100/- per month and her vehicle charges is also Rs.1000/- per month and as such, total expenses of Rs.10,000/- per month is being spent towards the education of the children of the respondent. Apart from it, according to learned Counsel, the respondent's mother is aged about 64 years, who due to her old age frequently falls ill and as a huge amount also goes towards the medical expenses of his mother and as a result of which the respondent is unable to bear the expenses from his total salary of Rs.23078/- and as such has on several occasion made a request to the department to not deduct the Insurance amount. Acting upon his request, from the month of June, 2024, the department started to pay the net amount of Rs.34989/- per month. In this backdrop, he prays that the salary being earned by him is not even sufficient to meet his own expenses as stated herein and thus submitted that the amount of maintenance of the appellant which have been passed by the Family Court is adequate and proper.

(12) Having regard to the rival submissions of the learned Counsel for the parties and going through the record

available before this Court, the point of consideration before us is twofold, (I) whether suit filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act, 1956 is maintainable especially in view of the order of maintenance granted under Section 125 of the Cr.P.C.?; and (ii) whether quantum of maintenance granted by the Family Court vide impugned order is adequate, if no, then what reliefs ?

(13) As far as point no. (I) *whether suit filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act, 1956 is maintainable specially in view of the order of maintenance granted under Section 125 of the Cr.P.C.*?, is concerned, we find from perusal of the impugned order that this point has not been considered by the Family Court while passing the impugned order even though specific pleadings in this regard at paras-28 and 29 of the objection, have been made by the husband/respondent. But since specific plea in this regard has been made by the respondent, therefore, we deem it apt to decide this issue in the present Appeal.

(14) It is not in dispute that the appellant has sought maintenance by initiating two separate proceedings i.e. (i) under Section 125 Cr.P.C.; and (ii) under Section 18 of the Hindu Adoption and Maintenance Act, 1956. In the proceedings under Section 125 Cr.P.C., the respondent/husband was directed to pay Rs.5000/- per month to the wife/appellant vide order dated 21.05.2022. After passing this order of maintenance, the Family Court, on taking into consideration the quantum of maintenance granted in the proceedings under Section 125 Cr.P.C., has also granted maintenance of Rs.1000/- per month in the proceedings under Section 18 of the Act, 1956.

(15) Hon'ble the Supreme Court in the case of **Nagendrappa Natikar Vs. Neelamma** : (2014) 14 SCC 452 has held that proceedings under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18 (2) of the Hindu Adoption and Maintenance Act, 1956.

(16) Later on, the Apex Court in its celebrated judgment in **Rajnesh v. Neha and Another** : (2021) 2 SCC 324 has laid down comprehensive guidelines pertaining to overlapping jurisdiction among courts when concurrent remedies for grant of maintenance are available under the Special Marriage Act, 1954, Section 125 Cr.P.C., the Protection of Women from Domestic Violence Act, 2005, Hindu Marriage Act, 1955 and Hindu Adoptions and Maintenance Act, 1956, and Criteria for determining quantum of maintenance, date from which maintenance is to be awarded, enforcement of orders of maintenance including fixing payment of interim maintenance. The relevant directions contained in **Rajnesh (supra)** reads as under :-

> **"Directions on overlapping jurisdictions**
>
> It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the D.V. Act and Section 125 of the Cr.P.C.,

or under H.M.A. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant.

**To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, we direct that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding."**

(17) From perusal of the record of the Family Court, we find that the appellant has filed additional affidavit dated 17.10.2022, wherein at para-6, the factum of granting maintenance under Section 125 Cr.P.C. has been narrated. Therefore, there is full disclosure of the maintenance having been awarded under section 125 of the Cr. P.C. Thus, in view of the Rajneesh case ( mentioned supra), we are of the view that the suit filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act, 1956 was very much maintainable and the Family Court has rightly entertained the suit filed by the appellant. Point no.1 is answered in affirmative in favour of the appellant.

(18) Now, we come to the second point i.e. whether quantum of maintenance granted by the Family Court vide impugned order is adequate, if no, then what reliefs ?

(19) Indeed, it is the sacrosanct duty of the husband to provide financial support to the wife and to the minor children. The husband is required to earn money even by physical labour, if he is an able-bodied, and can not avoid his obligation, except on the legally permissible grounds mentioned in the statute. In **Chaturbhuj vs, Sita Bai** : (2008) 2 SCC 316, the Apex Court has held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife, by providing her food, clothing, and shelter by a speedy remedy.

(20) In the instant case, the Family Court had not only over-looked and disregarded the aforesaid settled legal position but has proceeded with the proceedings in absolutely pervert manner. The right of the respondent to cross-examine the witnesses of the appellant-

plaintiff was closed as he had failed to appear before the Family Court. The allegations made by the appellant-wife in her evidence before the Court had remained unchallenged. She had clearly stated as to how she was harassed and subjected to cruelty by the respondent, which had constrained her to leave the matrimonial home, and as to how the respondent had failed and neglected to maintain her and illegally entered into a second marriage and is living now with the second wife and his children. She had also stated that her father is no more and she is living with her old aged mother, who has also having no source of income.

(21) This Court finds that even if this meagre amount of Rs. 1000/-, when added to the maintenance amount as granted under Section 125 Cr.P.C to the appellant, the said amount cannot be termed as adequate or commensurate to maintain a living in today's society. The Court should not forget that any maintenance awarded should not be merely ornamental or defeat the very purpose for which it has been provided for under the statute. The learned Family Court was expected to be more realistic and pragmatic in awarding the maintenance amount and should not be oblivious to the daily basic needs required for sustaining in today's world, keeping in mind that the sheer object of granting maintenance under any law is to afford the weaker party with sufficient means to sustain herself/himself.

(22) This Court would have remanded the matter back to the Family Court for considering it afresh, however considering the fact that the matter has been pending before this Court since 2023, and remanding would further delay the proceedings, this Court deems it proper to pass this order.

(23) As observed herein above, the fulcrum of the argument of respondent rests on the hinge that he gets a net amount of Rs.34989/- from salary w.e.f. June, 2024 as is evident from salary slip of respondent-husband enclosed as Annexure No.5 to the objection, out of which Rs.10,000/- per month is being spent on the children and, therefore, according to him, the salary is not sufficient to enhance the amount of maintenance of the appellant which has been passed by the Family Court. However, this plea is not acceptable in the facts of the case. Even after taking into consideration the photocopies of the documents filed in respect of the expenses incurred by the respondent regarding education of the daughter, the monthly tuition fee is only Rs.1100/- as per the said document. The respondent being an able bodied man, he is obliged to earn by legitimate means and maintain his wife.

(24) Having regard to the evidence of the appellant-wife before the Family Court and having regard to the other evidence on record, this Court has no hesitation in holding that though the respondent had sufficient source of income and was able-bodied, had failed and neglected to maintain the appellant.

(25) Considering the totality of facts and circumstances, appellant shall pay Rs.1000/- per month as maintenance from the date of filing of the suit till May, 2024 and keeping in view that the total salary of the respondent/husband enhanced to about Rs.34,989/- per month w.e.f. June, 2024, we deem it proper to enhance the maintenance amount from Rs. 1000/- awarded by the learned Family Court to Rs.4000/- per month w.e.f. June, 2024 to the appellant-wife, which shall be in addition to the maintenance allowance of

Rs. 5,000/- granted by the trial Court under Section 125 Cr.P.C. Point No.2 is decided accordingly.

(26) In view of the aforesaid, it is directed that the respondent/ husband shall pay maintenance amount of Rs. Rs. 1000/- per month from the date of filing of the suit till May, 2024 and shall pay Rs. 4000/- per month to the appellant-wife w.e.f. June, 2024. The entire amount of arrears shall be deposited by the respondent in the Family Court within eight weeks from today, after adjusting the amount, if any, already paid or deposited by him.

(27) The impugned order dated 16.11.2022 is modified to the aforesaid extent.

(28) The appeal stands **allowed in part** accordingly.

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**(2024) 10 ILRA 913**
**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

First Appeal No. 174 of 2023

**Pawan Kumar Pandey ...Appellant**
**Versus**
**Sudha ...Respondent**

**Counsel for the Appellant:**
Bhavini Upadhyay, Pankaj Kumar Tripathi, Sandhya Dubey

**Counsel for the Respondent:**
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**Civil Law- Appeal under Section 19 (1) of Family Courts Act, 1984 read with Section 28 of Hindu Marriage Act, 1955 and Section 96 of the Code of Civil Procedure, 1908- against dismisaal Hindu Marriage Act, 1955 — Section 13(1) (iii) — Divorce — Cruelty and desertion — Continuous separation for over a decade — No physical cohabitation — Wife's failure to contest proceedings despite service — Held, prolonged separation, coupled with non-performance of marital obligations and absence of opposition to appeal, amounts to mental cruelty — Matrimonial bond ruptured beyond repair — Family Court's refusal to grant divorce reversed in part — Judgment of Family Court partly set aside- Decree of divorce granted.**

**H.M. Act, 1955 — Section 13(1)(iii) — Unsoundness of mind — Schizophrenia — Allegation of mental disorder not sufficiently proved — Mere diagnosis without cogent medical evidence of severity and functional incapacity insufficient to dissolve marriage — Law requires proof of degree and intensity of mental disorder — Family Court's finding upheld- Appeal allowed. (Para 8, 10, 13, 17, and 18)**

**HELD:**
In the present case, the appellant is working in Uttar Pradesh Fire Department. He got married to the respondent on 08.06.2003. Apparently, both the parties belong to reputed families. The respondent/wife has lodged F.I.R. against the plaintiff/appellant and his family members. In cross examination, D.W.1/respondent-wife herself has St.d that after marriage, parties cohabitated only for a brief period and that she has been residing separately since 2012. Now, a period of more than a decade has elapsed since the parties started living separately. (Para 8)

Moreso, the respondent is not contesting the appeal in spite of service on notice having been issued by this Court. She has not come forward to oppose the pleas of the appellant. This shows her disinclination to live with the appellant in spite of the stand taken by him. Thus, the feeling of deep anguish, disappointment, frustration of the appellant caused by the conduct of respondent for a long time may also lead to mental cruelty and the long period of

continuous separation i.e. for more than a decade establishes that the matrimonial bond is beyond repair. The marriage between the parties becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such a situation, it may also lead to mental cruelty. In such circumstances, this Court is of the view that the matrimonial bond had been ruptured beyond repair because of the continuous mental cruelty caused by the respondent/wife. (Para 10)

In view of the aforesaid facts, we are of the considered view that the facts of the present case sufficiently points towards the willful desertion by the respondent/wife without any plausible reasons, which are sufficient for grant of a decree of divorce in favour of the plaintiff-appellant. The Family Court has erred in not considering the plaintiff's suit to the aforesaid aspect of the matter. Thus, point nos. 1 and 2 are decided in favour of the appellant. (Para 13)

In view of the above pronouncement, it appears that the ground of a spouse suffering from schizophrenia, by itself is not sufficient for grant of a decree of divorce under Section 13(1) (iii) of H.M. Act as it may involve various degree of mental illness. The law provides that a spouse in order to prove a ground of divorce on the ground of mental illness, ought to prove that the spouse is suffering from a serious case of schizophrenia which must also be supported by medical reports and proved by cogent evidence before Court that disease is of such a kind and degree that husband cannot reasonably be expected to live with wife. (Para 17)

Section 13 (1) (iii) of H.M. Act does not make mere existence of a mental disorder of any degree sufficient in law to justify dissolution of a marriage. The contest in which the ideas of unsoundness of mind and mental disorder occur in section as ground for dissolution of a marriage, require assessment of degree of mental disorder and its degree must be such that spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for grant of decree. The medical concern against too readily reducing a human being into a functional nonentity and as a negative unit in family or society, is law's concern also, and is reflected, at least partially, in the requirements of section 13 (1)(iii) of H.M. Act. The personality disintegration that characterizes schizophrenia may be of varying degrees and that not all schizophrenics are characterized by same intensity of disease. The burden of proof of existence of requisite degree of mental disorder is on the spouse who bases his or her claim on such a medical condition. (Para 18)

**Appeal allowed.** (E-14)

**List of Cases cited:**

1. Rakesh Raman Vs Kavita : 2023 SCC OnLine SC 497

2. Debananda Tamuli Vs Kakumoni Kataky: (2022) 5 SCC 459

3. Kollam Chandra Sekhar Vs Kollam Padma Latha : (2014) 1 SCC 225

4. Ram Narain Gupta Vs Smt. Rameshwari Gupta : (1988) 4 SCC 247

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Office has reported sufficiency of service of notice on sole respondent vide report dated 26.09.2023, but none appears on her behalf before this Court to oppose the appeal, hence the appeal was heard ex parte on 20.09.2024.

(2) Heard Ms. Bhavini Upadhyay, learned Counsel representing the appellant-husband and perused the impugned judgment as well trial Court's record.

(3) By means of the present appeal under Section 19 (1) of Family Courts Act, 1984 read with Section 28 of Hindu Marriage Act, 1955 and Section 96 of the Code of Civil Procedure, 1908, appellant/husband assails judgment and

decree dated 29.04.2023 passed by Principal Judge, Family Court-II, Pratapgarh (hereinafter referred to as 'Family Court') in Suit No. 787 of 2019 : Pawan Kumar Pandey Vs. Smt. Sudha, whereby learned Family Court has dismissed the said suit filed by the appellant/husband for grant of decree of divorce under Section 13 of the Hindu Marriage Act, 1955.

(4) At the very outset, it is essential to advert to the brief factual matrix to provide context to the manner in which the present proceedings have arisen before this Court.

A) Appellant and respondent got married on 08.06.2003 in accordance with Hindu Rites and Customs. The respondent-wife came to her martial home and kept performing her duties for some time. However, subsequently, the appellant/husband filed divorce suit, bearing No.787 of 2019, on 11.07.2011 under Section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as ***'H. M. Act'***) on the allegation that after marriage, his wife came to the marital home thrice and during this period, her mental condition was not good as his wife was suffering from Schizophrenia, which disease he came to know after marriage and before marriage, his father-in-law never told him about her illness. It was pleaded that the disease of Schizophrenia is hereditary and whatever children his wife will bear, will suffer from this disease and also due to this disease, her fertility has become zero due to which the husband's lineage will end. The husband further pleaded that he made constant efforts for his wife's treatment but the doctors told him that the disease is incurable. It has also been pleaded by the husband that in a state of mental illness, the mental condition of his wife was unnatural like she gets up and goes anywhere without informing anyone, loses sense of wearing clothes and at night when the family members are asleep, she leaves the house alone. In this way, according to the plaintiff, an unpleasant incident could occur at any time. It has been stated by the husband that his wife is being treated by a psychiatrist at Allahabad for a long time, but till now there is no improvement and there is no possibility of improvement either. Husband has further stated in plaint that lastly in June, 2011, the plaintiff took medical advice and on medical advice, he became fully convinced that mental disease of wife is continuous and incurable and of such a kind and to such an extent that husband cannot reasonably accept to live with wife and as such, he filed a suit for divorce on the ground of desertion, cruelty and mental disorder of wife under Section 13 of the H. M. Act., praying to grant him decree of divorce.

B) The respondent/wife appeared before the learned Family Court and denied allegations of mental disorder. She pleaded in written statement that after marriage, she went to her marital home and performed her marital

duties but her husband and his family members started torturing/harassing her in various ways to get more dowry, due to which she became stressed. She stated that she never suffered from any type of mental illness before or after marriage rather she tolerated the mental harassment by her husband and his family members. It was also pleaded in the written statement by the wife that her husband and his family members took all her jewellery and stridhan and while beating her, threw her out of the marital home and her husband is planning to get re-married, hence the wife prayed for dismissal of the husband's petition seeking divorce.

C) On the basis of pleadings of parties, the Family Court has framed the following issues :-

1. क्या विपक्षी श्रीमती सुधा बिना किसी युक्ति–युक्त कारण के अपने पति/याची पवन कुमार से अलग रह रही है ?

2. क्या विपक्षी श्रीमती सुधा द्वारा अपने पति/याची पवन कुमार के साथ क्रूरता का आचरण किया जा रहा है जिसके आधार पर याची पवन कुमार, विपक्षी श्रीमती सुधा से वैवाहिक विच्छेद की डिक्री प्राप्त करने का अधिकारी है ?

3. अन्य उप ाम यदि कोई है ?

D) In addition to the aforesaid issues, the Family Court, keeping in mind the fact that the husband has presented the plaint for decree of divorce against wife on the basis of her mental illness called Schizophrenia as per the provisions of Section 13 (1) (iii) of the H.M. Act, framed following additional issue for consideration :-

1. क्या याची दावे में वर्णित कारणों पर विपक्षी की मानसिक अक्षमता के आधार पर धारा 13 (1) (iii) के अंतर्गत विवाह विच्छेदन की डिक्री प्राप्त करने का अधिकारी है ?

E) Both the parties led evidence before the Family Court on the issues framed. The husband examined himself as P.W.1 by filing his affidavit as his examination-in-chief, wherein he verbatim reiterated the averments made in his plaint. In his cross-examination, he stated that his marriage with respondent was solemnized on 08.06.2003 according to Hindu rituals and 'Saptapadi' ceremony. He admittedly stated that neither his father nor he went to see the bride before marriage nor did he visit the bride alone. He was confronted with his statement during cross-examination in a maintenance case filed by the wife, wherein he stated that he had met the respondent before marriage and they had discussed their relationship and the same has not been rebutted by him. He further stated that he has been working with the Uttar Pradesh Fire Department since three years prior to the marriage. His first posting was in the Sitapur district. After their wedding, his wife came to his house and stayed with him for a week, but he did not remember how many days of leave he took at that time. He also stated that he went along with his wife for her treatment at Lucknow but he

returned back from there at the instance of his father-in-law as his father-in-law told him that they would take her to Allahabad for treatment because she was already being treated there. He also stated that he did not consult any doctor for his wife's treatment, however, at the time of her marriage, she brought treatment documents indicating she had a mental illness. He has submitted a certificate regarding the illness of his wife in the case, stating that Dr. Renu Verma from Pratapgarh had diagnosed her as mentally ill. P.W.1 has also stated that in this case, he had entered into a settlement at the mediation center of trial Court, however, the settlement did not fructify on account of the fact that the terms and conditions of the settlement between the parties were altered by his brother-in-law. He also stated that his wife had completed her Master's degree before marriage and after marriage, he made her fill application form seeking employment to the post of Postmaster, which required a land to be allocated, therefore, his father transferred a land in the name of his wife for this purpose in Umri village.

F) PW-1 has further stated that the divorce case was filed approximately seven years after marriage. In his plaint, initially, the type of mental illness of his wife was not specified, but he later amended the plaint and added that his wife is suffering from Schizophrenia disease, after he came to know about it in 2019. He has also stated that after the said settlement, he went to bring his wife from her parental home, but she did not come back. He also stated that when his wife came to his home after marriage, she did not fulfill her marital duties. The first time she came, she stayed for about four to five days, then returned two or three months later for another six to seven days. Overall, she did not stay longer than six or seven days. He asserted that he had never had a physical relationship with her and this fact has been stated in the divorce petition. However, when the husband was shown the plaint for divorce, P.W.1 could not specify in which para it was so mentioned. He admitted that he could not explain why that detail was not included in the plaint/affidavit. He also stated that due to Schizophrenia, his wife would suddenly fall and become aggressive, regaining consciousness after about half an hour, then would take medication and sleep. He also stated that he took his wife for treatment on 10.06.2003, but her father later brought her to another doctor, namely, Dr. A.K. Tandon.

G) Husband/plaintiff filed documentary evidence viz. photocopy of Kisan Vikas Patra, photocopy of mutation, photocopy of letters, photocopy of the case filed by wife under Section 125 Cr.P.C. :*Sudha Vs. Pawan Kumar Pandey*, photocopy of the cross-examination of the husband as P.W.1 in the case filed under Section 125 Cr.P.C. by the wife,

receipt of S.R.N. Hospital, Allahabad, photocopy of the application submitted by the wife, photocopy of the application submitted by the brother of the wife, namely, Vinod Kumar Dwivedi, photocopy of the written application submitted by wife, photocopy of outdoor patient card of S.R.N. Hospital.

H) The wife, in support of her case, examined herself as D.W.1 and her brother, namely, Vinod Kumar Dwivedi son of Ramadhar Dwivedi as D.W.2, wherein they reiterated the averments of written statements. In cross-examination, D.W.1/wife has stated that prior to the marriage, her husband along with his family and other women visited privately at Belha Devi Temple, where they all interacted with her. After the marriage, she maintained her marital responsibilities and there was regular interaction and a physical relationship between both of them. She asserted that her husband's claim that her parents deceived him into marriage while hiding her medical condition, is false. She has stated that she was never ill and had managed household work without any issue. She was never in need of medical treatment from her father nor did her husband take her to any doctor prior to the marriage. The prescriptions submitted by her husband were fraudulent. She did not have Schizophrenia or any symptoms of such a condition. Her physical and mental abilities have never been compromised by any illness. She denied that she would be incapable of procreation and that any offspring would inherit this alleged hereditary condition. She stated that there is no link between the alleged condition and reproduction. Husband and his family are greedy and have subjected her to various forms of harassment for dowry. She has stated that her husband, who is wealthy and in a government job, has failed to fulfill his marital duties and has filed this case based on fabricated claim. She has stated that she desires to fulfill her marital duties and live with her husband and his family, but she is continually subjected to harassment and violence, leading her to worry about her future. She has also stated that she has always been academically inclined, achieving high marks in school and excelling in debates, indicating her mental acumenity. The mention of Schizophrenia in the divorce appears to be an afterthought, reflecting legal advice rather than reality. She denied that she was mentally disturbed, as indicated in a document submitted by her sister-in-law. She stated that her marriage was solemnized with the plaintiff in the year 2003 and she had been living in her parental home for the past 15 years, with only 4-5 visits to her in-laws' home during that time. She stated that during these visits, she would stay for approximately 2-3 months and had no dispute with her husband or with anyone else in her in-laws' family. However, she did mention occasional harassment related to

dowry demands from her in-laws. In this regard, she had filed a First Information Report (FIR) against her in-laws at the Mandhata police station regarding the dowry demands. She has also stated that since her last visit to her in-laws, there had been no communication from her husband or his family, and her family had also not made any visits to her in-laws. She has also stated that her in-laws did not arrange for her medical treatment. She has stated that she was never admitted to SRN Hospital by either her in-laws or her parents. She has also stated that a compromise was made in 2012, where she agreed to go with her husband, provided that he would keep her with him. She has stated that while living with her in-laws, she and her husband maintained a physical relationship. She has also stated that she had applied for the post of Postmaster, and her father-in-law had executed a deed for 5 biswas of land in her name as a requirement for the job application, which she has subsequently sold and she has also stated that this marriage was by her consent.

I) D.W.2, Vinod Kumar Dwivedi, the brother of the respondent, stated that plaintiff/husband and his family members began subjecting her to various forms of torture and harassment for additional dowry. This led to significant mental and physical distress to the defendant/wife. He stated that defendant has never suffered from any mental illness either before or after marriage; the distress she experienced was solely due to mental harassment inflicted by the plaintiff and their family members. He stated that the plaintiff/husband was a wealthy individual with a government job, who, due to his ill intentions, failed to fulfill his marital duties and has falsely accused the defendant of having a fabricated mental illness. He insisted that defendant has never suffered any mental health issue and is an educated woman and is currently unemployed. He emphasized that the plaintiff made false allegations of mental illness against defendant without any evidence. He has stated that defendant still desires to fulfill her marital responsibilities and continues to strive for a life with her family. He has highlighted that plaintiff has made promises through mediation to uphold his marital duties, provide care, and ensure medical treatment for the defendant, but has failed to follow through. Instead, he sought a decree of divorce based on false accusations.

J) No documentary evidence has been led by the wife D.W.1 and his brother D.W.2.

K) The Family Court, after appraising the pleadings and evidence on record, has returned a finding that neither any evidence has been led by the plaintiff/appellant in respect of issues no.1 and 2 as mentioned above nor the same was pressed by the plaintiff/ appellant, therefore,

issue nos.1 and 2, as mentioned above, have been decided due to lack of evidence and not being pressed by the appellant.

L) So far as additional issue i.e. क्या याची दावे में वर्णित कारणों पर विपक्षी की मानसिक अक्षमता के आधार पर धारा 13 (1) (iii) के अंतर्गत विवाह विच्छेदन की डिक्री प्राप्त करने का अधिकारी है ?, the Family Court has returned a finding that basis for presenting the suit by the appellant has not been established from the evidence produced by the appellant himself, therefore, in such situation when the alleged disease of the wife/defendant is not proved by evidence presented by the plaintiff and further when it has not been proved that the wife/defendant is suffering from Schizophrenia and is incapable of producing children, then, his claim is not worthy of a decree.

M) Apart from this, the learned Family Court has also returned a finding that if it is believed that the wife was suffering from some kind of disease, then, being the husband, it is the responsibility of the plaintiff to provide a proper treatment for such kind of disease to his wife/defendant but from the evidence of plaintiff/husband, it was clear that he never provided any treatment for the defendant as a wife and she was abandoned from without any sufficient reason. It has also been recorded that the plaintiff has expressed the desire to get a divorce from defendant/wife, which seems more indicative of the plaintiff's neglect of marital relations towards his wife. In this background, additional issue no.1 has been decided against the plaintiff/husband.

N) Recording the aforesaid findings, the Family Court has dismissed the suit filed by the husband/plaintiff under Section 13 of the H.M. Act vide judgment and decree dated 29.04.2023. It is this judgment and decree dated 29.04.2023, which has been challenged in the present appeal.

(5) Ms. Bhavini Upadhyay, learned counsel appearing on behalf of appellant/husband has premised her submission on the following points :-

I. That the appellant/husband had filed a suit for grant of divorce under Section 13 of the H.M. Act on the grounds of desertion, cruelty and incurable unsoundness of mind, which in fact was noted by the learned Family Court while framing issues but the learned Family Court has erred in dismissing the suit without giving any finding on the first two grounds i.e. desertion and cruelty;

II. That under Section 13(1)(iii) of H.M. Act, mental disorder is enumerated as one of the grounds for divorce. The husband/plaintiff has pleaded in the suit that his consent for marriage was obtained by concealment of factum of mental health of his wife, as she was suffering from Schizophrenia and was under treatment even before marriage and this fact was deliberately

suppressed from husband. In this regard, even in her statement, she has admitted several times about expenditure on her medication;

III. That the conduct of the wife/respondent was highly contradictory in nature viz. she had stated in her deposition, on one hand, that she had no grievance whatsoever against her husband and her in-laws and on the other hand, she had lodged a case of dowry against her husband and her in-laws and also never tried to return to matrimonial house, which according to the husband/appellant is sufficient to constitute cruelty and as such the failure of the learned Family Court in considering and returning a finding on the said ground has made the impugned judgment erroneous;

IV. That the findings recorded by the learned Family Court to the effect that there was no sufficient evidence to prove desertion and cruelty amounts to ignorance of the evidence on record particularly because both parties gave evidence to the effect that wife had not been living with the husband for a period of at least five years preceding the date of presentation of the suit and since then, the wife had admitted to be living comfortably in her parental home;

(6) Having regard to the submission of the learned Counsel representing the appellant/husband and going through the record available before this Court in this appeal as well as the impugned judgment and decree and the record of the trial Court, the points of determination arise in consideration before us in the present appeal are as under :-

I. Whether the findings of the Family Court regarding issue no. 2 with respect to the plea of cruelty as grounds for divorce, is perverse and unsustainable thereby rendering the impugned judgment unsustainable ?

II. Whether the findings of the Family Court regarding issue no. 1 with respect to the plea of desertion as grounds for divorce, is perverse and unsustainable thereby rendering the impugned judgment unsustainable ?

III. Whether the findings of the Family Court regarding additional issue no.1 with respect to the plea that wife is suffering from such a disease, which may be treated as mental disorder under Section 13(1)(iii) for grant of decree of divorce, are perverse and unsustainable thereby rendering the impugned judgment unsustainable ?

**Point No. 1 is implicit in Point no. 2.**

(7) In **Rakesh Raman Vs. Kavita** : 2023 SCC OnLine SC 497, the Hon'ble Supreme Court has explained the meaning of the word "Cruelty" used in Section 13 of the H.M. Act in the following words :-

*"17. Cruelty has not been defined under the Act. All the same, the context where it has been used, which is as a ground for dissolution of a marriage would show that it has to be seen as a 'human conduct' and 'behavior" in a*

*matrimonial relationship. While dealing in the case of Samar Ghosh (supra) this Court opined that cruelty can be physical as well as mental :-*

*"46…If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.*

*19. Cruelty can be even unintentional :-*

*…The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment."*

*20. This Court though did ultimately give certain illustrations of mental cruelty. Some of these are as follows:*

*(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.*

*(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.*

*(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.*

*(xiv)* ***Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."***

(8) In the present case, the appellant is working in Uttar Pradesh Fire Department. He got married to the respondent on 08.06.2003. Apparently, both the parties belong to reputed families. The respondent/wife has lodged F.I.R. against the plaintiff/appellant and his family members. In cross-examination, D.W.1/respondent-wife herself has stated that after marriage, parties cohabitated only for a brief period and that she has been residing separately since 2012. Now, a period of more than a decade has elapsed since the parties started living separately.

(9) When this Court examines the aforesaid facts in light of the law explained in Rakesh Raman (Supra), we find that parties are living separately for a period exceeding a decade i.e. since 2012. In cross-examination, P.W.1 has stated that after solemnization of marriage, the respondent came to matrimonial home for

the first time and lived there only for 4-5 days and thereafter went to her parental home and subsequently, after 2-3 months, respondent/wife again came to matrimonial home and lived there only for 6-7 days. P.W.1 has also stated that respondent/wife never stayed matrimonial home more than 6-7 days after marriage and during stay at matrimonial home, there was no physical relationship with the respondent. These facts have not been contradicted by D.W.1 (respondent/wife) in her testimony before the Family Court. On consideration of these facts coupled with the factum of matrimonial life of the parties as is evident from the record, it appears that acute mental pain, agony and suffering as would not make possible for the appellant to live with the respondent could come within the broad parameters of mental cruelty.

(10) Moreso, the respondent is not contesting the appeal in spite of service on notice having been issued by this Court. She has not come forward to oppose the pleas of the appellant. This shows her disinclination to live with the appellant in spite of the stand taken by him. Thus, the feeling of deep anguish, disappointment, frustration of the appellant caused by the conduct of respondent for a long time may also lead to mental cruelty and the long period of continuous separation i.e. for more than a decade establishes that the matrimonial bond is beyond repair. The marriage between the parties becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such a situation, it may also lead to mental cruelty. In such circumstances, this Court is of the view that the matrimonial bond had been ruptured beyond repair because of the continuous mental cruelty caused by the respondent/wife.

(11) The term "desertion" has been explained by the Hon'ble Supreme Court in **Debananda Tamuli v. Kakumoni Kataky**: (2022) 5 SCC 459, in the following words: -

> *"7.…The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home.*
>
> * * *
>
> *8. The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence."*

(12) The respondent lived with the appellant only for few days though interregnum period after marriage and she

did not return to live with him till date, i.e. for more than a decade. The respondent is not contesting the appeal, which shows that she has no interest in her relation with the appellant and which indicates that the respondent has abandoned the relationship between herself and the appellant and an animus deserendi on her part, which is sufficient to constitute desertion.

(13) In view of the aforesaid facts, we are of the considered view that the facts of the present case sufficiently points towards the willful desertion by the respondent/wife without any plausible reasons, which are sufficient for grant of a decree of divorce in favour of the plaintiff-appellant. The Family Court has erred in not considering the plaintiff's suit to the aforesaid aspect of the matter. Thus, point nos. 1 and 2 are decided in favour of the appellant.

**Point No. III**

(14) Section 13(1)(iii) H.M. Act provides that either of spouse can apply for dissolution of marriage in case the other spouse is of unsound mind or suffering from mental disorder. It is suffice to reproduce the provision at this stage, which reads as under :-

> **"Section 13 Divorce –**
>
> (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--
>
> (iii) **has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.**
>
> Explanation.--In this clause,--
>
> (a) the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
>
> (b) the expression psychopathic disorder means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or"

(15) The Apex Court in the matter of **Kollam Chandra Sekhar vs. Kollam Padma Latha** : (2014) 1 SCC 225 has considered the aspect of grant of decree on the ground that other spouse is suffering from schizophrenia. The Apex Court framed question No.1 that, whether the respondent is suffering from a serious mental disorder i.e. schizophrenia or incurable unsoundness of mind, and can this be considered as a ground for divorce under Section 13(1)(iii) of the Hindu Marriage Act, 1955 ?

(16) To answer the aforesaid framed question, the Hon'ble Supreme Court considered its various earlier precedents including judgment of **Ram Narain Gupta vs Smt. Rameshwari Gupta** : (1988) 4 SCC 247 and judgment of Vinita Saxena (supra), wherein the Apex Court observed as under :

*"In our considered view, the contents of the report as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1)(iii) of the Act. The report states that the respondent, although suffering from "illness of schizophrenic type", does not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms are fairly under control with the medication which had been administered to her.* ***It was further stated that if there is good compliance with treatment coupled with good social and family support, a schizophrenic patient can continue their marital relationship.*** *In view of the aforesaid findings and reasons recorded, we have to hold that the patient is not suffering from the symptoms of schizophrenia as detailed above".*

(emphasis supplied)

(17) In view of the above pronouncement, it appears that the ground of a spouse suffering from schizophrenia, by itself is not sufficient for grant of a decree of divorce under Section 13(1)(iii) of H.M. Act as it may involve various degree of mental illness. The law provides that a spouse in order to prove a ground of divorce on the ground of mental illness, ought to prove that the spouse is suffering from a serious case of schizophrenia which must also be supported by medical reports and proved by cogent evidence before Court that disease is of such a kind and degree that husband cannot reasonably be expected to live with wife.

(18) Section 13 (1) (iii) of H.M. Act does not make mere existence of a mental disorder of any degree sufficient in law to justify dissolution of a marriage. The contest in which the ideas of unsoundness of mind and mental disorder occur in section as ground for dissolution of a marriage, require assessment of degree of mental disorder and its degree must be such that spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for grant of decree. The medical concern against too readily reducing a human being into a functional nonentity and as a negative unit in family or society, is law's concern also, and is reflected, at least partially, in the requirements of section 13 (1)(iii) of H.M. Act. The personality disintegration that characterizes schizophrenia may be of varying degrees and that not all schizophrenics are characterized by same intensity of disease. The burden of proof of existence of requisite degree of mental disorder is on the spouse who bases his or her claim on such a medical condition.

(19) Coming to facts of the present case and considering above pronouncements and legal proposition, findings of learned Family Court recorded in respect of additional issue no.1 have been examined, wherein Family Court has opined that husband has failed to prove the gravity and degree of disease and has merely brought on record the factum of long treatment of schizophrenia. The learned Family Court considered the balancing fact of the wife being educated upto M.A. (previous) and, therefore, refused to accept that the disease of alleged

mental illness was such that she cannot lead a normal life. Therefore, looking to evidence available on record, learned Family Court decided additional issue No.1 against appellant/husband.

(20) After considering entire evidence available on record, this Court has no hesitation in accepting findings and approach of learned Family Court, which appears to be valid and practical. Though, appellant/ husband was able to prove that respondent/wife is suffering from schizophrenia, but he failed to prove that disease is of such a kind and degree, which may be accepted for dissolution of marriage in terms of Section 13 (1) (iii) of H.M. Act. No sufficient material was brought on record by husband except prescriptions of Doctors, which do not contain any specific finding that disease is having grave consequences as is referred under Section 13 (1) (iii) of the H.M. Act, therefore, in considered opinion of this Court, findings of the Family Court in this regard are just, proper, legal and do not suffer from any perversity and do not call for any interference by this Court in this appeal. Point no.III is answered accordingly.

(21) As regard the contention of the appellant's counsel that the trial Court omitted to consider that the ground of divorce was concealment of material fact considering the mental condition of respondent-wife, we are of the opinion that the suit was filed under Section 13 of the H.M. Act and not under Section 12 of the H.M. Act. This ground is not available under Section 13 of the H.M. Act but under Section 12 (1) (c) of the H.M. Act. No objection was raised nor any application was given for framing any issue in terms of Section 12 (1) (c) of the H.M. Act, therefore, this plea is rejected.

(22) In view of the aforesaid facts, we set-aside the judgment and decree dated 29.04.2023 passed by the Principal Judge, Family Court-II, Pratapgarh in Suit No. 787 of 2019. Marriage between the parties is dissolved. Suit No. 787 of 2019 is decreed accordingly.

(23) Appeal is **allowed** in the above terms.

(24) There shall be no order as to cost.

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**(2024) 10 ILRA 926**
**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 21.10.2024**

**BEFORE**

**THE HON'BLE SUBHASH VIDYARTHI, J.**

Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 2090 of 2024

**Ankur Agarwal ...Applicant**
**Versus**
**State of U.P. & Anr. ...Opposite Parties**

**Counsel for the Applicant:**
Awadhesh Kumar Singh, Akhilesh Kumar Kalra, Rajesh Chandra Mishra

**Counsel for the Opposite Parties:**
G.A.

**Criminal Law - Code of Criminal Procedure, 1973 — Section 438 —Indian Penal Code,1860 - Sections 419, 420, 467, 468, 471 & 120-B - anticipatory bail in F.I.R. No.817 of 2023 - Maintainability when proclamation under Section 82 CrPC issued — Scope and applicability of law explained — Held, issuance of**

**proclamation under Section 82 CrPC does not create an absolute bar to grant of anticipatory bail — Case to be judged on its own facts and merits — Subsequent authoritative decision of Constitution Bench in *Sushila Aggarwal v. St. (NCT of Delhi)* holds the field, overruling earlier narrower views.**

**Criminal Jurisprudence — Anticipatory bail — Discretion of court — Must be exercised judiciously — No blanket rule barring grant of bail in cases where applicant is proclaimed offender — Courts must consider totality of circumstances, including whether accusation is aimed at humiliating or injuring applicant — Judicial discretion cannot be fettered by procedural technicalities-application allowed. (Paras 16, 17, 18, 20 and 25)**

**HELD:**

Apparently, the judgment in the case of Srikant Upadhyay has been passed after following the law laid down in the overruled judgment in the case of HDFC Bank (Supra) that anticipatory bail can be granted only in exceptional cases. The law laid down by the five Judge Bench of the Supreme Court in the subsequent judgment in the case of Sushila Aggarwal (Supra) will govern the field but it has not been considered in Srikant Upadhyay (Supra. (para 18)

Therefore, even as per the law laid down by the Hon'ble Supreme Court in the case of Srikant Upadhyay (Supra), there is no absolute prohibition against considering an application for anticipatory bail after issuance of warrant of arrest or a proclamation under Section 82 Cr.P.C. and the court is empowered to consider the merits of the case in extreme exceptional cases in the interest of justice. (Para 20)

Having considered the aforesaid peculiar facts and circumstances of this case, this court is of the considered opinion that the aforesaid facts make out a case warranting grant of anticipatory bail to the applicant in order to secure the interest of justice. (Para 25)

**Application allowed.** (E-14)

**List of Cases cited:**

1. Lavesh Vs St. (NCT of Delhi): (2012) 8 SCC 730

2. Srikant Upadhyay & ors. Vs St. of Bihar & anr.: 2024 SCC OnLine SC 282

3. Prem Shankar Prasad Vs St. of Bihar: (2022) 14 SCC 516

4. St. of M.P. Vs Pradeep Sharma, (2014) 2 SCC 171

5. HDFC Bank Ltd. Vs J.J. Mannan (2010) 1 SCC 679

6. Sushila Aggarwal Vs St. (NCT of Delhi): (2020) 5 SCC 1

7. Dharmapal Gautam Vs St. of U.P., 2023 SCC OnLine All 3648

8. Vipin Kumar Dhir Vs St. of Pun.: (2021) 15 SCC 518

9. St. of Har. Vs Dharamraj: 2023 SCC OnLine SC 1085

10. Parasa Raja Manikyala Rao Vs St. of A.P., (2003) 12 SCC 306

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

1. Heard Sri Akhilesh Kumar Kalra, the learned counsel for the applicant as well as Sri Punit Kumar Yadav, the learned counsel appearing on behalf of the State and perused the records.

2. The instant application has been filed by the applicant seeking anticipatory bail in F.I.R. No.817 of 2023, under Sections 419, 420, 467, 468, 471 & 129-B I.P.C., registered at Police Station Kotwali Nagar, District Gonda.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged by a Lekhpal on 15.09.2023 against 7 persons, including the applicant, stating

that the co-accused Jawahar Lal had executed two registered agreements in favour of co-accused Amit Agarwal to sell a piece of government land which is recorded as banjar in the revenue records. Another co-accused Rajmangal Mishra executed a registered agreement dated 11.03.2022 to sell a part of the aforesaid land to the applicant. The applicant's anticipatory bail application was rejected by the learned Sessions Court by means of an order dated 16.11.2023.

4. In the affidavit filed in support of the anticipatory bail-application it has been contended that the applicant is innocent, he has falsely been implicated in the present case and he has no criminal history. A copy of the plaint dated 03.10.2023 filed in the Court of Civil Judge, Junior Division, Gonda for a decree of cancellation of the agreement dated 11.03.2022 has been annexed with the affidavit filed in support of the application. It has been stated that the co-accused Jawahar Lal has been granted bail in this case and all the other co-accused persons have been granted anticipatory bail.

5. The learned counsel for the State has opposed the anticipatory bail application and on the basis of instructions provided to the learned State Counsel he has submitted that proceedings under Section 82 Cr.P.C. have already been initiated against the applicant on 16.08.2023 and, therefore, the application for anticipatory bail is not maintainable in view of the law laid down by Hon'ble Supreme Court in the case of **Lavesh versus State (NCT of Delhi):** (2012) 8 SCC 730 and **Srikant Upadhyay and others versus State of Bihar and another:** 2024 SCC OnLine SC 282.

6. In reply to the aforesaid submission, the learned counsel for the applicant submitted that the anticipatory bail applications of co-accused persons were pending and the applicant was waiting for its outcome and that is the reason for the delay in filing this application.

7. In **Lavesh** (supra), the wife of younger brother of the appellant had committed suicide after 1 year and 8 months of her marriage, while she was pregnant. An FIR under Section 304-B, 306 and 498 I.P.C. was lodged in this regard. There were definite allegations against the appellant and other family members that they had subjected the deceased to cruelty with a view to demand dowry right from the date of marriage and also immediately before date of her death. It was stated in the counter affidavit filed before the Supreme Court that "efforts were made to arrest the petitioner but he absconded as such he was got declared a Proclaimed Offender. The case is pending trial". In this background, a two Judge Bench of the Hon'ble Supreme Court held in **Lavesh** (Supra) that:—

*"From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."*

8. Even after making the aforesaid observations in **Lavesh** (Supra), the Hon'ble Supreme Court considered the merits of the case and recorded that another circumstance against the appellant was that even though the Hon'ble Supreme Court had granted interim protection to the appellant, he did not cooperate and visit the said police station. In this factual background, the Hon'ble Supreme Court held that:—

*"15. Taking note of all these aspects, in the light of the conditions prescribed in Section 438 of the Code and conduct of the appellant immediately after the incident as well as after the interim protection granted by this Court on 23-1-2012, we are of the view that the appellant has not made out a case for anticipatory bail. Unless free hand is given to the investigating agency, particularly, in the light of the allegations made against the appellant and his family members, the truth will not surface."*

9. Thus it is not that the Hon'ble Supreme Court had rejected the application has not maintainable on the ground that issuance of a proclamation under Section 82 Cr.P.C. without considering the merits of the application.

10. **Srikant Upadhyay** (Supra) was an appeal directed against an order passed by the High Court of Judicature at Patna whereby an application for anticipatory bail in offences under Sections 341, 323, 354, 354-B, 379, 504, 506 and 149 I.P.C. and Section 3/4 of Prevention of Witch (Daain) Practices Act, 1999 had been dismissed. The Hon'ble Supreme Court relied upon the precedents in the case of **Prem Shankar Prasad versus State of Bihar:** (2022) 14 SCC 516, **State of M.P. v. Pradeep Sharma,** (2014) 2 SCC 171 and **Lavesh versus State (NCT of Delhi):** (2012) 8 SCC 730.

11. **Prem Shankar Prasad** (Supra) was an appeal decided by a Bench consisting of two Hon'ble Judges of the Supreme Court wherein the Hon'ble Supreme Court followed the decision in Pradeep Sharma and held that the High Court has committed an error in granting anticipatory bail to Respondent 2-accused ignoring the proceedings under Sections 82/83CrPC.

12. In **Pradeep Sharma** (Supra) the persons accused of offence under Section 302 read with Section 34 IPC had filed an application for anticipatory bail, which was rejected by the High Court of Madhya Pradesh by means of an order dated 01.08.2012 on the ground that custodial interrogation was necessary in the case. The accused persons did not challenge the order dated 01.08.2012 and they did not appear before the Investigating Officer. A charge-sheet was submitted against them on 26.08.2012. Arrest warrants were issued on 21.11.2012 but the same were returned to the court without service. On 29.11.2012, a proclamation under Section 82 Cr.P.C. was issued against them for their appearance to answer the complaint. Pradeep Sharma filed a second application for anticipatory bail, which was allowed by means of an order dated 10.01.2013. Other co-accused persons were also granted anticipatory bail by separate orders, which were challenged before the Supreme Court. In the meantime, the accused persons approached the Chief Judicial Magistrate for the grant of regular bail and they were granted regular bail vide order dated 20.02.2013. The only question for consideration of the Supreme Court was

whether the High Court is justified in granting anticipatory bail under Section 438 of the Code to the respondent-accused when the investigation was pending, particularly, when both the accused had been absconding all along and not cooperating with the investigation. The Hon'ble Supreme Court referred to Section 438 Cr.P.C. and held that: -

*"The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty."*

13. Following the decision in **Lavesh** (Supra), the Hon'ble Supreme Court held in **Pradeep Sharma** (Supra) that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

14. Following the aforesaid decisions, the two Judge Bench of the Hon'ble Supreme Court held in **Srikant Upadhyay** (Supra) that: -

*"9. It is thus obvious from the catena of decisions dealing with bail that even while clarifying that arrest should be the last option and it should be restricted to cases where arrest is imperative in the facts and circumstances of a case, the consistent view is that the grant of anticipatory bail shall be restricted to exceptional circumstances. In other words,* ***the position is that the power to grant anticipatory bail under Section 438, Cr. P.C. is an exceptional power and should be exercised only in exceptional cases and not as a matter of course.*** *Its object is to ensure that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. [See the decision of this Court in HDFC Bank Ltd. v. J.J. Mannan (2010) 1 SCC 679].*

*10. When a Court grants anticipatory bail what it actually does is only to make an order that in the event of arrest, the arrestee shall be released on bail, subject to the terms and conditions.* ***Taking note of the fact the said power is to be exercised in exceptional circumstances*** *and that it may cause some hinderance to the normal flow of investigation method when called upon to exercise the power under Section 438, Cr. P.C., courts must keep reminded of the position that law aides only the abiding and certainly not its resistant. By saying so, we mean that a person, having subjected to investigation on a serious offence and upon making out a case, is included in a charge sheet or even after filing of a refer report, later, in accordance with law, the Court issues a summons to a person, he is bound to submit himself to the authority of law. It only means that though he will still be at liberty, rather, in his right, to take recourse to the legal remedies available only in accordance with law, but not in its defiance. We will dilate this discussion with reference to the factual matrix of this case. However, we think that before dealing with the same, a small deviation to have a glance at the scope and application of the provisions under Section 82, Cr. P.C. will not be inappropriate."*

15. It appears that it was not placed before the Hon'ble Supreme Court that the judgment in the case of **HDFC Bank** (Supra) has been overruled by a Five Bench

judgment in the case of **Sushila Aggarwal v. State (NCT of Delhi):** (2020) 5 SCC 1 and the relevant passage of the aforesaid judgment is being reproduced below: -

*"76. Therefore, this Court holds that the view expressed in Salauddin Abdulsamad Shaikh [Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667], K.L. Verma [K.L. Verma v. State, (1998) 9 SCC 348], Nirmal Jeet Kaur [Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558], Satpal Singh [Satpal Singh v. State of Punjab, (2018) 13 SCC 813, Adri Dharan Das [Adri Dharan Das v. State of W.B., (2005) 4 SCC 303,* ***HDFC Bank*** *[HDFC Bank Ltd. v. J.J. Mannan, (2010) 1 SCC 679] , and Naresh Kumar Yadav [Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632] about the Court of Session, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the "normal court" not being "bypassed" or* ***that in certain kinds of serious offences, anticipatory bail should not be granted normally — including in economic offences, etc.—are not good law.*** *The observations which indicate that such time related or investigative event related conditions, should invariably be imposed at the time of grant of anticipatory bail are therefore, overruled. Similarly, the observations in Mhetre [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694] that:*

*"105. ... the courts should not impose restrictions on the ambit and scope of Section 438 CrPC which are not envisaged by the legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it."*

*is too wide and cannot be considered good law. It is one thing to say that as a matter of law, ordinarily special conditions not mentioned in Section 438(2) read with Section 437(3) should not be imposed; it is an entirely different thing to say that in particular instances, having regard to the nature of the crime, the role of the accused, or some peculiar feature, special conditions should not be imposed. The judgment in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565] itself is an authority that such conditions can be imposed, but not in a routine or ordinary manner and that such conditions then become an inflexible "formula" which the courts would have to follow. Therefore, courts can use their discretion, having regard to the offence, the peculiar facts, the role of the offender, circumstances relating to him, his likelihood of subverting justice (or a fair investigation), likelihood of evading or fleeing justice — to impose special conditions. Imposing such conditions, would have to be on a case-to-case basis, and upon exercise of discretion by the court seized of the application under Section 438. In conclusion, it is held that imposing conditions such as those stated in Section 437(2) while granting bail, are normal; equally, the condition that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Other conditions, which are restrictive, are not mandatory; nor is there any invariable rule that they should necessarily be imposed or that the anticipatory bail order would be for a time duration, or be valid till the filing of the FIR, or the recording of any statement under Section 161 CrPC, etc. Other*

*conditions may be imposed, if the facts of the case so warrant.*

16. The conclusion drawn by the Hon'ble Supreme Court in **Sushila Aggarwal** (Supra) are reiterated in para 92 of the judgment, which are as follows:—

*"92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that* ***the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:***

*92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*

*92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.*

*92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc.* ***While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.*** *The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*

*92.4.* ***Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion;*** *equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.*

*92.5. Anticipatory bail granted can, depending on the conduct and*

*behaviour of the accused, continue after filing of the charge-sheet till end of trial.*

*92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

*92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

*92.8. The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565] regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia had observed that:*

*"19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125."*

*92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.*

*92.10. The court referred to in para 92.9 above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.*

*92.11. The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. [See Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189, Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379, State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21].) This does not amount to "cancellation" in terms of Section 439(2) CrPC.*

*92.12. The observations in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 and subsequent decisions which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled."*

17. In **Dharmapal Gautam v. State of U.P.,** 2023 SCC OnLine All 3648, this Court considered the judgments of the Hon'ble Supreme Court in the cases of **Lavesh v. State (NCT of Delhi):** (2012) 8 SCC 730, **State of M.P. v. Pradeep Sharma:** (2014) 2 SCC 171, **Vipin Kumar**

**Dhir v. State of Punjab:** (2021) 15 SCC 518 and **State of Haryana v. Dharamraj:** 2023 SCC OnLine SC 1085 and held that: -

*"7.* ***The later judgment rendered by five Hon'ble Judges of the Hon'ble Supreme Court will obviously prevail over the former judgment of two Hon'ble Judges and the law, as it now stands, is that there is no restriction that the discretion of grant of pre-arrest bail under Section 438 Cr. P.C. can be exercised only in exceptional circumstances.*** *The factors to be considered for grant of anticipatory bail to the applicant are somewhat similar to the considerations to be kept in mind for granting bail to an accused person. The only additional consideration to be kept in mind while deciding the application under Section 438 Cr. P.C. is contained in clause (iv) of Sub-section (i) of Section 438, as per which the Court has also to take into consideration whether the accusation has been made with object of injuring or humiliating the applicant by having him so arrested."*

18. Apparently, the judgment in the case of **Srikant Upadhyay** has been passed after following the law laid down in the overruled judgment in the case of **HDFC Bank** (Supra) that anticipatory bail can be granted only in exceptional cases. The law laid down by the five Judge Bench of the Supreme Court in the subsequent judgment in the case of **Sushila Aggarwal** (Supra) will govern the field but it has not been considered in **Srikant Upadhyay** (Supra).

19. However, even in **Srikant Upadhyay** (Supra), the Hon'ble Supreme Court has held as under: -

*"25. We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and* ***the question of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case****. While called upon to exercise the said power, the Court concerned has to be very cautious as the grant of interim protection or protection to the accused in serious cases may lead to miscarriage of justice and may hamper the investigation to a great extent as it may sometimes lead to tampering or distraction of the evidence. We shall not be understood to have held that the Court shall not pass an interim protection pending consideration of such application as the Section is destined to safeguard the freedom of an individual against unwarranted arrest and we say that such orders shall be passed in eminently fit cases.* ***At any rate, when warrant of arrest or proclamation is issued, the applicant is not entitled to invoke the extraordinary power. Certainly, this will not deprive the power of the Court to grant pre-arrest bail in extreme, exceptional cases in the interest of justice.*** *But then, person(s) continuously, defying orders and keep absconding is not entitled to such grant."*

20. Therefore, even as per the law laid down by the Hon'ble Supreme Court in the case of **Srikant Upadhyay** (Supra), there is no absolute prohibition against considering an application for anticipatory bail after issuance of warrant of arrest or a proclamation under Section 82 Cr.P.C. and the court is empowered to consider the merits of the case in extreme exceptional cases in the interest of justice.

21. In **Parasa Raja Manikyala Rao v. State of A.P.,** (2003) 12 SCC 306, the Hon'ble Supreme Court held that: -

*"9.* ***Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect.*** *In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

(Emphasis added)

22. When this court examines the facts of the present case in the light of law laid down by Hon'ble Supreme Court in the above mentioned cases, what comes to light is that the only allegation against the applicant is that a co-accused had executed an agreement dated 11.03.2022 to sell a certain piece of land to the applicant, which is claimed to be government land recorded in the revenue records as banjar. A copy of aforesaid agreement to sell dated 11.03.2022 annexed with the application indicates that out of the agreed sale consideration of Rs.10,00,000/-, the applicant had paid Rs.5,00,000/- to the seller and he had paid stamp duty amounting to Rs.20,000/-. The sale agreement does not state that possession of the land was handed over to the applicant. The applicant has already filed a suit for cancellation of agreement in the Court of Civil Judge (Junior Division), Gonda, wherein he has stated that after execution of the agreement, the applicant came to know that the seller was not the recorded tenure holder of the land in question and he has executed the agreement in a fraudulent manner. Jawahar Lal, the executant of the agreement dated 11.03.2022, has been granted bail and all the other co-accused persons have been granted anticipatory bail.

23. From the fact that the applicant has parted away with a sum of Rs.5,00,000/- for execution of the agreement and he has not acquired either possession or title in lieu thereof, prima facie it appears that the applicant is a victim of a fraud committed by the executor of the agreement – the co-accused Rajmangal Mishra. Rajmangal Mishra has already been granted anticipatory bail.

24. The agreement in question was executed on 11.03.2022, the FIR was lodged on 15.09.2023, the applicant filed a suit for cancellation of the agreement on 03.10.2023 and he also an application under Section 156 (3) Cr.P.C. against the executant of the agreement – Raj Mangal Mishra on the same date. The anticipatory bail application of the applicant was rejected by the Session Court on 16.11.2023. As per instructions provided to the learned State Counsel, a non-bailable warrant of arrest was issued against the applicant on 15.06.2024 and proceedings under Section 82 Cr.P.C. have been initiated against him on 16.08.2024 when all the co-accused persons had already been granted anticipatory bail.

25. Having considered the aforesaid peculiar facts and circumstances of this case, this court is of the considered opinion that the aforesaid facts make out a case warranting grant of anticipatory bail to the applicant in order to secure the interest of justice.

26. In view of the above, the anticipatory bail application of the

applicant is ***allowed***. In the event of arrest/ appearance of **applicant-Ankur Agarwal** before the learned Trial Court in the aforesaid case crime, he shall be released on anticipatory bail on his furnishing personal bond and two solvent sureties, each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court:

(i). that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii). that the applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence;

(iii). that the applicant shall not leave India without the previous permission of the court'

(iv). that the applicant shall appear before the trial court on each date fixed, unless personal presence is exempted; and

(v). that the applicant shall not pressurize/ intimidate the prosecution witness.

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**(2024) 10 ILRA 936**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2024**

**BEFORE**

**THE HON'BLE MAHESH CHANDRA TRIPATHI, J.**
**THE HON'BLE VIKAS BUDHWAR, J.**

Writ C No. 11108 of 2019
With
Writ C No. 41917 of 2018

**Satya Home Pvt. Ltd. & Anr. ...Petitioners**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Nisheeth Yadav, Sri Pankaj Kumar Shukla, Sri Prateek Sinha, Sri C.B. Yadav (Sr. Advocate)

**Counsel for the Respondents:**
C.S.C., Sri Kaushalendra Nath Singh, Sri Mahesh Chandra Chaturvedi (Sr. Advocate)

**A. Land Law – Sanctioning of map to raise construction – U.P. Industrial Area Development Act, 1976 -Section 19 - The bone of contention between the parties is as to whether the request sought to be made by the writ petitioners for sanctioning of the map can be turned down on the considerations which weighed the NOIDA in the orders impugned.** A survey of the statutory provisions shows that the basic object of engrafting the 1976, Act was to provide for constitution of the authority for the development of certain areas into industrial and urban townships and the matter connected therewith. (Para 28)

**Maintainability -** As regards, the objection raised by the NOIDA regarding maintainability of the writ petition on the ground of existence of an alternative efficacious remedy while preferring an appeal under Regulation 14 of 2010, Regulations, there is no quarrel to the said proposition, however, earlier an order impugned came to be passed which was subject matter of challenge in the earlier spell of litigation and the NOIDA itself withdrew the same and thereafter now the order impugned has been passed and questioning the same the writ petition is pending 2018-19 and responses have been filed by the NOIDA disclosing their stand, thus, it would be futile to dismiss the writ petition on the ground of alternative remedy. (Para 29)

**B. The first and foremost question which arises for consideration before us is whether it is open for the NOIDA to pass a blanket order forbidding the writ**

**petitioners to raise constructions while not sanctioning map as requested by them.** Once it is not disputed that the Khasra Nos. 793 and 795 situated in Village-Gulavali stands notified and are part of sector 161 of NOIDA then obviously the power to regulate stands conferred with the NOIDA. **The NOIDA can resort to appropriate regulatory measures which may be necessary from time to time in order to give effect to its statutory scheme and object.** (Para 30)

**C. For the query: Whether there is any restriction or a bar backed by a statutory provision relating to transfer of the land by anyone to the other, counsels for Noida could not point out any provision to the said fact.** (Para 31)

**As per the factual position, there is no option but to assume that the parties are free to transfer the land which belongs to them and they are the owners.**

**D. Whether in the said factual backdrop, there can be any resistance on the part of NOIDA in not processing the applications for building permit.** (Para 32)

**Mere obtaining of a declaration u/s 143 of 1950 Act would not be bind the NOIDA Authorities.** (Para 35, 44)

Once the Khasra Nos. 793 and 795 situated in Village-Gulavali stands notified by the NOIDA and is a part of Sector-161 then obviously NOIDA is possessed with the power to regulate the constructions. The power vested with the NOIDA to regulate cannot be transformed into the power to restrict or restrain constructions while not sanctioning map. The maps obviously are to be sanctioned until and unless the same is not as per the Acts and Regulations. (Para 36)

**E. Whether in the wake of the statutory provisions, the impugned orders could have been passed.**

There is no restriction on the transfer of the land which is owned by the tenure holder. Once the position being so which is owned a right stands accrued to the land owners to ask for sanctioning of map. The said **right is not an unfettered right but it is subject to various factors inclusive of compliance of the Rules and the Regulations on the said subject.** Once the NOIDA possesses the power to sanction the map then the said power cannot be exercised illegally and denial is to be based upon adequate reasons backed by the statute in consonance with the Article 14 of the Constitution of India.

**(i) One of the reasons for not according building permit was that such type of permit so sought by the land owners for raising constructions cannot be granted as there is no policy available with the NOIDA in sanctioning the map, when the land in question is neither allotted nor acquired. Certainly, said ground taken by the NOIDA in denying the building permit is inconceivable and not as per the statutes.**

**(ii) The other ground that since acquisition proceedings are underway as resolution has been passed for acquisition or purchase of the land owned by the writ petitioners, thus, the building permit cannot be accorded also does not test the legal touchstone as acquisition or resumption is a matter which is to happen in future and which will take a long time and even if it happens in future, the present cannot be sacrificed,** particularly, when the question of ownership is not disputed and the writ petitioners hold a valid title till the passing of the orders impugned in the present writ petitions. (Para 37)

**F. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.** (Para 40, 41)

So far as the allegations of raising illegal constructions by the writ petitioners is concerned though it is noticed in the order impugned and as well as allegations to the said fact are in the counter affidavit filed by the NOIDA but the extent of the said illegal constructions is not indicated or disclosed. There is no report of the NOIDA appended to

the counter affidavit so as to suggest as to what type of illegal constructions has been raised by the writ petitioners. (Para 38)

The counter affidavit filed by the NOIDA alleges that the lands which are owned by the writ petitioners have been further transferred by the writ petitioners in fragmentation to others which is also one of the ground for negating the request of the writ petitioners for grant of building permit but, the Court finds from the orders impugned in the writ petition that the said ground is not available. Regulations, 2010 also provides for filing of the application for according permission for layout and sub-division of plots as per checklist-1C, it might be a relevant consideration for granting or denying the building permit but the said facts have also not been adverted in the orders impugned. (Para 39)

Since the order impugned does not advert to said aspect, thus, this Court is not in a position to go into the said issue at this stage. (Para 42)

Since in the present case, the order impugned in both the writ petitions have not adverted to the core and fundamental issues which are being sought to be argued by the respective parties and noticed in the judgment, thus, the orders cannot be sustained and they are liable to be set aside while remitting the back to the matter to concerned authorities to pass a fresh order strictly in accordance with law after revisiting the entire issues. (Para 45)

**Writ petitions partly allowed.** (E-4)

**Precedent followed:**

1. M/s Bright Infracon Pvt. Ltd. & anr. Vs State of U.P. & anr., Writ-C No. 43195 of 2015, decided on 16.02.2018 (Para 34)

2. Paradise Development Vs Chief Town and Country Planed alongwith connected Misc. Bench No. 5617 of 19990, decided on 05.09.2017, 2017 SCC OnLine All 2744 (Para 35)

3. Mohinder Singh Gill Vs The Chief Election Commissioner, New Delhi & ors., (1978) 1 SCC 405 (Para 40)

4. U.O.I. & anr. Vs GTC Industries Ltd., Bombay, (2003) 5 SCC 106 (Para 41)

**Precedent distinguished:**

Ajeet Singh Chauhan Vs State of U.P. and 5 others, Writ-C No. 43275 of 2015 (Para 34)

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Since common question of facts and law are involved in both the writ petitions, thus, they are being decided by a composite order.

2. The counsel for the rival parties have made a joint statement that they do not propose to file any further affidavits and the writ petitions be decided on the basis of the documents available on record, thus, with the consent of the parties, writ petitions are being decided at the admission stage.

**Facts**

**Writ- C No. - 11108 of 2019 (Leading writ petition )**

3. The facts of the leading writ petition are that there happens to be a certain piece of land being khasra Nos. 793 and 795 situated in Village Gulawali, Tehsil and District-Gautam Budh Nagar which was transferred in favour of the writ petitioners by virtue of three registered sale deeds namely, (a)- Khasra No.793 admeasuring 4219 square meter on 20.06.2015, (b)- Khasra No.795 admeasuring 3372, square meter on 14.12.2015 and (c)- Khasra No.787 admeasuring 1980 square meter on 02.07.2015. As per the pleadings set out in para 11, 16 and 17 of the writ petition, the Khasra Nos. 793, 795 and 787 situate in the village in question is notified as a part of Sector 161 of New Okhla Industrial Development Authority (in short 'NOIDA').

4. According to the writ petitioners, after the execution of the registered sale deeds as referred to above, the writ petitioners preferred an application seeking permission on 16.10.2017 before the Chief Executive Officer of NOIDA, second respondent for construction of club building and guest house. The said application was preferred on the premise that the club building and the guest house are the part of the institutional development as per clause 24.5 of the New Okhla Industrial Development Area Building Regulation, 2010 (in short 'Regulation 2010'). On 17.10.2017, an order came to be passed by the Chief Executive Officer, NOIDA, second respondent whereby the request for sanctioning of the map for construction of club building and guest house was turned down. The said order was subject matter of challenge in Writ-C No.14777 of 2018 (Satya Homes Pvt. Ltd. and Another v. State of U.P. and three others) in which on 03.05.2018, the following order was passed:

*"Heard Mr. Nisheeth Yadav, learned counsel for the petitioners and Mr. Kaushalendra Nath Singh, learned counsel for respondents 2 and 4.*

*The principal prayer made in the writ petition reads thus:*

*"(i) A writ, order or direction in the nature of certiorari quashing the order dated 17.10.2017 issued by the respondent no. 2. (Annexure-11 to this writ petition)."*

*Counsel appearing for the respondent-Authority, on instructions, submits that the second respondent shall withdraw the order dated 17.10.2017 within a period of one week from today and seeks liberty to this respondent to initiate fresh proceedings and pass appropriate orders. His statement is recorded and accepted. In view thereof, nothing further survives in the writ petition. Petition is disposed of as infructuous with liberty as prayed. All contentions of the parties on merits are kept open."*

5. Post passing of the order dated 03.05.2018 in Writ-C No.14777 of 2018 (Satya Homes Pvt. Ltd. and Another v. State of U.P. and three others), the writ petitioners preferred a detailed representation/ application before the Chief Executive Officer, NOIDA, second respondent which has been rejected by the order dated 15.11.2018.

6. The same led to filing of the leading writ petition wherein the following reliefs was sought:

*"I. a writ, order or direction, in the nature of certiorari quashing the impugned order dated 15.11.2018 passed by the Authority (Annexure No.14 to this Writ Petition).*

*II. a writ, order, or direction, in the nature of mandamus, directing the respondent no.2 to reconsider the application for sanctioning of the map to raise construction as in the nature of institutional purposes.*

*III. any other suitable order or direction, as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.*

*IV. an award to the cost of the petition to the petitioners."*

7. The leading writ petition came to be entertained by this Court on 01.04.2019 while seeking response from the respondents.

8. A counter affidavit has been filed on behalf of the second respondent sworn

by Manager (Planning) NOIDA dated 03.11.2019 followed by a supplementary counter affidavit of the same authority dated 29.11.2019 of Tehsildar (NOIDA).

9. Rejoinder affidavit as well as supplementary rejoinder affidavit have been filed by the writ petitioners which are available on record.

**Writ- C No. - 41917 of 2018 (Connected writ petition)**

10. As regards, the connected writ petition is concerned, the same has been filed by one Smt. Kiran Devi wife of Arvind Kumar Singh and Smt. Mira Kumari wife of Sri Ramesh Kumar wherein it is claimed that one Mehar Chandra son of Sri Fatti was the original tenure holder of khasra No.795 of Khata No. 370 of the Village – Gulawali, Pargana Dankaur, Tehsil Sadar, District Gautam Budh Nagar area of 2.2320 hectare. It is pleaded that since the family of Mehar Chandra was using the land of Khasra No.795 for residential purposes and not for agriculture and further the land was a part of the village Abadi of Village Gulawali, therefore, Mehar Chandra made an application under Section 143 of U.P.Z.A. & L.R. Act, 1950 (in short 'Act, 1950') for declaration of the land as non-agricultural. The said application was registered as Case No. 38 of 2013-14 (Mehar Chandra v. State of U.P. & Others) and the Court of Sub Divisional Magistrate, Sadar, Gautam Budh Nagar after obtaining the report from concerned authority, passed an order on 29.04.2014 declaring the land to be non-agriculture. It is also pleaded that so far as Khata No. 281 of Khasra No. 793, a part of the same is also declared to be non-agriculture by virtue of the declaration under Section 143 of the Act, 1950.

11. Pleadings further reveal that though Mehar Chandra and his family members who are the owners of the respective Khasras and who were residing over the demise land in question, they were confronted with the demolition notices seeking to demolish their constructions at the end of the NOIDA on 28.08.2014.

12. Questioning the same, Writ-C No.65021 of 2014 (Fundan and 4 others v. State of U.P.) was preferred which came to be disposed of on 22.01.2015 while passing the following orders:

*"Heard learned counsel for the petitioners and learned counsel for the respondents.*

*The writ petition has been filed seeking following relief:-*

*"(i) To issue writ, order or direction in the nature of mandamus commanding the respondents not to take any action and not to disturb the peaceful possession of the petitioners part of the land comprising of Khata No. 281 Khasara No. 793 area 1.2280 hectare and Khata No. 370 Khasara No. 795 area 2.2320 hectare of revenue Village Gulavali, Pargana Dankaur, Tehsil Sadar, District Gautam Budh Nagar."*

*Time was granted to Sri Shivam Yadav, learned counsel appearing for respondent no. 3 to obtain instructions. Today when the matter has been taken up, Sri Shivam Yadav states that no notification has been issued. He further states that the possession of the land shall not be disturbed and shall be taken over only in accordance with law. He further states that the authorities do not have any intention to disturb the possession of the petitioners over the aforesaid two Khasara plot nos. and possession shall only be taken over in accordance with law.*

*In view of the aforesaid factual situation we direct that possession of the petitioners over Khasara No. 793 and 795 of Khata No. 281 and 370 respectively shall not be disturbed and shall not be taken over except in accordance with law.*

*With the aforesaid directions and observations, the writ petition stands disposed of."*

13. In para 12 of the connected writ petition, it is further asserted that since Mehar Chandra, the father of the co-tenure holders was quite old and, therefore, for disposing of the land in question, a General Power of Attorney was entered with Dinesh Pawar, son of Amar Singh. The writ petitioner No.1 in order to reside in Gautam Budh Nagar purchased a residential house situated on plot no. 27, having total area plot admeasuring 380 sq yards i.e. 317.72 sq meters comprising of Khasra No.795 in which two rooms, bathroom, toilet, veranda were already constructed, by way of a registered sale deed on 21.03.2015. Insofar as the petitioner No.2 is concerned, her husband post retirement from the Merchant Navy decided to settle down in NOIDA, Gautam Budh Nagar and by virtue of a registered sale deed dated 21.03.2015, he purchased a land bearing an area of 310 square yards i.e. 259.20 square meters, comprising of Khasra No.795 situated in Village Gulawali, Pargana-Dankaur, Tehsil and District Gautam Budh Nagar.

14. The writ petitioners further claim that their name also stood recorded in the revenue records. In para 19 and 20, it has been asserted that like the writ petitioners herein, about 64 families also purchased small pieces of land bearing areas between 176 square meters to 299 square meters situated in Khasra Nos.793 and 795 of village Gulawali. However, when renovation was being done then obstacles were created and no heed was paid to the request made by them for sanctioning the maps. Thus, Civil Misc. Writ Petition No.16026 of 2016 (Mrs. Minaksi and others v. State of U.P.) came to be filed. However, according to the writ petitioners, on 10.08.2017, an order came to be passed by the Chief Executive Officer, NOIDA whereby the request of the writ petitioners for sanctioning of the map has been turned down on the pretext that the Khasra Nos. 793 and 795 are the part of Sector-161 and notified by the NOIDA Authorities and as per the records, they are not the part of the village Abadi, thus, the maps cannot be sanctioned.

15. Assailing the action of the respondents as well as the order dated 10.08.2017, the connected writ petition came to be filed with the following reliefs:

*"I. a writ, order or direction, in the nature of certiorari quashing the impugned order dated 10.08.2017 passed by the respondents' Authority (Annexure No.18 to this Writ Petition).*

*II. a writ, order or direction, in the nature of mandamus, directing the respondents' Authority to allow the petitioner's to raise construction over there purchased plots, situated in Village-Gulawali, Pargana- Dankaur, Tehsil and District-Gautam Budh Nagar in terms of the parameters laid down in Regulation, 2016.*

*III. any other suitable order or direction, as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case.*

*IV. an award to the cost of the petition to the petitioners."*

16. In the connected writ petition, affidavits have been exchanged between the parties.

**Argument of the counsel for the writ petitioners**

17. Shri C.B. Yadav, learned Senior Advocate assisted by Sri Nisheeth Yadav, learned counsel for the writ petitioners in the leading writ petition and Shri Rahul Sripat, Senior Advocate assisted by Sri Shri Ishir Sripat, learned counsel for the writ petitioners in connected writ petition have sought to argue that the orders passed by the NOIDA negating the claim for sanctioning of the map is per se illegal besides being in violation of Article 300-A of the Constitution of India and, thus, it is liable to be set aside. Elaborating the said submission, it is being argued that the writ petitioners in the leading writ petition and the connected writ petition have purchased the land through a registered sale deed that too from actual owners who were possessed with the right and the title and in absence of any restriction in transfer of the properties, NOIDA cannot raise any objections regarding construction as though it is the part of Sector 161 of the NOIDA but the only power which is available with the NOIDA is regulatory and there cannot be any bar in not sanctioning map so as to throttle down any attempt of raising constructions which is in accordance with law.

18. Argument is that there is a marked difference between the regulatory power and the power to forbid a particular act and once the writ petitioners became owner by virtue of a registered sale deed then obviously as per there needs, they can raise construction as nobody can be forced to just purchase a land and to keep it vacant without raising any constructions.

19. In nutshell, submission is that though as per the 2010 Regulations framed under Section 19 of the UP Industrial Area Development Act, 1976 (in short 'Act 1976') power vests with the NOIDA with the approval of the State Government to make regulations and according to Regulation 4 & 5, Chapter II, an application for building permit is to be made by a prospective applicant and the same is to be decided as per the regulations but, in case, the writ petitioners are not permitted to raise constructions then the very basic object of framing of the regulations would stand redundant. According to the learned counsels for the writ petitioners, the basic premise on the basis whereof, the claim of the writ petitioners for sanctioning of the map has been negated is faulty and erroneous, particularly, when the writ petitioners are the recorded owners of the land in question and they are using the land for construction of club building and guest house and once according to the NOIDA, the same has been specified in the Master Plan for institutional use then the proposal for constructions of club building and guest house also comes within the definition of institutional use, thus, there was no occasion to turn down the request of the writ petitioners. Further submission is that merely because, there has been a deliberation at the end of the NOIDA for acquiring the land which is owned by the writ petitioners, the same cannot be a ground to resist constructions in view of the fact that acquisition has not taken place till date as no notification under the relevant statutes has been issued. Additionally, it has been submitted that acquisition or resumption of the land as proposed by the NOIDA is dependent upon certain contingencies and the said decision has not yet crystallized, thus, even if the maps are sanctioned and constructions are raised then in future, acquisition proceedings are

drawn then the NOIDA can obviously acquire the land or resume the same while paying compensation. It is, thus, prayed that the orders impugned in both the writ petitions be set aside, permission be accorded to the writ petitioners to raise constructions as per the regulations and the writ petitions be allowed in toto.

**Argument of the counsel for the NOIDA**

20. Countering the submissions of the learned counsel for the writ petitioners in both the writ petitions, Shri M.C. Chaturvedi, Senior Advocate assisted by Sir Kaushalendra Nath Singh, who appears for the respondent-NOIDA Authorities have submitted that the orders impugned in the writ petitions are perfectly valid in accordance with law and needs no interference in the present proceedings. A question regarding maintainability of the writ petition has been raised on the premise that the writ petitioners have an alternative efficacious remedy of preferring appeal under Regulation 14 of the 2010, Regulations, thus, the writ petition be dismissed on the ground of alternative remedy. On merits, It is submitted that in order to raise constructions over the land which is situated in an area which is notified by the NOIDA being within its jurisdiction, permission is required. According to them, there happens to be specific procedure contemplated under the Chapter-II of the Regulation, 2010 wherein an application for building permit is required and as per Regulations 4 & 5 under Chapter-II read with the checklist 1-A (for building on individual plots), checklist-1B (for the buildings other than those on individual residential plots) and checklist-1C (for the layout and subdivision of plots), certain formalities are to be completed at the end of the applicants who seek to raise constructions. Submission is that in the present case, the writ petitioners in leading and the connected writ petition have violated the regulations as they have raised constructions without there being any application for building permit less to say about approval.

21. In nutshell, the submission is that the constructions so raised are totally unauthorized and illegal and in the garb of an application seeking building permit, they seek to regularize the same which is thoroughly impermissible as per the regulations. It has also been argued on behalf of the NOIDA that the Khasra Nos. 793 and 795 comes within the notified area as per the provisions of the Act, 1976 and they are meant for institutional purpose, thus, allowing the writ petitioners to raise constructions individually would tantamount to distort the very scheme, particularly, when the same is to be allotted for the institutional purpose.

22. While inviting attention towards the counter affidavit filed on 03.11.2019 sworn by the Manager Planning, NOIDA on behalf of the second respondent, it is sought to be contended that with respect to Khasra Nos. 793 and 795 which falls in the notified area of NOIDA in Village-Gulawali, the NOIDA has already sent a proposal on 15.10.2012 to Additional District Magistrate, Land Acquisition, Gautam Budh Nagar for acquisition of the above Khasras and the NOIDA has already carved out a plan for Sector-161 in which Khasra Nos.793 and 795 falls. It is also contended that the NOIDA in furtherance of its object for sustained development has by virtue of the sale deed and acquisition acquired a total area of 8.94 acres and for the rest proceedings are already in line. It is

also contended that against the order declaring the land of the writ petitioners to be non-agriculture under Section 143 of 1950, Act restoration/ recall application has been filed which is pending consideration.

23. While further inviting attention towards the averments made in the supplementary counter affidavit, it is contended that in the 198th Board's meeting of the NOIDA, an approval has been accorded for purchasing of the land for the purposes of development of the Sector-161. With vehemence, it has been contended that the writ petitioners in leading writ petition have further transferred the plots to different people carving out of small plot and reference is made to Annexure SCA-2 so as to contend that now lands stand transferred to many individuals in small proportions clearly creating a situation whereby the very object of institutional sustained development is being sought to be throttled.

24. Additionally, it has been argued that though for the urban areas, their exist an Act by the name of Uttar Pradesh Urban Planning and Development Act, 1973 for regulation of the constructions and ancillary issues but in the case of the Industrial and Urban Township post acquisition and purchase of land under the 1976, Act, a great amount of development is required inclusive of laying down of roads, water-supply and sewerage etc. Thus, in case, permission is accorded to the writ petitioners to raise constructions according to their whims and fancies that too in fragmentation then the basic object of institutional development would stand redundant. It is, accordingly, prayed that the writ petition be dismissed with cost.

**Argument of the learned Standing Counsel for the State-respondents**

25. Shri Devesh Vikram, learned Additional Chief Standing Counsel along with Shri Fuzail Ahmad Ansari, learned Standing Counsel have adopted the submissions of Shri M.C. Chaturvedi, Senior Advocate who had appeared for NOIDA and have submitted that they have nothing more to add except the fact that the order impugned in the present proceedings are perfectly valid in accordance with law and no fault whatsoever can be attributed in this regard.

26. Before dwelling into the tenability of the arguments raised by the respective parties, it would be opposite to quote, the relevant provisions of the Act and the Regulations which are germane to the controversy in question.

**Statutory Provisions**

***"U.P. Industrial Area Development Act, 1976***

***Section 2 (d)*** *"industrial development area" means an area declared as such by the State Government by notification.*

***Section 6. Functions of the Authority.-*** *(1) The object of the Authority shall be to secure the planned development of the industrial development areas.*

*(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions-*

*(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purposes of this Act;*

*(b) to prepare a plan for the development of the industrial development area;*

*(c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;*

*(d) to provide infra-structure for industrial, commercial and residential purposes;*

*(e)to provide amenities;*

*(f) to allocate arid transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;*

*(g) to regulate the erection of buildings and setting up of industries; and*

*(h) to lay down the purpose for which a particular site or plot of land shall be used, namely, for industrial or commercial or residential purpose or any other specified purpose in such area.*

***Section 8. Power of issue directions in respect of erection of building.***

*(1) For the purposes of proper planning and development of the industrial development area, the Authority may issue such directions as it may consider necessary, regarding-*

*(a) architectural features of the elevation or frontage of any building,*

*(b) the alignment of buildings on, any site.*

*(c) the restrictions and conditions in regard to open spaces to be maintained in and around buildings and height and character of buildings,*

*(d) the number of residential buildings that may be erected on any site,*

*(e)regulation of erection of shops, workshops, warehouses, factories or buildings,*

*(f) maintenance of height and position of walls, fences, hedges or any other structure or architecture constructions,*

*(g) maintenance of amenities,*

*(h) restriction of use of any site for a purpose other than for which it has been allocated;*

*(i) the means to be provided for proper-*

*(i) drainage of waste water,*

*(ii) disposal of industrial waste, and*

*(iii)disposal of town refuse.*

*(2) Every transferee shall comply with the directions issued under sub-section (1) and shall as expeditiously as possible erect any building or take such other steps as may be necessary to comply with such directions.*

***Section-9. Ban on erection of buildings in contravention of regulations**.- (1) No person shall erect or occupy any building in the industrial development area in contravention of any building regulation made under sub-section (2).*

*(2) The Authority may by notification and with the prior approval of the State Government, make regulations to regulate the erection of buildings and such regulations may provide for all or any of the following matters, namely,-*

*(a) the materials to be used for external and partition walls, roofs, floors and other parts of a building and their position or location or the method of construction;*

*(b) lay out plan of the building whether industrial, commercial or residential;*

*(c) the height and slope of the roofs and floors of any building which is intended to be used for residential or cooking purposes;*

*(d) the ventilation in, or the space to be left about any building or part thereof*

*to secure circulation of air or for the prevention of fire;*

*(e) the number and height of the storeys of any building;*

*(f) the means to be provided for the ingress and egress to and from any buildings;*

*(g) the minimum dimensions of rooms intended for use as living rooms or sleeping rooms and the provision of ventilation;*

*(h) any other matter in furtherance of the proper regulation of erection, completion and occupation of buildings; and*

*(i) the certificates necessary and incidental to the submission of plans, amended plans and completion reports.*

*[ No Panchayat for Industrial Township. [Inserted by U. P. Act No. 4 of 2001, Section 2 (w.e.f. 24-3-2001).]*

***Section 12-A- No Panchayat for industrial township.-****Notwithstanding anything contained to the contrary in any Uttar Pradesh Act, where an industrial development area or any part thereof is specified to be an industrial township under the proviso to clause (1) of Article 243-Q of the Constitution, such industrial development area or part thereof, if included in a Panchayat area, shall, with effect from the date of notification made under the said proviso, stand excluded from such Panchayat area and no Panchayat shall be constituted for such industrial development area or part thereof under the United Provinces Panchayat Raj Act, 1947 or the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, as the case may be, and any Panchayat constituted for such industrial development area or part thereof before the date of such notification, shall cease to exist.*

***Section 16. Powers of entry, etc.-*** *The Chief Executive Officer may authorise any person, to enter into or open any land or building with or without assistance, for the purposes of-*

*(a) making any inquiry, inspection, measurement or survey or taking levels of such land or building;*

*(b) examining works under construction or of ascertaining the course of sewers or drains;*

*(c) ascertaining whether any building is being or has been erected or re-erected without sanction or in contravention of any sanction given under this Act or the rules and regulations made thereunder and to take such measurements and do any such other acts as may be necessary for such purpose;*

*(d) doing any other thing necessary for the efficient administration of this Act:*

*Provided that-*

*(i) no such entry shall be made except between the hours of sunrise and sunset and without giving reasonable notice to the occupier, or if there be no occupier, the owner of the land or building;*

*(ii) sufficient opportunity shall, in every instance, be given to enable women, if any, to withdraw from such land or building;*

*(iii) due regard shall always be had, so far as may be compatible with the exigencies of the purpose of which the entry is made, to the social and religious usages of the occupants of the land or building enacted.*

***Section 17. Overriding effect of the Act.-*** *Upon any area being declared an industrial development area under the provisions of this Act, such area, if included in the master plan or the zonal development plan under the Uttar Pradesh Urban Planning and Development Act, 1973, or any other development plan under any other Uttar Pradesh Act, with effect*

*from the date of such declaration, be deemed to be excluded from any such plan.*

***Section 18. Power to make rules.-*** *The State Government may, by notification, make rules for carrying out the purposes of this Act.*

***Section 19. Power to make regulations.-*** *(1) The Authority may, with the previous approval of the State Government, make regulation not inconsistent with the provisions of this Act or the rules made thereunder for the administration of the affairs of the Authority.*

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

*(a) the summoning and holding of meetings of the Authority, the time and place where such meetings are to be held, the conduct of business at such meetings, and the number of members necessary to form a quorum thereat;*

*(b) the powers and duties of the Chief Executive Officer;*

*(c) the form of register of application for permission to erect a building;*

*(d) the management of properties of the Authority;*

*(e) fees to be levied in the discharge of its functions;*

*(f) such other matters as are to be provided for in regulation.*

***New Okhla Industrial Development Authority Rural Abadi Site (Management and Regularization for Residential Purposes) Regulations, 2006***

*["2. (1) (f) "Rural Abadi Site" means the rural areas used for residential purpose on June 30, 2011 and continues to be so used on the date of commencement of the New Okhla Industrial Development Authority Rural Abadi Site (Management and Regularisation for Residential Purpose) (Third Amendment) Regulations, 2011 or such rural areas as are used for residential purpose as on the date of commencement of these regulations and continues to be used as such on June 30, 2011. These regulations shall also extend to such Gram Sabha land which has been resumed by Revenue Department in favour of the Authority and kept on the disposal of Industrial Development Department and on which any person has made residential accommodation."*

***3. Survey and land plan of Rural Abadi Site and Demarcation of Peripheral Boundary.-(****1) The Authority shall as soon as possible carry out a planning survey and prepare plan along with the sketch map of the Rural Abadi Sites in which the following shall be shown:*

*(a) The plots available for regularisation for residential purpose and the plot reserved for other purpose under the Village Development Schemes.*

*(b) Village-wise complete list, maps, location and size of rural abadi sites within the industrial development area, irrespective of the fact whether after declaration as industrial development area, the land has been acquired or process of acquisition initiated or land is not acquired with specific remarks as to in whose possession each site is.*

*(c) The location of the plots and use of land within Rural Abadi Sites.*

*(d) The description of the plot allotted or to be allotted and roads, open spaces, by-lanes, recreation, shops, schools and other places of public utility according to the needs of the particular village.*

*(2) The plan of the Rural Abadi Sites under sub-regulation (1) shall, as early as possible, be submitted to the*

*Authority for approval, which shall either be approved with or without modifications as may be considered proper by the Authority.*

*(3) The peripheral boundary of related Abadi village will be demarcated before regularisation. The management of the plot that are being regularised shall be within the peripheral boundary.".*

***4. Application for regularization.-*** *Any person whose land has been acquired by the Authority and that land is to be regularized, may apply in writing to the Chairman of the Committee and subject to the bona fide requirement of such person his application may be considered by the Committee under and in accordance with these regulations.*

***The New Okhla Industrial Regulations, 2010***

*2.65 Urbanisable Area' means the area earmarked for any of the following uses in the Development Plan/ Master Plan.*

*(i) Residential;*

*(ii) Commercial;*

*(iii) Industrial;*

*(iv) Institutional;*

*(v) Green area*

*(vi) Transportation, and*

*(vii) Any other Special uses as specified in the Development Plan/Master Plan/Scheme duly approved by the Authority.*

***4.0 Building permit.-*** *No person shall erect any building or a boundary wall or fencing without obtaining a prior permit thereof, from the Chief Executive Officer or an Officer authorized by the Chief Executive Officer for this purpose.*

***5.0 Application for building permit-***

*(1) Every person who intends to erect a building within the Industrial Development Area shall give application in the Form given at Appendix – 1.*

*(2) The application for building permit shall be accompanied by documents as mentioned in checklist annexed to Appendix - 1.*

*(3) Such application shall not be considered until the applicant has paid the fees mentioned in Regulation No. 10.*

*(4) In case of objections, the fees so paid shall not be refunded to the applicant but the applicant shall be allowed to resubmit the plan without any additional fees after complying with all the objections within a period of sixty days from the date of receipt of the objection order. If plan is submitted after sixty days, fresh plan fee shall be charged.*

*(5) No application for building permit shall be necessary for the following additions/alterations provided they do not violate any of the provisions regarding general building requirements, structure stability and fire safety requirements specified in National Building Code-*

*(a) Whitewashing and painting;*

*(b) Plastering, patch work, flooring.*

*(c) Renewal of roof at the same height;*

*(d) Reconstruction of portions of building damaged by any natural calamity to the same extent as previously approved;*

*(e) Internal additions / alterations within the building envelop certified and supervised by a Technical Person;*

*(f) Digging or filling of earth;*

***13.0 Sanction or refusal of building permit-***

*(1) After filing of the application for building permit duly certified by the Technical Person as per Appendix 4, the applicant can commence the construction in accordance with the requirements of Zoning Regulations of Development Plan/*

*Master Plan, these Regulations or Planning, Development Directions and terms of lease deed. In case any objections are found during scrutiny of the plans, the same shall be got rectified by the applicant and if any violations are found during or after the construction, the owner shall be required to rectify the same to the satisfaction of the Authority within a period of 30 days from the date such violations are intimated to the owner. In case the owner fails to comply, the Authority shall ensure compliance and the expenditure incurred on doing so shall be recovered from the owner before issue of occupancy certificate.*

*(2) If within sixty days of the receipt of the application, refusal or sanction is not granted, the application with its annexures shall be deemed to have been allowed and the permit sanctioned, provided such fact is immediately brought to the notice of the Chief Executive Officer in writing by the applicant within twenty days after the expiry of the period of sixty days but nothing herein shall be construed to authorize any person to do anything in contravention of the Master Plan, lease conditions, these Regulations and Planning and Development Directions issued under Section 8 of the Uttar Pradesh Industrial Area Development Act, 1976.*

*(3) In case of refusal:-*

*(a) the Authorised Officer shall give reasons and quote the relevant provision of the regulations which the plan contravenes, as far as possible in the first instance itself and ensure that no new objections are raised when they are re-submitted after compliance of earlier objections.*

*(b) The Authority shall demolish the unauthorised construction at the expense and cost of the owner/lessee/sub-lessee. In case the owner/ lessee/sub-lessee fails to pay the above said cost, the same may be recovered from him as arrear of land revenue.*

*(4) Once the plans have been scrutinised and objections, if any, have been pointed out, the applicant shall modify the plans to comply with the objections raised and re-submit them. If the objections remain unremoved for a period of sixty days, the permit shall be refused and the plan shall stand rejected and fee submitted shall be forfeited.*

*(5) When Allottee submits the application for seeking the occupancy certificate without actually completing the building, inspection shall be done within 30days. If during the inspection for issue of completion certificate any building is found incomplete the allottee will be penalised 50 % of occupancy charges or Rs. 5000/- which ever is more and his/her/their application for occupancy shall be rejected. On such rejection of application the allottee will be required to apply afresh along with penalty charges and time extension charges if required. The action against all the concerned Technical person who has prepared the plan will be taken in following steps*

*(i) First time - Warning to concerned Technical person*

*(ii) Second time-black listed in Authority for one year.*

*(ii) Third time refer to Council of Architecture/ IPI/MIC for cancellation of Registration.*

***14.0 Appeal against refusal or sanction with modification of a building permit -***

*Any applicant aggrieved by an order of refusal of a building permit or its sanction under these regulations or directions, may appeal to the Chairman of the Authority within sixty days from the date of communication of such order. Such*

*appeal shall be accompanied by a true copy of the order appealed against, and receipt of appeal fee which shall be 50% of the original plan fee.*

*The decision of the Chairman on such appeal shall be final, conclusive and binding. The chairman shall provide opportunity of hearing to all concern parties with regard to the disputed map.*

*The appeal may be referred after sixty days of communication of such order if within 30 days after the previous period of sixty days he satisfies the chairman that he was prevented by sufficient causes from not filing of appeal and not thereafter.*

***Greater NOIDA Industrial Development Rural Abadi Sites (Management and Regularization) Regulations, 2011***

***Regulation- 2 (1) (i)*** *"Rural Abadi Site" means the rural areas used for residential purpose before June 30, 2011.'*

***3. Survey and land planning of the Rural Abadi Site.-*** *(1) The authority shall as soon as possible carry out survey with view to planning and preparing plan along with the sketch map of Rural Abadi Sites in which the following shall be shown:*

*(a) The plots available for regularization for residential purpose and the plot reserved for other purpose under the Village Development Schemes.*

*(b) Village-wise complete list, maps, location and size or rural abadi site within the Industrial Development area, irrespective of the fact whether after declaration as industrial development area the land has been acquired with specific remarks as to in whose possession each site is.*

*(c) The location of the plots and use of lands within Rural Abadi Sites.*

*(d) The description of the plot allotted or to be allotted and roads, open spaces, bye-lanes, recreation, shops, school and other places of public utility according to the needs of the particular village.".*

*(2) The map of the Rural Abadi Sites under sub-regulation (1) shall, as early as possible, be submitted to the Authority for approval, which shall either be approved with or without modifications, or will be given directions as may be considered proper by the Authority.*

***4. Constitution of Committee for the Rural Abadi Site, Identification etc.-*** *(1) The Authority shall constitute a Committee to be called the Committee for matters related to, identification, control etc., of rural abadi sites.*

*["(2) The Committee shall consist of the following members, namely:*

| | |
|---|---|
| *(a) The Additional Chief Executive Officer/ Deputy Chief Executive Officer* | *Chairman* |
| *(b) Additional District Magistrate (L.A.)* | *Member* |
| *(c) UP Zila Adhikari of concerned Tahsil* | *Member* |
| *(d) Representative of Senior Superintendent of Police* | *Member of concerned district.* |
| *(e) Secretary/Administrative Officer/ Deputy Collector/ Tehsildar.* | *Member/Convenor* |
| *(f) General Manager (Finance)* | *Member* |
| *(g) General Manager (Planning/Architect)* | *Member* |
| *(h) General Manager/O.S.D. (Project)* | *Member* |
| *(i) Senior Manager/Senior Executive/ Manager/Assistant-* | *Member* |

*Manager-Law.]*

***["5. Function of the Committee**. The functions of the committee constituted under Regulation 4 shall be-*

*(a) to identify all rural abadi sites within the industrial development area of Greater Noida.*

*(b) to recommend the rural abadi sites which may be excluded while submitting proposal for acquisition of land within the industrial development area to Chief Executive Officer.*

*(c) to recommend the rural abadi sites which may be released from acquisition proceedings if acquisition process has already been initiated to the Chief Executive Officer.*

*(d) to make recommendation to Chief Executive Officer for such rural abadi land whose possession has been transferred to acquiring body and which is eligible for regularization.*

*(e) to make suitable recommendations and suggestions for limiting and controlling the further extensions of rural abadi sites after the date of the survey conducted under Regulation 3, including determination of peripheral boundaries etc. but not confined only to this extent.*

*(f) to make recommendations in the interest of planned development, for reallocation of abadi sites falling outside the peripheral boundaries of rural abadi site to an area within the peripheral boundary.*

*(g) to make recommendations for settlement of disputed abadi sites and any other matter which may be referred to by the Authority.".]*

***["6. Committee constituted under Chairmanship of Chief Executive Officer-** (1) The Committee constituted under Regulation 4 will submit its recommendation about the rural abadi sites which be released from acquisition to the following Committee constituted under Chairmanship of Chief Executive Officer:*

*(a) The Chief Executive Officer of the Authority.*

*(b) The District Magistrate of Gautambuddh Nagar or Member Additional District Magistrate nominated by him*

*(c) Superintendent Police of Gautambuddh Nagar or Assistant Superintendent Police nominated by him. Member*

*(2) The Authority shall appoint one of the members nominated by it under clause (b) of sub-regulation (1) to be the Secretary of the Committee, who shall maintain the relevant records, prepare and place the agenda before the Committee, prepare the minutes and discharge all such duties as are entrusted to him by the Committee from time to time.*

*(3) Three members of the Committee shall constitute the quorum but quorum shall include at least one member referred to in clause (c) of sub- regulation (1).*

*(4) No act or proceeding of the Committee shall be invalid by reason of the existence of any vacancy or a defect in the constitution of the Committee.*

*(5) The decision of the Committee shall be duly recorded in the minutes and it shall be clearly mentioned therein that the particular case, the regularization of undeveloped plot is not against the interest of development scheme of the Authority and the Committee has obtained that concurrence of the interested person upon individual basis, for which the Committee shall be competent.*

*(6) The decisions of the Committee shall be transmitted to the*

*Authority which shall consider it in the first meeting thereafter or for reason to be recorded in any subsequent meeting and the Authority may make such modification as it think fit for reasons to be recorded."]"*

**Analysis**

27. We have given thoughtful consideration to the arguments raised by the learned counsel for the parties and perused the record.

28. The facts are not in issue. It is not in dispute that the writ petitioners who are two in number in the leading writ petition purchased land by virtue of the registered sale deed in Khasra Nos. 793 and 795 of village in question. Similarly, so far as the writ petitioners in the connected writ petition they also purchased the land through the registered sale deed in the said Khasras. It is also not in dispute that the Khasra Nos. 793 and 795 are situated in Village- Gulawali which is notified by the NOIDA in terms of the provisions of the Act, 1976. The bone of contention between the parties is as to whether the request sought to be made by the writ petitioners for sanctioning of the map can be turned down on the considerations which weighed the NOIDA in the orders impugned. A survey of the statutory provisions shows that the basic object of engrafting the 1976, Act was to provide for constitution of the authority for the development of certain areas into industrial and urban townships and the matter connected therewith. Section 2-(d) of the 1976 Act defines industrial development area as an area declared as such by the State Government by notification. Section 3 provides for constitution of the NOIDA and the Section 6 further provides for the function of the authority. What is relevant, is sub-section 2-(g) of Section 6 of 1976 Act which amongst other gives power to the NOIDA to regulate the erection of building and setting up of industries. Section 8, further enjoins the NOIDA the power to issue directions in respect of erection of the building whereas Section 9 authorizes the NOIDA to put up ban on erection of buildings in contravention of regulations. Section 12-A starts with non obstante clause and takes away the powers of panchayat in respect of industrial area which may fall within territorial area of panchayat if notified by the State Government. Likewise, Section 17 gives an overriding effect to the provisions of the 1976 Act, Section 18 provides for power to make rules and Section 19 is with respect of power to make regulations. As regards, Regulations, 2006 are concerned, they have been framed in exercise of the powers conferred under sub-section (1) read with clause (d) of sub-section (2) of 1976, Act with respect to proper management of land within the rural abadi site vested within in the authority and Regulation 2 (1) (f) defines rural abadi site, Regulation 4 provides for application for regularization, Regulation 5 of constitution of committee, Regulation 5A, constitution of committee for identification, etc. Regulation 6, functions of the committee, Regulation 10 talks about restriction and Regulation 21 exercise of powers. Likewise, Regulation 2010 provides for layout of the building permit and occupancy and 2.65 defines urbanisable area, Chapter-II, Regulation 4 provides for building permit and Regulation 5 applies for building permit. Checklist has been provided being checklist-1A for building on individual residential plots and checklist-1B for buildings others than those on individual residential plots, meaning thereby that for filing an application for building permit

due compliance of the requirements in the checklist is to be made which is a condition precedent. Regulation 13 provides for sanction or refusal of the building permit and Regulation 14 appeals against refusal or sanction with modification of a building permit. Checklist-1C is also relevant which is deals with layout or subdivision of plots. Likewise, Regulation 2011 also contains similar provisions with slight modification as in the case of Regulation 2010.

29. As regards, the objection raised by the NOIDA regarding maintainability of the writ petition on the ground of existence of an alternative efficacious remedy while preferring an appeal under Regulation 14 of 2010, Regulations, there is no quarrel to the said proposition, however, we find that earlier an order impugned came to be passed which was subject matter of challenge in the earlier spell of litigation and the NOIDA itself withdrew the same and thereafter now the order impugned has been passed and questioning the same the writ petition is pending 2018-19 and responses have been filed by the NOIDA disclosing their stand, thus, it would be futile to dismiss the writ petition on the ground of alternative remedy.

30. Bearing in mind, the aforesaid statutory provisions, the controversy in question is to be addressed. The first and foremost question which arises for consideration before us is whether it is open for the NOIDA to pass a blanket order forbidding the writ petitioners to raise constructions while not sanctioning map as requested by them. Once it is not disputed that the Khasra Nos.793 and 795 situated in Village-Gulawali stands notified and are part of sector 161 of NOIDA then obviously the power to regulate stands conferred with the NOIDA. The NOIDA can resort to appropriate regulatory measures which may be necessary from time to time in order to give effect to its statutory scheme and object.

31. On a pointed query being raised to Shri M.C. Chaturvedi assisted by Shri Kaushalendra Nath Singh who appears for the NOIDA whether there is any restriction or a bar backed by a statutory provision relating to transfer of the land by anyone to the other, Shri M.C. Chaturvedi assisted by Shri Kaushalendra Nath Singh could not point out any provision to the said fact.

32. Keeping in mind, the aforesaid factual position as portrayed before us, we have no option but to assume that the parties are free to transfer the land which belongs to them and they are the owners. Now a question arises whether in the said factual backdrop, there can be any resistance on the part of NOIDA in not processing the applications for building permit. The stand of the NOIDA as per the orders impugned in the present writ petition and the counter affidavit is that Khasra Nos. 793 and 795 are situated in Village-Gulawali are part of Sector-161 and has been earmarked for industrial use and purpose. It has also come on record that on 15.10.2012, the NOIDA Authorities have sent a proposal to Additional District Magistrate, Land Acquisition, Gautam Budh Nagar for acquisition of the part of the land which is owned by the private individuals. A Board's meeting is also stated to have been convened, approving for purchase of the land for the purposes of the development of the said sector and advertisement to the said effect was also published in the widely circulated newspapers. Pleadings reveal that till date, the land possessed by the writ petitioners have not been either acquired or resumed.

However, the objections of the NOIDA as set out in the orders impugned before us and in the counter affidavits filed by them is that illegal constructions has been sought to be raised by the writ petitioners and further the land in question being the part of Araji Nos. 793 and 795 so owned by the writ petitioners has been sold in tits and bits i.e. fragmentation.

33. Supplementary counter affidavit also appends a chart showing the transfer of the lands by the writ petitioners to others in fragmentation. Attention has also been drawn towards the sale deeds appended in the leading writ petition whereby only the land was being sought to be transferred by the erstwhile owner in favour of the writ petitioners in the leading writ petition which shows that only land had been purchased and constructions were erected without any authorization. The writ petitioners on the other hand have come up with the stand that they possess declaratory orders under Section 143 of the 1950, Act declaring the land to be non-agricultural and the said order is still existing though, according to the NOIDA restoration/ recall application has been filed, thus, it is was always open for them to raise constructions and in the present case in hand, according to them, whatever constructions earlier existed, they are still standing and their request for grant of building permit to raise further constructions have been turned down. They further contend that they are resorting to commercial activities and not residential.

34. Learned counsel for the writ petitioners have sought to rely upon the judgment of a coordinate Bench in ***Writ-C No. 43275 of 2015 (Ajeet Singh Chauhan v. State of U.P. and 3 others)*** along with connected ***Writ-C No.43195 of 2015 (M/S Bright Infracon Pvt, Ltd. and Another v. State of U.P. and Another)*** decided on 16.02.2018 so as to contend that NOIDA has no right to resist the sanctioning of the map.

35. The Learned Senior Counsel for the NOIDA has also relied upon a judgment of the coordinate Bench in ***Paradise Development v. Chief Town and Country Planed*** along with connected writ petitions in ***Misc. Bench No.5617 of 1990 decided on 05.09.2017 reported in 2017 SCC Online AII 2744*** so as to contend that mere obtaining of a declaration under Section 143 of 1950 Act would not be bind the NOIDA Authorities.

36. In the opinion of the Court, once the Khasra Nos.793 and 795 situated in Village-Gulawali stands notified by the NOIDA and is a part of Sector-161 then obviously NOIDA is possessed with the power to regulate the constructions. The power vested with the NOIDA to regulate cannot be transformed into the power to restrict or restrain constructions while not sanctioning map. The maps obviously are to be sanctioned until and unless the same is not as per the Acts and Regulations. Here in the present case, the crucial question is whether in the wake of the statutory provisions, the impugned orders could have been passed.

37. Interestingly, there is no restriction on the transfer of the land which is owned by the tenure holder. Once the position being so which is owned a right stands accrued to the land owners to ask for sanctioning of map. The said right is not an unfettered right but it is subject to various factors inclusive of compliance of the Rules and the Regulations on the said subject. Once the NOIDA possesses the

power to sanction the map then the said power cannot be exercised illegally and denial is to be based upon adequate reasons backed by the statute in consoance with the Article 14 of the Constitution of India. One of the reasons for not according building permit was that such type of permit so sought by the land owners for raising constructions cannot be granted as there is no policy available with the NOIDA in sanctioning the map, when the land in question is neither allotted nor acquired. Certainly, said ground taken by the NOIDA in denying the building permit is inconceivable and not as per the statutes. The other ground that since acquisition proceedings are underway as resolution has been passed for acquisition or purchase of the land owned by the writ petitioners, thus, the building permit cannot be accorded also does not test the legal touchstone as acquisition or resumption is a matter which is to happen in future and which will take a long time and even if it happens in future, the present cannot be sacrificed, particularly, when the question of ownership is not disputed and the writ petitioners hold a valid title till the passing of the orders impugned in the present writ petitions.

38. Moreover, the other ground taken in the order impugned that in case maps are sanctioned then their whole scheme for institutional purpose/ development will stand distorted cannot be countenanced by us, particularly, when till date, no acquisition has been made. As a matter of fact, in case, permission is accorded and constructions are raised and thereafter lands are acquired as per the relevant statutes then obviously it would not be in any manner whatsoever detrimental to the interest of the NOIDA as in that event, the NOIDA would be paying compensation of the land and the constructions made thereon. So far as the allegations of raising illegal constructions by the writ petitioners is concerned though it is noticed in the order impugned and as well as allegations to the said fact are in the counter affidavit filed by the NOIDA but the extent of the said illegal constructions is not indicated or disclosed. We further find that there is no report of the NOIDA appended to the counter affidavit so as to suggest as to what type of illegal constructions has been raised by the writ petitioners. In absence of any document available on record we are not in a position to delve into the said issue.

39. The counter affidavit filed by the NOIDA alleges that the lands which are owned by the writ petitioners have been further transferred by the writ petitioners in fragmentation to others which is also one of the ground for negating the request of the writ petitioners for grant of building permit but, the Court finds from the orders impugned in the writ petition that the said ground is not available. We further find that the Regulations, 2010 also provides for filing of the application for according permission for layout and sub-division of plots as per checklist-1C, it might be a relevant consideration for granting or denying the building permit but the said facts have also not been adverted in the orders impugned.

40. The Hon'ble Apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi and Others, (1978) 1 SCC 405*** has observed as under:

*"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons*

*so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise."*

41. Further in ***Union of India and another v. GTC Industries Ltd., Bombay, (2003) 5 SCC 106*** it was held as under:

*"It is well settled that a quasi-judicial order has to be judged on the basis of reasoning contained therein and not on the basis of pleas put forward by the person seeking to sustain the order in its counter-affidavit or oral arguments before the court."*

42. Since the order impugned does not advert to said aspect, thus, this Court is not in a position to go into the said issue at this stage.

43. So far as the reliance and reference so placed by the writ petitioners in the case of **Ajeet Singh Chauhan (supra)** is concerned, the same is of no aid to the writ petitioners, particularly, when in the said case, the land in question over which the constructions were raised was not notified by the NOIDA and did not come within the urbanisable area and were under the concerned village panchayat and taking into the said factual aspect the coordinate bench came to the conclusion that the NOIDA had no authority to issue demolition notice. However, in the present case, the Village-Gulawali wherein the Khasra Nos. 793 and 795 are situated has been notified by the NOIDA and it is the part of the Sector-161 which has not been disputed by the writ petitioners, thus, it can be safely said that the NOIDA is the regulatory authority.

44. As regards, the judgment in the case of **Paradise Development (supra)** is concerned, a Division Bench of this Court while addressing one of the issues relatable to grant of declaration under Section 143 of the 1950, Act, declaring the land to be non-agricultural which was within the territorial jurisdiction of the NOIDA came to the conclusion that the declaration under Section 143 of the 1950, Act by the prescribed authority would not bind NOIDA and the Regulations would prevail and constructions raised would be after the approval of the NOIDA after sanctioning the building permit. The said judgment squarely applies in the present facts, particularly, when the land stands notified to NOIDA.

45. Since in the present case, we find that the order impugned in both the writ petitions have not adverted to the core and fundamental issues which are being sought to be argued by the respective parties and noticed in the judgment, thus, in the opinion of the Court, the orders cannot be sustained and they are liable to be set aside while remitting the back to the matter to concerned authorities to pass a fresh order strictly in accordance with law after revisiting the entire issues.

46. Accordingly, the writ petition is being decided in the following terms:

(a). Order dated 15.11.2018 impugned in the leading writ petition and order dated 10.08.2017 impugned in the connected petition passed by the Chief Executive Officer, NOIDA are set aside.

(b). The matter stands remitted back to the Chief Executive Officer, NOIDA to pass a fresh orders in accordance with law.

(c). The writ petitioners shall appear before the Chief Executive Officer, NOIDA on 13.11.2024 along with an

appropriate application accompanied with complete documents which they seek to rely upon to substantiate their claim.

(d). The Chief Executive Officer, NOIDA shall get a spot inspection done by a team constituted by it while fixing a specific date in the 4th week of November, 2024.

(e). The spot inspection shall be done in the presence of the writ petitioners and the affected parties.

(f). A copy of the inspection report shall be served upon the writ petitioners/ affected parties by hand, by speed post/ e-mail by 14.11.2024, granting them a suitable time to submit their objections within further 10 days, say 26.11.2024.

(g). On the receipt of the objections, a date shall be fixed for hearing in the 2nd week of December, 2024.

(h). Hearing be done and the orders be passed by within a period of two months thereafter.

(i). The orders to be passed by C.E.O. NOIDA should be reasoned and speaking dealing with each and every contentions raised by the parties.

47. With the aforesaid observations, the writ petitions are partly **allowed**.

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**(2024) 10 ILRA 957**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2024**

**BEFORE**

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

Writ C No. 16616 of 2024

**Larsen & Toubro Ltd. ...Petitioner**
**Versus**
**State of U.P. & Ors. ...Respondents**

**Counsel for the Petitioner:**
Raghuvansh Misra, Sr. Advocate

**Counsel for the Respondents:**
C.S.C., Mohd. Afzal, Rahul Agarwal

**A. Real ESt. Law – Registration of Project – Promoter – Penalty - Real ESt. (Regulation and Development) Act, 2016 - Sections 4 & 5(2) - RERA Act, 2016: Section 43(5) r/w Section 44 - U.P. Real ESt. (Regulation and Development) Rules, 2016: Rule 3(1)(f); The Uttar Pradesh Real ESt. (Regulation and Development) (Agreement For Sale/Lease) Rules, 2018; Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010.**

**There is no Section, Rules or Clause under the RERA Act or Rules, which makes it mandatory for the owner to be a Promoter.** (Para 142)

**It is apparent that a promoter is the one who is responsible for constructing the project or causes to be constructed and is responsible for selling the project. In this case, on a plain reading of the definition the petitioner falls within the category of the promoter as he is constructing and selling the project and also have the necessary agreements from the owner of the land.** (Para 143)

A plain reading of Section 2(zk) shows that the promoter is defined as a person who has been assigned development rights in respect of a project for the purpose of constructing and selling the apartments. The Parliament in its wisdom has used the word 'or' and not 'and' and hence the promoter need not be the owner of the land, but can be a person who is developing the land even on the basis of power of attorney. **When the definition is not ambiguous, it has to be read as it is, and the scope of promoter cannot be expanded.** (Para 141)

**In the present case, the promoter is not the owner of the land, so he will fall under**

**the category of Rule 3(f).** Rule 3(f) postulates the possibility when the developer does not own the title of the land but he is only developing, in that case the promoter needs to submit the consent of the owner of the land along with the copy of proper agreement with the person who has the title. All these documents sought under the Rules have been furnished and inspite of completing all the formalities as laid down u/Rule 3 of Rules 2016 yet the respondents have illegally held back the registration. (Para 138, 142)

**B. JIL would not fall in the category of promoter for the project. The forms annexed to U.P. Real ESt. (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 provides standard form of agreement to sale/lease which clearly contemplates a situation where the owner is not a promoter.** (Para 149)

**It is settled that being owner of the land would not essentially make them the promoter and they would not suffer the consequence of being a promoter.** (Para 148)

RERA does not require owner of the land to be a promoter, infact the other consequences in the rule makes it clear that the promoter could be the owner OR the person who is developing the project on his land. (Para 144)

While drafting the Act, the legislature intended for two parties to be made co-promoters and they have expressly said so in the "Explanation" to Section 2(zk) wherein it has been provided that "For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified", under this Act or the rules and regulations made thereunder. **The words "cause it to be constructed" in Section 2(zk) have to be read in context of the entire subsection and further apply only to a promoter who is responsible for construction.** (Para 145)

The builder who do not own the land can be a promoter alone. It further shows the intent of the Legislature that the promoter need not be the owner. The person who constructs and sells is the promoter even if he is carrying on the construction activities on someone else's land, provided that a valid agreement has to be there between the owner of land and the developer. (Para 149)

**C. Since the application was in proper format and accompanied by all the documents as laid down in Section 4(2), there is no illegality in the application and UPRERA cannot do a hair-splitting exercise and ask for further documents which are not even been asked for in Section 4(2) of the RERA Act.** (Para 154)

As per Section 4(1) every promoter has to make an application to the Authority for registration of the UPRERA project in the form and manner provided accompanied by the fees. (Para 150)

The petitioner has made an application as a developer wherein it was clearly St.d by him that the land is owned by JIL. The fact is that said land is actually owned by YEIDA and leased out to JAL/JIL, who has given a permission by way of Assignment Deed to develop the project land on which the petitioner is supposed to construct/sell the apartments to the allottees. The petitioner apparently comes within definition of 'promoter' wherein he does not own the land but he is developing the land. The application filed by the petitioner on 02.06.2023 completes all the formalities and has been accompanied by all the documents as contemplated u/s 4(2) of RERA Act. (Para 151)

**As per Section 2(zk) of the Act, the promoter can be a person who owns the land and wants to construct on it, or a promoter can just be a developer who is developing the apartments on the land owned by somebody else.** (Para 152)

In the supplementary reply filed by UPRERA, the annexures confirm that all the details and documents as required to be filed by the petitioner have been received and they have marked 'no objection' to the same. This was reflected from the print out of the website of

UPRERA, which was filed along with the supplementary reply. A plain perusal of the document uploaded shows that all the documents as required by UPRERA to be submitted, have been duly uploaded by the petitioner. Since Section 4(2) lays down a format and all the documents have to be uploaded in the particular format and it has been done so, since it is an online portal, no further document can be uploaded. The objections raised by UPRERA to include JIL as co-promoter was not a mandatory requirement as per the Act. (Para 153)

Thus, in view of clear provisions of the Act, it is not open for UPRERA to impose the condition on the petitioner to get JIL/JAL sign the application as a co-promoter. The application filed by the petitioner under the provisions of the Act and Rules of RERA was complete and there was no occasion for UPRERA to raise an objection, which is not contemplated under the Act and also to hold back the application for more than a period of thirty days. (Para 155)

**D. It is the mandatory duty of UPRERA to act in accordance to the provisions of the Act, and the UPRERA cannot hide from its statutory obligations on the ground that the application was incomplete and was pending.** As per Section 5(2) of the Act, UPRERA had only two options to be exercised within thirty days,- (a) to grant registration (b) reject the application. As per the Act, it was mandatory for UPRERA to exercise one of these options within stipulated time of thirty days. If UPRERA had serious objections on the application of the petitioner, and if they thought it necessary to include JIL as promoter, and if the same was not done within stipulated time, they ought to have rejected the application. UPRERA cannot keep any application pending beyond the statutory period of thirty days. (Para 164)

**Since, the application of the petitioner was kept pending much beyond the period of thirty days, hence, as per Section 5(2) of the RERA Act, the project of the petitioner is deemed to have been registered and UPRERA is bound to provide the petitioner registration number, login Id and password to the applicant/petitioner for accessing the website of the Authority and to create his web page.** (Para 168)

**Section 5(2) was an answer to the prospective ills in the system whether to grant registration, the officers of the authorities could harass the promoter or extract a pound of flesh.** The Legislature in its wisdom has enacted Section 5 of the Act which St.s that any application moved u/s 4 has to be allowed or rejected within a period of thirty days, failing which the application will be deemed to have been approved. Definitely, this provision has been introduced by the Legislature to address the mischiefs which could possibly happen. **When the words of a section in the Act is unambiguous, it is presumed that the legislature has deliberately and consciously used the words for achieving the purpose of the Act.** (Para 165, 169)

**E. The petitioner by means of the agreement has right to built and sell the apartments made on the contracted area, and also has right to transfer undivided portion of the land on which the project has been made in favour of the Association of Allottees, and also has a right to provide water/sewerage/road/electricity etc. to the project on behalf of JIL/JAL.** A plain reading of the Assignment Agreement read with general Power of Attorney answers all the apprehensions raised by the respondents. (Para 172)

**F. The petitioner cannot ask for negative parity on the ground of similarly situated companies who had been granted registration whereas the petitioner has been refused for registration.** (Para 177)

**G. It is settled that once a matter is subjudice and a question of law is pending consideration before a court of law, the Authority ought not to act with undue haste and interfere in the adjudication process of the Court and any attempt of the authority to decide the same matter, which is pending before the court, would be an overreach.** (Para 181)

**H. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.** (Para 185)

An apprehension was raised by the respondents that in case JIL/JAL is not made a co-promoter, there could be a chance that the common area of the building as well as amenities like water supply, sewage system, electricity, road etc., which fall in the domain of JIL/JAL, could not be provided to the allottees. **No authority or the court could move on apprehensions, specially when, the apprehension is far-fetched.** The Act is absolutely clear that it does not interfere in the ownership rights of the owner and it is only there to take care of interest of the allottees, in case, the project is not completed or handed over in time to the allottee, the Authority has to ensure the refund of his money along with interest. Section 18 of the RERA Act is answer to the apprehensions raised by the respondents wherein return of amount and compensation has been laid down. (Para 184)

**I. Words and Phrases – (i) *'Promoter'* -** A plain reading of Section 2(zk)(i) shows that a promoter is a person "who constructs or causes to be constructed an independent building consisting of apartments for the purpose of selling". Further, Section 2(zk)(v) also defines the promoter as any other person who acts as a builder, developer holding the power of attorney from the owner of the land on which the apartment is to be constructed.

(ii) ***"A Verbis Legis Non Est Recedendum"*** which means "From the words of law there must be no departure". The Court has to decide on the footing that the legislature intended what has been said in the Act. A statute is required to be interpreted without doing any violence to the language used therein. (Para 165)

**J. Interpretation of statute - When a definition used the word "means",** it means that such definition is hard and fast definition and no other meaning can be assigned to the expression than what is put down in the definition. (Para 146)

**Writ petitions allowed**. (E-4)

**Precedent followed:**

1. M/s Singh Brother, Kanpur Nagar through Partner & ors. Vs UPRERA Lucknow and 3 others, Writ-C No. 2928 of 2024 (Para 30)

2. St. of W.B. & ors. Vs Gitashree Dutta (Dey), 2022 SCC OnLine SC 691 (Para 32)

3. Uttar Pradesh Power Transmission Corporation Ltd. & anr. Vs CG Power and Industrial Solutions Ltd. & anr., (2021) 6 SCC 15 (Para 32)

4. Vaidehi Akash Housing (P) Ltd. Vs New D.N. Nagar Co-Opposite Party, Housing Society Union Ltd., 2014 SCC OnLine Bom 5068 (Para 42)

5. Goregaon Pearl CHSL Vs Dr. Seema Mahadev Paryekar & ors., 2019 SCC OnLine Bom 3274 (Para 42)

6. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd. & ors., (2003) 2 SCC 111 (Para 51)

7. Sharif-Ud-Din Vs Abdul Gani Lone, (1980) 1 SCC 403 (Para 52)

8. Chandrakant Kolavale Vs Government of Maharashtra & ors., 2003 SCC OnLine Bom 34 (Para 53)

9. St. of Bihar Vs Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472 (Para 54)

10. Vyas Narain Singh & ors. Vs The B.R. Ambedkar Bihar University, (2006) SCC OnLine Pat 461 (Para 54)

11. Commissioner of Income Tax Muzaffar Nagar Authority, AIR 205 All 76 (FB)

12. Commissioner of Income Tax Vs Raghuraji Devi Foundation Trust, 2022 SCC OnLine All1 295 (Para 54)

13. Tata Chemicals Ld. Vs Commr. of Customs, (2015) 11 SCC 628 (Para 55)

14. M/s Siemens Aktiengeselischaft and Siemens Ltd. Vs Delhi Metro Rail Corporation Ltd. & ors., (2014) 11 SCC 288 (Para 67)

15. Doiwala Sehkari Shram Samvida Samiti Ltd. Vs St. of Uttaranchal & ors., (2007) 11 SCC 641 (Para 108

16. Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore Vs President, Indore Development, (2006) 2 SCC 604 (Para 109)

17. Mohd. Abdul Wahid Vs Nilopher & anr., (2024) 2 SCC 144 (Para 121)

18. Bachhaj Nahar Vs Nilima Mandal & anr., (2008) 17 SCC 491 (Para 121)

19. P. Kasilingam Vs P.S.G. College of Technology, AIR 1995 SC 1395 (Para 146)

20. Punjab Land Development and Reclamation Corp. Ltd. Chandigarh Vs Presiding Officer Labour Court, Chandigarh, (1990) 3 SCC 682 (Para 146)

21. Kehar Singh Vs St. (Delhi Admn.), (1988) 3 SCC 609 (Para 162)

22. District Mining Officer Vs Tata Iron & Steel Co., (2001) 7 SCC 358 (Para 163)

23. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92 (Para 165)

24. M/s Newtech Promoters and Developers Vs St. of U.P., (2021) 18 SCC 1 (Para 165)

25. Sarku Engineering Services & ors. Vs U.O.I. & ors., AIR 2017 (NOC) 49 (Bom.) (Para 181)

26. S. Rangarajan VsP. Jagjiran Ram, (1989) 2 SCC 574 (Para 185)

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

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Raghuvansh Misra, Sri Shivang, Ms. Saloni Kapadia, Sri Devansh Misra, Sri Anup Shukla, Sri Asvani Tripathi and Sri Shubam Yadav, Advocates appearing on behalf of the petitioner, Sri Anil Tiwari, learned Senior Counsel assisted by Sri Mohd. Afzal and Sri Rahul Agarwal, Advocates appearing on behalf of respondent nos.2 and 3-Uttar Pradesh Real Estate Regulatory Authority and Sri R.M. Upadhyay, Ms. Uttara Bahuguna, Sri Ambrish Shukla, learned Additional Chief Standing Counsel and Sri Fuzail Ahmad Ansari, learned Standing Counsel for State-respondent.

**FACTUAL MATRIX**

2. Yamuna Expressway Industrial Development Authority had granted a concession in favour of Jaiprakash Industries Limited vide Concession Agreement on 07.02.2003 whereby YEIDA has agreed to transfer land admeasuring 2,50,00,000 square metres to Jaiprakash Industries Limited, for commercial, amusement, industrial, institutional and residential development, at five(5) or more locations alongside the Yamuna Expressway. In furtherance of the same, YEIDA executed various lease deeds in favour of Jaiprakash Industries Limited for a period of ninety(90) years spread out in various sectors of Noida/Greater Noida ("Lease Deeds–I"). The said lease deeds covered land measuring 248.6704 hectares (614.00 acres) in Sectors 128, 131 and 133 at Noida thereon.

3. This Concession Agreement also conferred rights in favour of the allottee/Jaiprakash Industries Limited to transfer the whole or any part of the said land, whether developed or undeveloped, by way of plots or constructed properties, or otherwise dispose of its interest in the said land or part thereof to any person in any manner whatsoever without requiring any consent or approval of YEIDA or of any other relevant authority.

4. Subsequent to the execution of the Concession Agreement, Jaiprakash Industries Limited got merged with Jaypee Cement Limited by virtue of a scheme of amalgamation and merger, which was sanctioned by this Court vide order dated March 10, 2004. Further, on March 11, 2004 the name of Jaypee Cement Limited got changed to Jaiprakash Associates Limited (JAL). By virtue of the same, all rights, interest, entitlement, benefits and obligations of Jaiprakash Industries Limited under the Concession Agreement and the Lease Deeds-I came to be vested with JAL.

5. Thereafter, in terms of the Concession Agreement, JAL incorporated a Special Purpose Company (SPC)/Special Purpose Vehicle, namely Jaypee Infratech Limited for the implementation of the Expressway project. All the rights and obligations of JAL, under the Concession Agreement and the Lease Deed-1 were transferred/assigned to this SPC(JIL).

6. JIL prepared a layout plan including the land use plan, road network plan, landscape plan and area charts for the development of 453 acres situated in Sectors 128, 129, 131, 133, and 134 at Noida. The same was initially sanctioned on 31.10.2007. Subsequently, the said layout plans were revised and the amended plan was sanctioned on 23.03.2011. Yet again, these layout plans were revised on 20.02.2015. The project now is known as "Jaypee Greens Wish Town".

7. Thereafter, a registered Assignment Agreement was entered on 31.07.2017 between JIL/JAL and the petitioner as the developer, wherein the petitioner took over the development rights in respect of the Floor Area Ratio ("FAR") over a portion of the Development Lands. JIL/JAL after receiving ₹487.5 crores from the petitioner, had executed an "Assignment Agreement" on 31.07.2017.

8. In furtherance of the Assignment Agreements, an irrevocable General Power of Attorney, was executed on 31.07.2017 by JIL in favour of the petitioner.

9. On this land, the petitioner intended to develop a project in the name of Green Reserve, which comprises of 4 Towers, Towers 1 & 2 were to be built on a plot of 12,394 square metres land bearing Group Housing Pocket No.B-24A and Towers 3 & 4 were to be built on plot of 12,311 square metres land bearing Group Housing Pocket No..B-22B.

10. In order to develop the project on 02.06.2023, the petitioner made an application under Section 4 of the Real Estate (Regulation and Development), Act, 2016 before the UPRERA for registration of Towers 1 & 2 on the Development Land. (Application No.1)

11. On 07.06.2023, UPRERA issued a letter asking the petitioner to include JIL as a 'Promoter' for the project, since the approved map and layout for the Developments Land was in the name of JIL. Again on 08.06.2023, UPRERA asked the petitioner to get a letter from the Suraksha Consortium clarifying that the Project Land do not form part of the resolution plan of Suraksha Realtors Pvt. Limited and Lakshdeep Investments and Finance Private Limited, approved by the Hon'ble National Company Law Tribunal in the corporate insolvency resolution process of JIL.

12. On 12.06.2023, the petitioner responded that they had legal, valid and

marketable rights in respect of the project through the registered GPAs and Assignments Deeds. It was submitted that the petitioner (Larsen & Toubro Ltd.) has the right to advertise, offer, book, sell, dispose, assign, transfer, in any manner whatsoever, the units of the Project along with the sub-lease of proportionate undivided interest in the Development Land, in favour of the allottees, without the prior consent of JIL/JAL, and for such purposes sign and execute booking application form, booking confirmation-cum-allotment letter, agreement for sale, sale deed to transfer title and all necessary assurances, writings, letters, agreements etc. (without the requirement of JIL personally executing such documents), and receive in its name all revenues, receivables and consideration thereof. It was further stated that the petitioner was not required to add JIL as a 'Promoter' in the project.

13. In response thereto, UPRERA called upon the petitioner to appear before it on 23.06.2023 and provide clarifications with respect to the queries raised vide letter dated 08.06.2023. The petitioner appeared before UPRERA on 23.06.2023 and provided the requisite clarifications/responses to the queries raised by them, and also filed a letter issued by the Implementation and Monitoring Committee of JIL.

14. UPRERA, on technical grounds, rejected the first application of the petitioner on 06.07.2023 giving right to the petitioner to re-apply for registration of Towers 1 & 2 inter alia by providing the following:

*i. A copy of the Concession Agreement,*

*ii. A confirmation on which party will sign and execute the deed and which party will be the confirming party in the deed along-with the promoter to be executed in favour of the homebuyer, and*

*iii. A confirmation on which party will bear/pay the Farmer's additional compensation as demanded by YEIDA.*

15. On the request of the petitioner, the Implementation and Monitoring Committee of JIL issued another letter dated **20.07.2023** to UPRERA inter alia making the following submissions:

*(a) As per the various conditions of the Assignment Agreements, the Petitioner is entitled to develop the Project, sale booking, allotment of the units and flats in the Project.*

*(b) Further in terms of RERA Act and the Assignment Agreements,* ***the Petitioner shall always be the promoter/developer of the Project*** *as all rights to develop the said land, selling, marketing, and advertising are of the Petitioner only.*

*(c)* ***The responsibility with respect to construction, quality and all promises made to the allottees/home-buyer shall be of the Petitioner only.***

*(d) JIL is only responsible to execute sub-lease in favour of allottees/homebuyers to whom the unit have been sold by the Petitioner as developer/promoter for their impartible and undivided share/rights in the Project as per Clause 10.5 of the Assignment Agreements.*

*(e) It is confirmed that in terms of the agreements JIL's role and responsibility shall only be of executing the Sub-Lease Deed in favour of the allottees of the Project for which JIL has also executed the GPAs separately to enable the Petitioner to execute Sub-Lease Deed as provided in Clause 10.5 of the Assignment Agreements.*

*(f) A sub-lease deed executed by JIL in a similar case to an allottee of M/s. Genx Estate LLP was enclosed. It was also submitted that the said project named Golf Street Hub was assigned to M/s. Genx Estate LLP and the project is registered with RERA vide registration No. UP RERA/ PRJ439474 ("Genx Estate LLP Project").*

*(g) It was also submitted that the additional compensation with respect to the Development Lands has already been paid by the Petitioner to the Noida Authority directly.*

16. The petitioner re-applied for the registration of Towers 1 & 2 with UPRERA on 21.07.2023 and which was uploaded on the portal of UPRERA on 31.07.2023("Application 3"), wherein the petitioner provided all the clarifications sought by UPRERA in the Rejection Letter and also submitted the Assignment Agreements and GPAs, and provided a copy of the Conveyance Deed.

17. UPRERA, on 22.08.2023, once again sought the same clarifications from the petitioner as were sought earlier vide letters 07.06.2023 and 08.06.2023. Yet again, the petitioner gave the same response to the queries put forth by UPRERA and stated that the said rights, interest, and obligations of the petitioner are derived from clauses 2.1, 2.4, 2.6, 2.7, 3.3, 10.4, and 10.5 of the Assignment Agreements, and clauses 24, 26, and 27 of the GPAs.

18. UPRERA raised its objection on 22.08.2023 for Towers 1 & 2 and had noted following defects in the application :

*"1. The project land and the approved map are not under the ownership of the promoter M/s Larsen & Toubro Limited-Add the land and map owner as the promoter of the project.*

*2. The promoter should provide a letter from M/s Suraksha Realtors Pvt. Ltd. And M/s Lakshadeep Investment and Finance Pvt. Ltd mentioning that the project land B-24A, Jaypee wishtown Sector-128 Noida do not come under the Resolution Plan accepted by Hon'ble NCLT and should upload the same on the UPRERA project registration portal."*

19. Thereafter, the petitioner applied for the registration of Towers 3 & 4 with UPRERA vide an application on the portal of UPRERA dated 23.08.2023.

20. Thereafter, further notices were sent by UPRERA to the petitioner on 02.09.2023 and 11.09.2023 qua Towers 1 & 2 asking the petitioner to appear before the UPRERA and to submit response inter alia as to why JIL has not been added as a 'Promoter' for Towers 1 & 2. In response to it, the petitioner appeared before UPRERA and submitted the same response which was submitted earlier that JIL need not be a promoter and all its rights have been assigned over to the petitioner. UPRERA still not being satisfied did not grant the registration to the petitioner.

21. Petitioner issued a letter on 25.04.2024 stating that the applications filed on 31.07.2023 and 23.08.2023 were pending for more than 30 days, hence, as per Section 5(1) and 5(2) of the RERA Act, they are deemed to have been approved. The applications are deemed to have been registered on 30.08.2023 and 22.09.2023. Hence, the registration numbers including a login Id and password should have been provided to the promoter/petitioner by 06.09.2023 for Towers 1 and 2 and by 29.09.2023 for Towers 3 & 4 for accessing

the website of the Authority and to create its web page and to fill therein the details of the proposed project.

22. It appears that some advertisement was placed by a third person for the project of the petitioner have a notice dated 08.05.2024 was issued by UPRERA stating that the petitioner has violated Section 3 of the RERA Act by advertising its Project on the website 'www.gaurnewyorkcityghaziabad.com', while the Project was not registered and the petitioner was called upon to provide an explanation to UPRERA by May 23, 2024, failing which action would be taken against the petitioner under the RERA Act.

23. This notice dated 08.05.2024 has been assailed by the petitioner by means of the instant petition seeking inter alia the following reliefs:-

*"(i) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/2024-25 and upon perusing the same, quash and set aside the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 (Annexure No. 1 to this petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;*

*(ii) issue writ, order or direction in the nature of Mandamus declaring that the project of Larsen & Toubro Limited ie. Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No. B-24A are deemed to be registered under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;*

*(iii) issue writ, order or direction in the nature of mandamus directing the Uttar Pradesh Real Estate Regulatory Authority to provide the respective registration numbers for the project of Larsen & Toubro Limited Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B; and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No.B-24A under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;"*

24. On 17.05.2024, this Court has passed the following order :-

*"1. Heard Sri Shashi Nandan and Sri Anurag Khanna, learned senior advocates assisted by Sri Raghuvansh Misra and Ms. Saloni Kapadia, learned counsels for the petitioner, Sri R.M. Upadhayay, learned Additional Chief Standing Counsel for the State respondents and Sri Rahul Agrawal and Sri Mohd. Afzal, learned counsels for the contesting respondent Nos.2 and 3 - Uttar Pradesh Real Estate Reguatory Authority (UPRERA).*

*2. Sri Rahul Agrawal, learned counsel for the contesting respondent Nos.2 and 3 - Uttar Pradesh Real Estate Reguatory Authority (UPRERA) prays for an adjourned on behalf of Sri Anil Tiwari, learned Senior Advocate as he is ill and admitted in P.G.I., Lucknow.*

*3. Matter is adjourned.*

*4. Put up this matter again as fresh on 29.05.2024.*

*5. It is informed that two simultaneous proceedings under Section 3/59 and Section 4 of the Real Estate*

*(Regulation and Development) Act, 2016 (RERA Act) are ongoing against the petitioner. So far as the proceeding under Section 3/59 of the RERA Act is concerned, the same entails imprisonment and penalty and in case it is finalized on the next date fixed, i.e. 23.05.2024, the petitioner would suffer irreparable loss and injury even though on the ground of medical exigency the matter is adjourned. Suffice to indicate, on the next date, the parties shall appear in response to the impugned notice but no final decision shall be taken till 29.05.2024."*

25. UPRERA filed a counter affidavit on 28.05.2024, which was sworn on 27.05.2024, wherein it was stated that the respondent has a preliminary objection regarding maintainability of the present writ petition on the ground that there exists an equally efficacious alternative remedy under Section 43(5) read with Section 44 of the RERA Act, which provides that any aggrieved person by any order or decision or direction of the Authority or Adjudicating Officer, may prefer an appeal to the Appellate Tribunal. Apart from it no other ground was taken.

26. Thereafter, on 29.05.2024 this Court passed the following order :-

*"1. Counter affidavit filed by Sri Rahul Agarwal and Mr. Mohd. Afzal on behalf of respondent nos. 2 and 3 is taken on record.*

*2. Heard Sri Shashi Nandan and Sri Anurag Khanna, learned Senior Counsels assisted by Sri Raghuvansh Misra, learned counsel on behalf of the petitioner, Mr. Mohd. Afzal, learned counsel for the respondent nos. 2 and 3 and Ms. Uttara Bahuguna, learned Additional Chief Standing Counsel assisted by Mr. Fuzail Ahmad Ansari, learned Standing Counsel for the State-respondents.*

*3. On the request of learned counsel for the petitioner, the matter is passed over.*

*4. Put up this matter on 31.05.2024 as fresh.*

*5. Interim order, if any, is extended."*

27. During pendency of case, the application of the petitioner was rejected in UPRERA's 147th Meeting on 16.05.2024, which was communicated to the petitioner on 29.06.2024.

*28. It was then the petitioner preferred an amendment application on 05.07.2024, which was allowed. By means of the amendment, following prayers were made in the amended writ petition :-*

*"(i) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 and upon perusing the same, quash and set aside the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 (Annexure No. 1 to this petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;*

*(ii) issue writ, order or direction in the nature of Mandamus declaring that the project of Larsen & Toubro Limited ie. Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No. B-24A are deemed to be registered under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;*

*(ii.1) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the rejection letter dated June 29, 2024 bearing no. 9073/UPRERA/Projreg/2024-25 and upon perusing the same, quash and set aside the rejection letter dated June 29, 2024 bearing 9073/UPRERA/Projreg/2024-25 (Annexure No.39 to the present writ petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;*

*(ii.2) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the rejection letter dated June 29, 2024 bearing no. 9053/UPRERA/Projreg/2124-25 and upon perusing the same, quash and set aside the rejection letter dated June 29. 2024 bearing 9053/UPRERA/Projreg/2024-25 (Annexure No. 40 to the present writ petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;*

*(iii) issue writ, order or direction in the nature of Mandamus directing the Uttar Pradesh Real Estate Regulatory Authority to provide the respective registration numbers for the project of Larsen & Toubro Limited Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B; and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No. B-24A under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;"*

**PRELIMINARY OBJECTION OF RESPONDENTS**

29. During the course of hearing a preliminary objection was raised by learned Senior Counsel appearing for respondent nos.2 and 3-UPRERA on the ground of availability of alternative remedy. He has cited a judgment of Hon'ble Supreme Court passed in the matter of **Assistant Commissioner Sales Tax and others vs. Commercial Steel Ltd.** wherein the Hon'ble Apex Court has held as follows:-

*"11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:*

*(i) a breach of fundamental rights;*

*(ii) a violation of the principles of natural justices;*

*(iii) an excess of jurisdiction; or*

*(iv) a challenge to the vires of the statute or delegated legislation."*

30. In addition, in the case of M/**s Singh Brother, Kanpur Nagar through, Partner & 7 others versus UPRERA, Lko. & 3 others in Writ-C No.2928 of 2024,** the Lucknow Bench of this Hon'ble Court has held that writ petition is not maintainable in cases where there exists an alternative remedy.

31. It was submitted that, moreover, the petitioner does not fall within the ambit of the exceptions carved out by the Apex Court in cases where an alternative remedy is available and hence, the writ petition is liable to be dismissed on this ground alone. He further submitted that since the authority has passed the rejection order in exercise of its jurisdiction and not in excess

of jurisdiction thus the petitioner fails to satisfy the requirement of law as laid down by the Hon'ble Apex Court and the remedy is, therefore, before the appellate tribunal.

32. In response to it, learned counsel for the petitioner submitted that in the instant matter, UPRERA has passed an order of rejection, when the application of the petitioner has been deemed to have been allowed. He submitted that after deeming provision has come into play, UPRERA had no jurisdiction to pass any such order, hence, it is a case of an "excess of jurisdiction". Since it is a case of an "excess of jurisdiction", it definitely falls within the third category of the judgment cited by learned counsel for the respondent. As such, the instant writ petition cannot be dismissed on the ground of alternative remedy. To buttress his argument, he has relied on judgments passed by Hon'ble Supreme Court in the matter of **State of West Bengal and others vs. Gitashree Dutta (Dey)** and **Uttar Pradesh Power Transmission Corporation Ltd. and another vs. CG Power and Industrial Solutions Limited and another.**

**CONSIDERATION ON PRELIMINARY OF OBJECTION**

33. After hearing the parties at length for couple of days, specially, the parties have argued and advanced all the legal issues, and specially in the light of paragraph no.11 (iii) of the judgement of Hon'ble Apex Court passed in the matter of **Assistant Commissioner Sales Tax and others** (supra), which provides that a writ petition can be entertained in exceptional circumstances where there is an excess of jurisdiction, therefore, it will be a futile exercise to relegate the matter to the appellate authority.

34. Therefore, we are of the considered opinion that the instant writ petition cannot be dismissed on the ground of alternative remedy, and it has to be adjudicated on merits.

**ARGUMENTS ON BEHALF OF THE PETITIONER**

35. Sri Shashi Nandan, Senior Advocate assisted by Sri Raghuvansh Misra, Sri Shivang, Ms. Saloni Kapadia, Sri Devansh Misra, Sri Anup Shukla, Sri Asvani Tripathi and Sri Shubam Yadav, Advocates appearing on behalf of the petitioner advanced his arguments. The argument of the petitioner is on the following points:-

**OBJECTS OF THE REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016**

36. Sri Shashi Nandan, learned Senior Counsel for the petitioner submitted that the statement and objects of the RERA Act was primarily to protect the interest of the flat buyers/addressees. For ready reference relevant provision of the statement of objects and reasons of RERA Act is being quoted below:-

*"The Real Estate (Regulation and Development) Bill, 2013, inter alia, provides for the following, namely:-*

*"(a) to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;*

……..

*(d) to impose liability upon the promoter to pay such compensation to the*

*allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;*

*(e) to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the powers conferred on it and to perform the functions assigned to it under the proposed legislation;*

*(f) the functions of the Authority shall, inter alia, include-(i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (ii) to publish and maintain a website of records of all real estate projects for which registration has been given, with such details as may be prescribed; (iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation;*

*……..*

*(1) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;*

*……..*

37. In Clause (d) of the statement of objects and reasons, it is specifically mentioned that UPRERA is established to impose liability on the promoter to pay compensation to the allottees, in case, if he fails to discharge its obligations imposed on him under the RERA Act. He further submitted that at best UPRERA while registering the project has only to see whether the developer has clear title, free from all encumbrances and whatever he does, has to be transparently shown on the website of the Authority. The Authority can only ensure timely development of the project and in case the same is not done, the promoter can be penalised for the same.

**PROMOTER**

38. The counsel for the petitioner emphasized that the petitioner is a "Promoter" as per the definition provided under Section 2(zk) of the RERA Act. Section 2(zk) is being reproduced hereunder for ready reference:-

*2(zk) "**promoter**" means,—*

*(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or*

*(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or*

*(iii) any development authority or any other public body in respect of allottees of—*

*(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or*

*(b) plots owned by such authority or body or placed at their disposal by Government, for the purpose of selling all or some of the apartments or plots; or*

*(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the*

*allottees of such apartments or buildings; or*

*(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or*

*(vi) such other person who constructs any building or apartment for sale to the general public.*

*Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;"*

39. Section 2(zk) of the RERA Act, which defines 'promoter', states that a person who has been assigned development rights in respect of a project for the purpose of selling the apartments, a power of attorney holder, or a person who develops land as a project for the purpose of selling (all being petitioner in this case), would qualify as being a 'promoter'. In this backdrop, he submits that the RERA Act does not mandate, landowner to be a promoter, as the definition of 'promoter' does not include 'owner'.

40. The learned Senior Counsel elaborated that as per the definition, a promoter is a person, who constructs 'OR' causes to be constructed. Here, the definition uses the words "OR" and not "AND" while defining promoter and hence, an owner can be a 'Promoter' if he is developing himself or anyone who is building on his land after a proper agreement can be a 'Promoter'.

41. He next submitted that JIL does not fall under the provisions of Section 2(zk) of the RERA Act. Respondent has failed to identify a single provision under the RERA Act or the Rules and Regulations thereunder for justifying their action to include JIL as a promoter for the Project. UPRERA is seeking to expand the scope of a clear and unambiguous section 2(zk), which is impermissible. In the event, the intention is to include landowners then appropriate amendments will have to be brought in the RERA Act.

42. The learned Senior Counsel vehemently submitted that it is settled that merely being the owner of a land would not make the party a promoter and ought not to suffer the consequences of being a promoter, and further it is not correct to say that a land owner ought to be a promoter on the premise that he is providing his land for the project. It is clarified that only the promoter is one, who is responsible for constructing the project or can cause it to be constructed. He has placed reliance on **Rajasthan RERA Notification No. F.1(152)RJ/RERA/LAND/2020/1202 dated June 30, 2020, Vaidehi Akash Housing (P) Ltd. v. New D.N. Nagar Co-op. Housing Society Union Ltd., Goregaon Pearl CHSL vs. Dr. Seema Mahadev Paryekar and Others.**

43. He further submitted that Rule 3(1)(f) of the U.P. Real Estate(Regulation and Development) Rules, 2016 is as follows:

*"3.(1)(f) where the promoter is not the owner of the land on which development is proposed details of the*

*consent of the owner of the land along with a copy of the collaboration agreement, development agreement, joint development agreement or any other agreement, as the case may be, entered into between the promoter and such owner and copies of title and other documents reflecting the title of such owner on the land proposed to be developed."*

44. With reference to Rule 3(1)(f) learned Senior Advocate specifically stated that where the promoter is not the owner of the land which is being developed, the consent of the owner should be included when applying for registration. The forms annexed to The Uttar Pradesh Real Estate (Regulation and Development) (Agreement For Sale/Lease) Rules, 2018 and Circular dated 16.03.2024 of UPRERA also contemplate a situation where the promoter is not the landowner. Hence, the Act and Rules framed thereunder clearly contemplates, both, the one who owns the land and construct, and the other, who constructs on someone else's and sells the apartments after executing a proper agreement by the owner, both of them would independently be the promoter.

45. He further raised objection that without prejudice to the above, it is admitted that it is YEIDA and not JIL which is the owner of the land and UPRERA has never insisted on making YEIDA a promoter and hence it cannot insist on making JIL a promoter.

46. He lastly relied on the letters dated June 9, 2023, July 20, 2023 and October 18, 2024 issued by the JIL wherein it has been stated that all rights in the Project are with the petitioner, who is the sole promoter and are in a position to meet all the obligations of the promoter. Hence, the objection of UPRERA is illegal and misplaced.

**SECTION 4 OF RERA ACT (APPLICATION BY THE PROMOTER)**

47. The counsel for the petitioner further submitted that Section 4 of RERA Act deals with application for registration of real estate projects. For ready reference Section 4 of RERA Act is reproduced herein:-

*(a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;*

*(b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;ll or some of the apartments to other persons and includes his assignees*

*(c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;*

*(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole*

*project as sanctioned by the competent authority;*

*(e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;*

*(f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;*

*(g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;*

*(h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas appurtenant with the apartment, if any;*

*(i) the number and area of garage for sale in the project;*

*(j) the names and addresses of his real estate agents, if any, for the proposed project;*

*(k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;*

*(l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—*

*(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;*

*(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;*

*(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;*

*(D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:*

*Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:*

*Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:*

*Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.*

*Explanation.— For the purpose of this clause, the term "scheduled bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;*

*(E) that he shall take all the pending approvals on time, from the competent authorities;*

*(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and (m) such other information and documents as may be prescribed.*

48. He further submitted that the petitioner had made an application under Section 4 of the RERA Act and enclosed all the relevant documents as has been specified under Section 4(2) of the Act, and had furnished all the documents as prescribed under the Rules and Regulations framed under the Act and had applied in requisite form as has been presented under the Act & Rules.

49. As per Section 4(2)(l), the Promoter has to make a declaration, supported by an affidavit, which has to be signed by the promoter under which he has to make certain statements. When the petitioner applied under Section 4(1) of the RERA Act, he has complied with all the provisions of Section 4(2) of the Act. Once all the compliance was done, there was no reason for the respondent authority to hold back the project or reject the same.

**DEEMING PROVISION**

50. He further submitted that Section 5 of the RERA Act deals with registration. Section 5(1) lays down that on receipt of application under Section 4(1), the authority shall within a period of thirty days grant registration and provide registration number including login Id and password to the applicant for accessing the website of the authority and to create his web page and fill therein the details of the proposed project, or reject the application for the reasons to be recorded in writing, if such application is not in confirmation to the provisions of the Act and the Rules. Section 5(2) of the Act clearly lays that if the authority fails to grant registration or rejects the application within the stipulated time, the project shall be '**deemed'** to have been registered and the authority shall within a period of seven days of the expiry of said period of thirty days as specified under section 5(1), shall provide the registration number, login Id and password to the promoter for accessing the website of the Authority and to create its web page and to fill therein the details of the proposed project.

51. It is the argument of the petitioner that the Act, specifically provides the deeming clause if the application is not rejected, hence, in the present case invocation of deeming clause is imperative. In support of the aforesaid argument, learned counsel for the petitioner has placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of **Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others** in which in paragraph 42 it has been held as under :

*"42. We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory but it is equally well settled that when consequences for inaction on the part of the statutory authorities within such specified time is expressly provided, it must be held to be imperative."*

52. He has further placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of **Sharif-Ud-Din vs. Abdul Gani Lone**, wherein it has been held that whenever a Statute prescribes that a particular Act has to be dealt with in a particular manner and also lays down that if failure to comply with the said requirement,

would lead to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

53. Learned Senior Counsel submitted that a deeming fiction is indicative of the framers of the law that they expect compliance of the requirements of the provision, in a prescribed time frame, and in case of failure to dispose of an application within the statutory time limit, the application for registration shall be deemed to have been registered and failure of the authority to communicate the decision of refusal within the prescribed period entitles the applicant to claim deemed acceptance**.(Ref:Chandrakant Kolavale vs. Government of Maharashtra and others).**

54. He further elaborated that when a public functionary is required to do a certain act within a specified time period, the same is ordinarily directory, however, when the consequence for inaction on the part of the said functionary within such specified time is expressly provided (as in the present case under Section 5(2) of the RERA Act), it must be held to be mandatory**.[Bhavnagar University (supra), State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samti, Sharif-Ud-Din vs. Abdul Gani(supra), Vyas Narain Singh and others vs. The B.R. Ambedkar Bihar University, Commissioner Income Tax vs. Muzaffar Nagar Authority upheld in Commissioner of Income Tax vs. Raghuraji Devi Foundation Trust.**

55. He argued that correspondence after the deemed registration of the Project under the RERA Act would not act as an estoppel against the petitioner claiming deemed registration as there can be no estoppel against a Statute/law and if law requires something to be done in a particular manner, it must be done in that manner, and if not done in that manner, it has no existence in the eyes of law at all. **[Tata Chemicals Ltd. v. Commr. Of Customs; State of W.B. vs. Gitashree Dutta (Dey) (supra) and Uttar Pradesh Power Transmission Corporation Ltd (supra)].**

56. The Senior Counsel next submitted that the deeming fiction in Section 5(2) of the RERA Act interpreted with the aid of the scheme of the RERA Act (including the purpose of the RERA Act as provided in the Frequently Asked Questions issued by the Ministry of Housing & Urban Poverty Alleviation, Government of India) and the preamble shows that the same has been incorporated by the Legislature to counter inter alia the delays and laches in compliance processes.

57. In this backdrop he submitted that the petitioner had initially made an application for Towers 1 & 2 on 02.06.2023, which was rejected by UPRERA on 16.07.2023 with the right to the petitioner to re-apply for registration. Accordingly, the petitioner had made a fresh application on 31.07.2023 along with all the relevant documents, Assignment Agreement, GPAs, which were sought for while rejecting the earlier application. An objection was raised on 22.08.2023, which was duly answered by the petitioner.

Thereafter, the petitioner made another application for Towers 3 & 4 on 23.08.2023 and the same was pending before the Authority. Neither the application was rejected nor any order was passed thereon. Hence, as per Section 5(1)

of the Act, if the application is deemed to have been allowed. Section 5 of RERA Act is reproduced hereunder for ready reference:-

*"(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be* ***deemed to have been registered,*** *and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project."*

58. He further submitted that after completion of statutory period of thirty days, the deeming provision comes into play and the application alternatively stands allowed. Once the application is allowed, the Authority has no right to reject the same as they are denuded of the power to reject the application, which is deemed to have been allowed. He submitted that once deeming provision has come into effect, the respondents has no authority to reject the application, otherwise the deeming clause will itself become redundant. Since, the application was deemed to have been allowed, thereafter, the Authority had no jurisdiction to reject the same.

**ASSIGNMENT AGREEMENT**

59. The learned Senior Counsel invited our attention to the relevant clauses of the Assignment Agreements dated 31.07.2017 entered into by JIL/JAL and the petitioner, which are as follows:

*Clause 2.4:*

*"The Developer shall be entitled to develop the Group Housing Project on the Development Land by utilizing the FAR Area and Additional Area2 which includes development of Common Areas and Facilities, parking spaces, services, amenities, fittings, fixtures and enjoy all rights, privileges and benefits arising there from, including but not limited to exclusive right to/ for:*

*...*

*(v) sale, booking, allotment, renting, license, transfer, nomination, substitution etc., of the units/flats in the Group Housing Project and enter into agreements, contracts etc., with third parties for the same and receive in its name all revenues, receivables and consideration for the same and other facilities and amenities over the Development Land.* ***JIL and JAL shall have no right/claim of any nature whatsoever in such revenues, receivables and consideration and same shall accrue to the sole benefit of the Developer;***

*(vi) to cause JIL to execute sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5;*

*...*

*(viii) to enter into tri-partite agreements with financial institution and apartment buyers for housing loans for which NOC(s) will be issued by JIL and/or JAL to the Developer;*

*...*

*(x) to decide on the pricing of the units and other facilities and amenities developed by the Developer over the Development Land;....."*

*Clause 2.6:*

*"The Developer shall have all rights to deal with the Development Rights including but not* ***limited to right to sell, enter into any arrangement with any third***

***parties, to allot and enter into arrangement for sub-lease, renting, license of units /residential apartments to be constructed on the Development Land and receive consideration and all other amounts for*** *booking, allotment, sub-lease, renting, license and maintenance of areas in the Group Housing Project, as per terms of this Agreement."*

Clause 2.7:

*"This Agreement shall not be construed in any manner as conveying* ***sub-lease/ownership rights in the Development Land to the Developer. However, the Developer shall have the right to cause JIL to execute sub-lease of impartible and undivided share/rights in the Development Land beneath the building(s)/tower(s) thereon,*** *as per Clause 10.5. It is hereby clarified that the* ***structure developed by the Developer over the Development Land shall always belong to the Developer unless same has been conveyed/ sub-leased to unit owners."***

Clause 3.3:

*"The Developer shall have the right to develop and to offer or advertise, sale of apartments or accept any booking amount from apartment buyers in respect of whole or port of the development in the Development Land, from the execution hereof."*

Clause 10.4:

*"Subject to the Developer not being in breach of the conditions of this Agreement, the Developer shall, on execution hereof,* ***be entitled to offer, market, book, allot and advertise the proposed residential Group Housing Project on the Development Land to third parties without prior consent of JIL & JAL.*** *However, for this purpose, all the documents shall be finalized by the Developer and the Developer shall keep JIL/JAL informed, in this regard."*

Clause 10.5:

*"After completion of the building(s)/tower(s) in the Development Land and the* ***Developer obtaining occupancy/completion certificate thereof, JIL and JAL along with the Developer shall execute the conveyance deeds in the form of sub-lease of land sale of super structure in favour of the allottees****/customers of the Developer. JIL and JAL shall grant such allottees/customers impartible and undivided sub-lease rights up to the period expiring on 27.02.2093 i.e. for the remaining period of lease deed expiring first out of the Lease Deeds of which the Development Land is a part, in the Development Land and such right shall be proportionate to the super area of his/her unit to the total super area of the said building/tower. JIL and JAL shall execute such authorities/Power of Attorney in favour of the Developer to transfer/convey the rights and title, in the superstructure of the said units and/or in respect of the Development Land, to the association and/or the body/organization of the allottees/customers.* ***The sub-lease in favour of allottees/customers shall be executed by JIL/JAL, subject to Developer obtaining requisite NOC(s) from the Bank****/Financial Institution from whom the Developer has raised funds for executing Group Housing Project on the Development Land."*

60. Learned Senior Counsel for the petitioner submitted that Assignment Agreement dated 31.07.2017 was executed between JIL/JAL and the petitioner. In its Clause 1c, "Common Areas & Facilities" and in Clause 1f, "Shared Areas and Facilities" had been defined. Clause 4 mentions Assignment of Development Rights. Clause 2.4 (vi) allows the petitioner

to execute sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5. Clause 2.6 gave the petitioner all rights to deal with the development rights including but not limited to right to sell, enter into any arrangement with any third parties, to allot and enter into arrangement for sub-lease, renting, license of units in the project land. Clause 2.7 makes it clear that by this Assignment Agreement, JIL/JAL is not executing any sub-lease or the ownership rights. However, the Developer have the right to cause JIL and execute sub-lease of impartible and undivided share in the development land. As per Clause 8.1, JIL/JAL is obliged to make necessary arrangement of electricity supply, water supply, sewage system and drainage system as a part of Shared Areas and Facilities similar to those made available to other sub-projects/plots in Jaypee Greens, Wish Town, Noida. Clause 8.2 also gave right to way to the roads adjoining the development land and was entitled to enter upon such roads for the purpose of accessing the project land. As per Clause 10.5 of the Assignment Agreement after completion of the project, the Developer would get occupancy/completion certificate thereof, JIL/JAL along with the Developer shall execute conveyance deed in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL/JAL would further provide impartible and undivided sub-lease rights to the customers/owners of the flats. It was further clarified that the flat owners would have proportionate share in the undivided land on which the building and the towers were constructed and for this JIL/JAL executed a power of attorney in favour of the Developer to transfer the conveyance right and title to the Association/body or Association of allottees/customers.

**POWER OF ATTORNEY**

61. While referring to the Power of Attorney, the Senior Counsel submitted that JIL has authorized the petitioner to undertake certain acts by way of General Power of Attorney. As per Clause 24 of the Power of Attorney, the petitioner had right to sell, dispose, assign, transfer the premises in the project to third parties or intended purchasers and for this he can sign and execute Booking Application, agreement to sale, sale deed and all other necessary agreements and get the sale registered before the proper registration authority and to carry on all the acts and deeds in relation to the sale of premises, as may be necessary for the registration. As per Clause 26 of the Power of Attorney, the petitioner is entitled to receive sale consideration from the sale of said premises and to refund the money to the purchasers in the event of cancellation. As per Clause 27, the petitioner was authorized to represent before regulatory authorities and any other third parties in connection with the sale of premises in the project and to take all necessary incidental steps for the sale of premises.

**SIMILARLY SITUATED DEVELOPERS GRANTED APPROVAL**

62. Learned Senior Counsel vehemently submitted that there are four identically situated companies, who had applied with UPRERA and their applications were allowed placing reliance on the verbatim identical Assignment Deeds/Agreements and Power of Attorneys, as were entered into between the petitioner and JIL/JAL. He raised serious objection by submitting that the respondent authority is adopting “pick and choose”

policy as they have rejected the application of the petitioner, and had granted registration to these projects in Jaypee Greens Wish Town, which are as follows:-

(i) Mahagum Manorialle (Registration granted on 27.07.2017)

(ii) Kalpatru Vista (Registration granted on 22.01.2018)

(iii) Genx Estate LLP Project (Registration granted on 17.08.2019)

63. He submitted that apart from these three, another identically situated company, namely, M/s Golf Lake LLP for their Trecento Residents-A which has also been built on the land owned by JIL/JAL, RERA granted registration in October, 2023 wherein no such restriction of making JIL/JAL as a co-promoter was raised by UPRERA. The letter given by JAL in favour of M/s Golf Lake LLP clearly shows that lease holder was JAL and the map/building plan was sanctioned in the name of J.P. Greens wherein all the development, maintenance and execution of sub-lease deed would be the sole responsibility of M/s Golf Lake LLP. This registration certificate was issued much after rejection of the application of the petitioner. It clearly shows that UPRERA herein is adopting a 'pick and choose' policy wherein they have earlier granted permission to identically situated companies, i.e. Mahagun India Pvt. Ltd., Kalpataru Urban Space L.L.P. and M/s GenX Estate L.L.P., whereas refused to register the Project of the petitioner.

**CONDUCT OF UPRERA**

64. With regard to conduct of RERA, the learned Senior Counsel submitted that the application was filed on 31.07.2023 and after expiry of the period of thirty days, it is deemed to have been allowed, since it was not rejected till that time, and since the password has not been issued, which was to be issued within a period of seven days of the deeming provision, and RERA had initiated proceedings against the petitioner under Section 3 of the Act because of some advertisement given by some unknown third party, the petitioner was left with no option but to file the instant writ petition. During pendency of the writ petition, on the ground of illness of Sri Anil Tiwari (learned Senior Advocate appearing on behalf of UPRERA), the matter was adjourned. However, this Court vide order dated 17.05.2024 has categorically directed that the Authority will not take any decision till 29.05.2024. On the next date of listing i.e. 29.05.2024, the matter was adjourned till 31.05.2024, and the interim order, granted earlier, was extended. In spite of clear direction that no orders will be passed by the respondent-Authority on 28.05.2024, UPRERA rejected the application preferred by the petitioner under Section 4 of the RERA Act. Such conduct of UPRERA is nothing but an endeavour to just overreach the order of this Court.

65. He further submitted that an affidavit was filed by respondents on 28.05.2024, which was sworn on 27.05.2024, wherein there was not an iota of suggestion that the rejection has already taken place on 16.05.2024. When the rejection order was passed on 16.05.2024, it ought to have been brought to the notice of the Court in the said affidavit. It was only on 29.06.2024 it was communicated to the petitioner that the application stands rejected vide decision taken in a meeting, which was held on 16.05.2024. This entire exercise seems to be a back dated exercise, just to overreach the orders of this Court. In

spite of a clear direction by this Court, the application of the petitioner was rejected and to ensure no adverse order is passed against the Authority, on the next date of hearing, which was barely two days away.

66. Section 38 of the RERA Act provides for principles of natural justice to be followed, which has not been done. The rejection orders were passed without giving the petitioner an opportunity of being heard and despite information given by the petitioner to UPRERA by its letter dated 16.05.2024 that the matter was subjudice before the Court and any hearing before UPRERA could only be done, after the writ petition is heard.

67. He further submitted with vehemence that once a matter is subjudice and a question of law is pending consideration before a court of law, the Authority ought not have acted with undue haste and interfere in the adjudication process of court, and any attempt of the authority to decide the same matter, which is pending before the court, would be an overreach. To buttress this proposition he had relied on the judgement passed by Hon'ble Supreme Court in the matter of **[M/s Siemens Aktiengeselischaft and Siemens Limited vs. Delhi Metro Rail Corporation Ltd. and others, Sarku Engineering Services and others vs. Union of India and others]**

**MISCELLANEOUS**

68. Learned Senior Counsel for the petitioner further raised its submissions qua Uttar Pradesh Real Estate Regulatory Authority, Rules, 2016 wherein Chapter II Rule 3 lays down the details of the documents which has to be furnished by the promoter for registration of the project. Rule 3(d) states that only a copy of the title deed of the promoter of the land has to be supplied by the promoter if the land is owned by them. Rule 3(e) lays down that the details of encumbrances on the land on which the development is to be carried out has to be mentioned and Rule 3(f) postulates the possibility when the developer does not own the title of the land but he is only developing, in that case the promoter needs to submit the consent of the owner of the land along with the copy of collaboration agreement/development agreement or any other agreement as the case may be and also copy of the title of the document. He further submitted that in this case the promoter is not the owner of the land. He falls under the category of Rule 3 (f) and Rule 14 (I) (e) (vi) (E), which specifically states that, if the promoter is not the owner of the land, all he has to produce is an agreement, development agreement or any other agreement by which he is carrying on the development and also copy of the title deed.

69. He further submitted that as per Rule 3(4) of these Rules a declaration has to be submitted under Clause 1 of sub-section 2 of Section 4 in the form B. Form B along with the Rules specifically in the first clause clarifies that the promoter who owns the land can develop the land or anybody else on behalf of the promoter can develop the land. Accordingly, the petitioner had filled up Form B as per the Rules. He further submitted that even the Form A which is made as per Rule 3(2), which is nothing but an application for registration of the project, also recognizes that if promoter is not the owner of the land on which the development is to be carried out, the consent of the owner of the land along with the copy of the collaboration agreement, development agreement or any

other agreement entered between them and the copy of the title has to be furnished. The same has been furnished. He next submitted that as per clause 9 and 10 of Form A the project proponent has to give the boundary wall and the locations of the project and also a proforma of allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottees. All these things had been carried out by the petitioner. He further submitted that Rule 1 of U.P. Real Estate(Regulation and Development)(Agreement for sale/lease) Rules, 2018, sets out a proforma for agreement of sale. Even in that proforma the Statute recognizes that if the project proponent is not the owner of the land, all he has to mention is about the development agreement/any other agreement which should be registered in the office of Registrar.

70. In this backdrop, he argued that all these documents have been furnished and in spite of completing all the formalities as laid down under Rule 3 of Rules, 2016 yet the respondent have illegally held back the registration.

71. The learned Senior Counsel submitted that as per RERA Act and Rules, 2016, there is no provision for the owner of the land to be made co-promoter. The RERA Act as well as Rules, 2016 itself recognize a party who is developing a project on somebody's land as a promoter. He submitted that there is no clause, section or rule in the RERA Act or Rules framed under the Act which makes it mandatory for the owner of the land to be a co-promoter in case it is being developed by someone else.

72. Learned Senior Counsel for the petitioner further submitted that as per the Assignment Agreement JIL does not have the power to construct or sell. The power of constructing and selling is with the petitioner, and therefore, JIL does not fall in the definition of the promoter. To be a promoter, the two cardinal conditions are that he should have the power to construct and to sell and both of them are lacking from the obligations of JIL. Therefore, Uttar Pradesh Real Estate Regulatory Authority cannot ask them to sign the application as a co-promoter. UPRERA cannot create any other person as promoter who is not covered under Section 2(zk) of the RERA Act.

73. He submitted that even Section 11 of the RERA Act lays down the obligation of the promoter. Section 11 (4) (a) specifically states that the promoter shall be responsible for all obligation, responsibilities and function till the conveyance of the apartments, plots or the building, as the case may be is executed in favour of the allottees, and the common areas in favour of the Association of allottees. Here, the petitioner is in a position to execute the conveyance deed of apartment and is in a position to hand over the common areas to the Association of allottees as per the Assignment Agreement and also as per the General Power of Attorney executed by JIL/JAL in favour of the petitioner. He further submitted that as per Clause 11(4)(f), the petitioner is in a position to execute a registered conveyance deed of the apartment/plot in favour of the allottees along with undivided proportionate share in the common area to the Association of the allottees.

74. He further submitted, that the only power which UPRERA can exercise is under Section 18, 32, 38 and 40 of RERA Act. Section 18 specifically mentions

return of the amount and compensation, if the promoter fails to complete the project or is not able to give possession of the flats in accordance with the terms of the agreement or discontinuance of his business. Section 32 lays down functions of Authority for promotion of real estate sector, Section 38 gives power to UPRERA to impose penalty or interest if there is any contravention of obligations cast upon the promoter. Section 40 lays down recovery of interest or penalty or compensation and enforcement of the orders in case where a penalty has been imposed on the promoter and he is not paying. Apart from these four sections, UPRERA has no authority to check the obligations of the builders. UPRERA cannot pass any order except under these four sections, and that is how they protect the interest of the allottees, and in this case the interest of the allottees can very well be protected under these four sections.

75. Sri Nandan, Senior Advocate further submitted that under the RERA Act, the owner has no role to play. It is only the promoter who is liable for each and everything and even the RERA Act recognizes both the categories, firstly, the promoter as the owner of the land secondly, and the promoter, who has the development agreement or any other agreement with the owner of the land. All that UPRERA can see is whether the owner of land has a valid title and is free from all encumbrances.

76. Learned Senior Advocate further submitted that the power of UPRERA starts from conceptualizing of the project and ends up once the completion certificate is given and the possession is handed over to the Association of allottees(AOA), thereafter, the provisions of Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 (For Brevity Act of 2010) comes into play. Section 3(d) defines "apartment owner", Section 3(i) defines of Act 2010 "common areas and facilities" and Section 3(w) defines "promoter". The definition of the "promoter" in the Apartment Act is quite different from the definition of "promoter" in the RERA Act. Under the Apartment Act, promoter is one who constructs. Keeping this in mind, in Clause 7.3 of the Assignment Agreement it has been specifically stated that the developer (petitioner) shall abide by the provisions of RERA Act and also the Apartment Act. Section 9 of the Apartment Act lays down certain rights, and it is only because of this Section that Clause 10.5 was incorporated in the Assignment Agreement.

77. The argument is thus raised by Senior Advocate that the obligation of the promoter to ensure the project is completed as per the specifications and time line given while applying for registration of RERA Act and get the occupancy certificate. If he fails to fulfil his obligation, RERA can direct the Promoter to hand over the possession of the apartment or return the money along with interest. In this case, the petitioner is solely responsible for constructing and selling the apartments and, hence, he is responsible for completing the project. Hence, even on this ground there is no need to include JIL as a promoter in the Project as including JIL in no manner protects the interest of the allottees in any manner. Further, in the present case JIL has just come out of the corporate insolvency resolution process with a huge debt still outstanding and hence, no allottee would invest if JIL is included as a promoter for the Project.

78. Learned Senior Advocate concluded his arguments by lastly submitting that a reading of the RERA Act

and the Rules thereunder makes it clear that the statutory obligation cast upon UPRERA is to protect the interest and investment of the allottee. This protection must be assessed on a case-to-case basis. In the present case, the investment of the allottees as well as their interest is well protected as the petitioner is far better equipped to ensure compliance of all obligations of a promoter under the RERA Act and Rules thereunder to protect the investment of the investors than JIL. On the other hand, JIL itself has stated that it does not fall under the ambit of a promoter and hence does not want to be included as a promoter in the Project as they are not developing and selling the apartments, and hence rightly they can not shoulder the liability of the Developer, as that is the sole domain of the petitioner.

**ARGUMENTS ON BEHALF OF THE RESPONDENTS**

79. Per contra, Sri Anil Tiwari, learned Senior Counsel assisted by Sri Mohd. Afzal and Sri Rahul Agarwal, Advocates appearing on behalf of respondent nos.2 and 3-Uttar Pradesh Real Estate Regulatory Authority and opposed the petition. His contentions are summarized as follows:-

**RERA ACT AND ITS OBJECT**

80. Learned Senior Counsel for the respondents submitted that the objects of RERA Act are as follows:-

*"for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority."*

81. He further submitted that the objects of the Act clearly suggests that the Act has been made to established an authority to regulate, promote the real estate sector and to ensure that the apartments are sold in transparent manner. As per the objects of the Act, it is the duty of UPRERA to ensure that the interest of flat buyers/customers are well taken care of. Keeping the objects in mind UPRERA has passed the impugned order as per the objects of the RERA Act. The authority is not against the petitioner per se and has only asked to make JIL/JAL as co-promoter.

**APPLICATION MADE UNDER SECTION 4 OF RERA ACT**

82. Sri Anil Tiwari, learned Senior Advocate stated that the application of the petitioner was not as per Section 4 of the RERA Act. He submits that the petitioner has not disclosed anything in the affidavit enclosed with the application for registration, hence, it is contrary to Section 4(l) of the RERA Act. He submitted that the documents filed by the petitioner does not show that the petitioner has got right to transfer the title of the land to the allottees. He submitted that the petitioner was given absolute right to sell the residential apartment in favour of the allottee and there is no dispute about it, but so far as common area of the apartment is concerned, the right is given to JAL/JIL and the petitioner jointly. He further submitted that undivided share of the land can only be transferred by JIL and not by the petitioner. In support of his submission, he has placed reliance on Section 5 and 17 of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010.

83. He has further placed reliance on Rule 10 of Rules, 2018, which provides that the promoter, on receipt of total price of the apartment/plot as per Para 1.2 under the Agreement from the Allottee, shall execute a conveyance deed and convey the title of the apartment/plot together with proportionate indivisible share in the common areas within three months from the date of issuance of the completion certificate to the allottee. He has placed reliance on Clauses 2.4(vi), 2.7 and 10.5 of the Assignment Agreement, which specifically stated that the Developer after obtaining occupancy/completion certificate thereof, JIL and JAL along with the Developer shall execute the conveyance deeds in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL and JAL shall grant such allottees/customers impartible and undivided sub-lease rights up to the period expiring on 27.02.2093 i.e. for the remaining period of lease deed.

**DEEMED PROVISION**

84. Learned Senior Counsel, appearing on behalf of respondent authority stated that the petitioner cannot seek benefit of Section 5(2) of the RERA Act as his first application had already been rejected on merits after providing ample opportunity of hearing within thirty days. Since, the petitioner had again applied for registration of the same project without removing deficiencies, hence, it cannot get benefit of Section 5(2) of the RERA Act. The petitioner was directed by the answering respondent vide order dated 06.07.2023 to make fresh application in prescribed Form D within three months after clarifying on the queries raised by UPRERA supported by requisite documents. The rejection order dated 06.07.2023 was never challenged by the petitioner before any Court of Law, and has attained finality. However, the petitioner without removing serious legal deficiencies directed by the authority vide order dated 06.07.2023, an application (2nd Application ID-809171) for registration of its Tower 1 & 2 on 31.07.2023. This application on 31.07.2023 was not a fresh application but was an extended application, which was filed earlier. Since the second application was not accompanied by mandatory fees under Section 4 of RERA Act, hence, it cannot be said that the second application was a fresh application. He submitted that all applications have to be filed along with mandatory documents as per the provisions laid down under Section 4 of the RERA Act, but all the mandatory documents were not filed and the affidavit filed along with the document was false. Hence, the authority had rightly rejected the application filed by the petitioner.

85. He submitted that the application dated 31.07.2023 was uploaded on RERA website without resolving shortcoming as was previously reported on 06.07.2023. Respondent on 31.10.2023 granted an opportunity of hearing to the Petitioner. But, no satisfactory reply was provided with respect to the first query raised i.e. the map owner and the lease owner (JIL) was not added as a promoter of the project. The petitioner cannot seek benefit of section 5 (2) of the Real Estate (Regulation and Development) Act 2016 as his first application had already been rejected on merits after 30 days. Since, the Petitioner had again applied for registration of the same project without removing deficiencies the case of the Project is not protected by Section 5(2) of the Real Estate (Regulation and Development) Act 2016.

86. He submitted that from the documents filed by the petitioner in the amended petition, it is clearly evident that application dated 21.07.2023 had been uploaded on 31.07.2023. The date for counting thirty days would start from the date of uploading. Since, the objections were raised by UPRERA on 22.08.2023, which were not rectified, hence, it cannot be said that the mandatory period of thirty days has elapsed. Hence, the petitioner is not entitled for the benefits of deeming provision as provided under section 5(2) of the RERA Act.

87. He submitted that the petitioner has never been serious in removing/rectifying the shortcoming in the application, and this fact is evident from the own conduct of the petitioner as when the matter was scheduled on 13.03.2024 before the UPRERA for hearing, the petitioner himself filed an application dated 12.03.2024 seeking two weeks further time for hearing. Despite, being afforded numerous opportunities to the petitioner, the petitioner till date had failed to rectify the deficiencies and have now approached this Hon'ble Court. If the petitioner was desirous of claiming benefit of deemed approval then he would not have been seeking time for curing the deficiencies.

88. He submitted that keeping in view of the principle of natural justice, an opportunity of hearing was once again provided to the petitioner on 10.01.2024 to answer/reply/clarify on the following points:-

*a. The Project Land and Approved Map are not under the ownership of the petitioner but it is owned by JIL. Thus, it was advised to add the land and the map owner as the Promoter of the Project.*

*b. According to clause 2.7 and 10.5 of assignment agreement by whom the conveyance deed will be executed in favour of the allottees. Moreover, it was even not clarified as to who amongst JIL or Suraksha Realtors Pvt. Ltd. or Lakshdeep Investment & Finance Ltd. Will handover title in lieu of the title conveyance deed and who will be confirming party while the execution of the sub-lease agreement along with the petitioner.*

*c. Who amongst JIL or Suraksha Realtors Pvt. Ltd. or Lakshdeep Investment & Finance Ltd. will bear the additional compensation of farmers as demanded by YEIDA paying the additional compensation to the farmers is also necessary.*

89. He further submitted that Section 5(2) of the RERA Act nowhere contemplates that even if there are serious shortcomings in the registration application of the Promoter then also, if thirty days are elapsed, and in the meantime if the deficiencies are not rectified, the project will be deemed to be allowed and registered. The issue of deemed registration is well settled and there is no dispute about it. But the instant case is not a case of deemed registration, because several conditions precedent pertaining to concept of deemed registration is not there.

90. Sri Tiwari, Senior Advocate further submitted that the provision of the deeming clause cannot be interpreted and given effect in a way which will defeat the very object and purpose of the Act. If the contention is allowed then the interest of the allottee would be compromised in getting the valid title in the land which is mandatory requirement under Section 11 & 17 of the Act.

**PROMOTER**

91. Learned Senior Counsel for the respondent submitted that the petitioner cannot independently file application under section 4 of the RERA Act without mentioning JIL/JAL as Promoter/Co-promoter, since JIL/JAL falls within the ambit of Section 2(zk)(1), hence, it is imperative to make JIL/JAL as a promoter. He submitted that a plain reading of Section 2(zk) of the RERA Act, which defines the word "promoter", clearly shows that JIL is a promoter, and necessarily has to sign an application before the same is considered by UPRERA. It is only after adding JIL as a Promoter the application of the petitioner will be in consonance of the Act.

92. To buttress his argument he submitted that by making land owner as a promoter, the promoter can be forced to execute sub-lease deed in favour of the allottees to discharge the duties and functions of the promoter as per Section 11(4)(f) and perfect titles can be transferred to the allottees as per Section 17 of the RERA Act, so that the rights and interest of allottees can be protected, but if he does not sign as a promoter, it will be very difficult to safeguard the interest of the allottees.

**TRANSFER OF TITLE**

93. Sri Tiwari, learned Senior Counsel, further submitted that as per the provision of RERA Act, at the time of purchase of a plot/apartment/flat by the allottee, the transfer of title has to be ensured at the level of the promoter, as per the provisions of Section 17 of RERA Act, it is the promoter, who shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building to the allottees and the common areas to the association of the allottees and the other title documents pertaining thereto within three months from the date of issue of occupancy certificate.

94. He submitted that it is thus clear that no person other than the legal owner of the property has a right to transfer the title in that property. Hence, if JIL is made a promoter to the project, then if required, action against them under Sections 34(f), 11(4)(f), 17 and 37 of the RERA Act can be initiated in case of non-compliance with the provisions of the Act.

95. He submitted that it is well settled principle of law that a person can transfer only those rights which are vested with oneself. In the present matter, the petitioner cannot transfer this right to the allottees unless that title has been transferred by way of a sub-lease deed in favour of the petitioner. If sub-lease is not executed in favour of the petitioner then the transfer of title to the allottees is possible only when JIL/JAL become promoters because undisputedly, title of land as well as the map are in the name of JIL/JAL.

96. In this background the argued that therefore, the claims made by the petitioner that JIL has provided them with absolute, unfettered and unqualified rights to transfer the sub-lease deed and title in favour of the allottees under section 17 of the Real Estate (Regulation & Development) Act, 2016, are false and it is not acceptable.

**ASSIGNMENT AGREEMENT & GENERAL POWER OF ATTORNEY**

97. Learned Senior Counsel for respondent-UPRERA has further drawn attention of the Court towards definition of

word "common area" given in Rule 2(d) of RERA Rules, which reads as follows:-

*2(d) "Common area" means:-*

*(i) the entire land for the real estate project, or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;*

*(ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;*

*(iii) the common basements, terraces, parks, play ground, open parking areas and common storage spaces;*

*(iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;*

*(v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;*

*(vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;*

*(vii) all community and commercial facilities as provided in the real estate project;*

*Explanation:- community & commercial facilities shall include only those facilities which have been provided as common areas in the real estate project.*

*(viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;*

*He submitted that as per the Assignment Deed/Agreement the petitioner has not been given any specific right over the common area rather the petitioner has specifically been excluded from it.*

98. He submitted that the Assignment Agreement dated 31.07.2017 relied by learned counsel for the petitioner are also against them. He submitted that in clause 24 of the Assignment Agreement whereby Power of Attorney was executed in favour of the petitioner it has clearly been mentioned that, the petitioner has right to sell, dispose, assign, transfer, in an manner whatsoever, the newly constructed premises in the project to third parties/intended purchasers and for that purpose to sign and execute booking application form, booking confirmation cum allotment letter, agreement for sale, sale deed and all necessary assurances, writings, letters, agreements etc. as was set out in the assignment agreement dated 19.10.2007. He submitted that even this Assignment Agreement dated 31.07.2017 does not give right to the petitioner to transfer the title of land to the allottees.

99. Relying upon Clause 10.5 of the Assignment Agreement learned Senior Counsel submitted that after completion of building(s)/tower(s) in the project land, the developer/petitioner would get the occupancy/completion certificate. Thereafter, JIL/JAL is supposed to grant the allottees/customers the impartible and undivided sub-lease rights for the remaining period of lease.

100. Learned Senior Counsel while referring to Clause 10.5 of the Assignment Agreement submitted that it is specifically mentioned that the Developer shall be transferring/conveying the right, title in the superstructure of the said unit to the allottee/customer. Further, it says that the sub-lease in favour of allottees/customers shall be executed by JIL/JAL, subject to Developer obtaining requisite NOC(s) from the Bank/Financial Institution from whom the Developer has raised funds for

executing Group Housing Project on the Development Land. Thus, it is clear from the provisions of the assignment agreement that transferring/conveying of the rights by the developer is not independent of the rights of the JIL to execute the sub-lease deed in favour of the allottees as transferring of rights and execution of sub-lease deed have been given two different connotations and sub-lease deed is to be executed only with the JIL being the confirming party.

101. He submitted that a bare perusal of both clauses of the Assignment Agreement does not construe in any manner as conveying sub-lease/ownership rights in the Development Land to the Developer. Even as per Assignment Agreement, the petitioner has to approach JIL to execute sub-lease of impartible and undivided share/rights in the Development Land beneath the building thereon.

102. Refuting the submission of the petitioner that Clause 24 of the General Revocable Power of Attorney dated 31.07.2017 gives full right to transfer ownership and sell the constructed premise to third parties he submitted that Clause 24 of the General Revocable Power of Attorney has to be tested on the anvil of clause 2.7 and 10.5 of Assignment Agreement, as to whether clause 24 of the General Revocable Power of Attorney supersedes clause 2.7 and 10.5 of Assignment Agreement or not. It is noteworthy that both the Assignment Agreement and the General Revocable Power of Attorney were executed on 31.07.2017. Therefore, it to be seen as to who overrides whom in case of conflict between the two. Learned Senior Counsel vehemently submitted that the provisions of fully stamped and registered assignment agreement will supersede the general irrevocable power of attorney.

103. He next submitted that from a bare perusal of the abovementioned clauses it becomes clear that only development and marketing rights have been transferred by JIL to the petitioner and all the other rights such as right to acquire title and execute sub-lease has been reserved by JIL itself. Therefore, the petitioner cannot be sole promoter in this development project as they are not legally entitled to execute the sub-lease in favour of the allottees.

104. He submitted that even in the Assignment Agreement, JIL/JAL has not assigned the petitioner the right to execute such agreement with the allottees for undivided share of the land for that project. If JIL/JAL are not made the co-promoters and for some reason they refuse to execute the transfer deed of the undivided share of land in favour of the allottees then it would be very difficult task for UPRERA to ensure that the interest of flat buyers is secured.

105. At this juncture, it is vehemently argued that any right or title, which was not conferred by the Assignment Agreement, now cannot be confirmed through a confirmation letter. Further, in reality the General Revocable Power of Attorney has not given any rights to the petitioner other than the rights mentioned by the Assignment Agreement.

**LAUNCHING PROBLEMS**

106. Sri Anil Tiwari, learned Senior Counsel submitted that the RERA Act was enacted in 2016 and was enforced with effect from 01.05.2016. Under Section 84 of the RERA Act power has been accorded

to appropriate Government to make rules, and accordingly, Uttar Pradesh Real Estate Regulatory Authority Rules, 2016 were made which came into effect on 27.10.2016 and immediately thereafter, U.P. Real Estate Regulatory Authority was constituted and its web portal was launched on 26.07.2017. Thereafter, all the Developers were asked to register their respective projects within three months from the date of commencement of the RERA Act. In the initial days, the registration was granted by UPRERA on the basis of self certification by the Promoters due to shortage of manpower. Since, all the on going projects were to be registered, the projects were registered on the basis of self certification by the Promoters. There was some technical glitch in the website of UPRERA during initial period, which was revamped in May, 2018 by putting minimum validation check to minimize the errors in the registration on the basis of self certification.

**SIMILARLY SITUATE COMPANIES**

107. Learned Senior Counsel further submitted that, immediately after launch of website of UPRERA, one Mahagun India Pvt. Ltd. applied on the basis of self certification and the registration for the project was accorded automatically. Another company, Kalpataru Urban Space L.L.P. also applied on the web portal and registration was automatically generated on 22.01.2018 without any proper scrutiny of the application. Another company, M/s GenX Estate L.L.P. also applied for its project Golf Street Hub on 10.05.2019 and same was also registered on 17.08.2019. Undoubtedly, those few identically placed companies got registered on the basis of self certification. In the interregnum period, they have launched the project and booked number of apartments with the prospective customers.

108. In this backdrop, he submitted that now in case their registration is tampered with, the interest of a number of flat buyers/allottees/customers would be put in jeopardy, and as such, in consonance with its main objective to safeguard the interest of flat buyers/allottees/customers, UPRERA cannot proceed to cancel their registration. Hence, request of the petitioner asking for negative parity cannot be entertained by UPRERA. To buttress his argument, he placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of **Doiwala Sehkari Shram Samvida Samiti Ltd. vs. State of Uttaranchal and others** has observed as under:-

*"This Court in Union of India & Anr. vs. International Trading Company & Anr. has held that two wrongs do not make one right. The appellant cannot claim that since something wrong has been done in another case, directions should be given for doing another wrong. It would not be setting a wrong right but could be perpetuating another wrong and in such matters, there is no discrimination involved. The concept of equal treatment on the logic of Art. 14 cannot be pressed into service in such cases. But the concept of equal treatment pre-supposes existence of similar legal foothold. It does not countenance repetition of a wrong action to bring wrongs at par. The affected parties have to establish strength of their case on some other basis and not by claiming negative quality. In view of the law laid down by this Court in the above matter, the submission of the appellant has no force. In case, some of the persons have been*

*granted permits wrongly, the appellant cannot claim the benefit of the wrong done by the Government."*

109. He further placed reliance on another judgment passed by Hon'ble Supreme Court in **Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore vs. President, Indore Development,** has held as under :

*"So far as the allotment to non-eligible societies is concerned even if it is accepted, though specifically denied by the Authority, to be true that does not confer any right on the appellants. Two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the appellant cannot strengthen its case. It has to establish strength of its case on some other basis and not by claiming negative equality."*

110. He submitted that on perusal of the aforesaid judgments of Hon'ble Supreme Court, it is quite apparent that the Court has clearly laid down that, two wrongs will not make a right. A party cannot claim advantage for something wrong, which has been done in the past.

111. Learned Senior Counsel for the respondents further submitted that permission was granted to M/s Golf Lake LLP for their Trecento Residents-A project, in this facts are different, as the applicant company had bought the property in auction and has become the owner. Hence, case of Golf Lake LLP is completely different from that of the petitioner, as the petitioner is not the owner of the development land and hence the petitioner cannot claim a parity with the registration granted to M/s Golf Lake LLP.

**MISCELLANEOUS**

112. He further submitted that in the assignment agreement it has been mentioned that the map of the project was approved in the name of JIL. This has to be read in the light of township policy prevalent in the Industrial Development Authority. Hence, the occupancy certificates will also be issued in the name of JIL. In future if, because of any reason the project is not completed, and the occupancy certificate is not issued, then no direction could be issued against JIL. Since, the project map has been approved in favour of JIL and the occupancy certificate has to be issued in favour of JIL/JAL, as such it becomes mandatory to incorporate/add JIL as a promoter.

113. Referring to Rule 10 of UPRERA Rules, 2018 he submitted that the promoter, on receipt of total price of the apartment/plot as per paragraph 1.2 under the agreement from the allottee, shall execute a conveyance deed and convey the title of the apartment/plot together with proportionate indivisible share in common area within three months from the date of issuance of the completion certificate and the certificate as the case may be, to the

allottee. However, in this case the applicant/petitioner had no right to execute the conveyance deed, on the land on which the project is made, for the indivisible share in the common area.

114. He further submitted that the impugned order passed by the Authority is a well considered order and all the possible facts have been taken into consideration while passing the order, hence, there is no reason for this Court to interfere in the matter and the instant writ petition is liable to be dismissed.

115. Learned Senior Counsel for respondent nos.2 and 3-UPRERA further submitted that the interest of the allottees/customers would be put in jeopardy if JIL/JAL do not come up as a promoter along with the petitioner. He further submitted that there is an apprehension that JIL/JAL after execution of the project might not sign or assign the undivided share in that building to the customers/Association of Apartment Owners/Association of allottees. He submitted that what if the road access, sewage system, water supply, electricity supply in the project, which is provided by JIL/JAL, is interrupted and if JIL/JAL is not a promoter before UPRERA and if the authority find JIL/JAL liable for the interruption and cannot proceed against them.

**REJOINDER BY PETITIONER**

116. In rejoinder, the Senior Counsel for the petitioner submitted that UPRERA is reading clause 10.5 in piecemeal,- under clause 10.5 of RERA Act, it has been expressly stated that JIL will execute power of attorneys in favour of the petitioner to transfer and convey the rights and title in the Project (units and land) Recital J and clause 30 of the GPA state the same, and same are being reproduced below for ready reference:-

*"Recital J. The Developer shall construct a group housing/residential project on the Development Land, which will include the sale and transfer of the premises/apartments constructed thereon, to the prospective purchasers/buyers("Project").* ***Upon construction of the entire Project, the Developer shall transfer the Development Land to the association of the apartment purchasers by executing a Deed of Conveyance/Sub-Lease."***

*"Clause 30. To prepare and execute, for and on our behalf, the deed of conveyance/sub-lease and any other necessary deed or document or writing for the transfer of the Development Land in favour of the society/organization."*

117. From clauses 2.6 and 3.3 of the agreement it is evident that the right to sell includes the right to execute Agreements in favour of the allottees which necessarily caries the right to the land as well and clause 10.5 must be read harmoniously with other clauses.

118. Further, he submitted that the rights of the allottees under the RERA Act including Section 19 can be claimed against the petitioner as per the terms of the contract between the parties. Under Section 34(f) of the RERA Act, UPRERA is required to ensure compliance by the promoter of its obligations, which obligations have been undertaken by the petitioner.

119. He submitted that even Section 11(4) of the RERA Act lays down the

obligation of the promoter. Section 4(a) specifically states that the promoter shall be responsible for all obligation, responsibilities and function till the conveyance of the apartments, plots or the building, as the case may be, to the allottees and the common areas to the Association of allottees. Here, the petitioner is in a position to execute the conveyance deed of apartment and is in a position to hand over the common areas to the Association of allottees as per Clause 2.7, 10.5 of the Assignment Agreement and also as per the General Power of Attorney executed by JIL/JAL in favour of the petitioner. He further submitted that as per Section 11(4)(f) of RERA Act, the petitioner is in a position to execute a registered conveyance deed of the apartment/plot in favour of the allottees along with undivided proportionate share in the common area to the Association of the allottees.

120. He further submitted that UPRERA today is acting like a court, empowering itself with granting specific performance of a contract and on the basis of far-fetched future contingencies seeking to pass orders as opposed to limiting itself to the mandate of the RERA Act. As per the Act, JIL does not fall within the definition of a "promoter". To buttress his argument, he has placed reliance on an order passed by Rajasthan RERA (vide notification No.F.1 (152) RJ/RERA/LAND/2020/1202 dated 30.06.2020) wherein they have notified that a landowner shall not be named or treated as a promoter and this Notification squarely applies to the present matter.

121. Learned Senior Counsel submitted, without prejudice, that UPRERA during its oral arguments has made various submissions for including JIL as a promoter which do not form a part of the Reply or Supplemental Reply or even the Rejection Orders and on this ground alone the oral submissions of UPRERA should be rejected. It is settled law that the Court must limit its judgment to the pleadings **[Mohd. Abdul Wahid vs. Nilopher and another; Bachhaj Nahar vs. Nilima Mandal and another].**

122. He further submitted that all the apprehensions raised by learned Senior Counsel appearing for respondent nos.2 and 3-UPRERA, that the interest of the allottees/customers would be in jeopardy if JIL/JAL do not come up as a promoter along with the petitioner, does not have any valid ground as the Assignment Agreement when read with Power of Attorney clearly indicates that JIL/JAL had allowed the Developer to develop the towers and after getting completion certificate it would execute sub-lease deed in favour of the customer and the same would be done by the Developer and by JIL/JAL and for this JIL/JAL had already given Power of Attorney to the Developer to execute the deed on their behalf.

123. He submitted that the other apprehension of learned counsel for respondent nos.2 and 3 that JIL/JAL after execution of the project might not sign or assign the undivided share in that building to the customers/Association of Apartment Owners/Association of allottees, is also misconceived as the petitioner in the Assignment Agreement as well as Power of Attorney has the right to transfer the undivided share of the land on behalf of JIL/JAL in favour of such allottees/Association of Apartment Owners/Association of allottees.

124. With regard to the apprehension raised by learned counsel for the

respondents that what if the road access, sewage system, water supply, electricity supply in the project, which is provided by JIL/JAL, is interrupted and if JIL/JAL is not a Promoter before UPRERA and if the authority find JIL/JAL liable for the breach and cannot proceed against them. He submitted that it is also without any basis as the Assignment Letter read with Power of Attorney makes it clear that this right of providing road access, sewage system, electricity supply, water supply and other such basis amenities has already been assigned to the petitioner by means of Assignment Agreement and Power of Attorney.

125. Learned Senior Counsel for the petitioner further submitted that Section 18 of RERA Act provides for return of amount and compensation. If the petitioner/promoter fails to complete or in unable to give possession of an apartment as per terms of the agreement for sale, he shall be liable to compensate the allottee to any loss caused to him due to defective title of the land, and the project is not being developed as provided under this Act, and for any reason if the Promoter fails to discharge any obligation imposed on him under the Act or the Rules/Regulations made therein, he shall be liable to pay such compensation to the allottees in the manner as provided under the Act. He submitted that with this provision the interest of the allottees are completely secured and it is open for the UPRERA to proceed against the petitioner in case he defaults or his unable to meet his obligations.

126. The learned Senior Counsel refuting the argument of counsel for UPRERA vehemently submitted that UPRERA by not granting/rejecting the application of the petitioner has acted in benefit of the allottees, as the petitioner completely falls in the ambit of Section 2(zk) of the RERA Act, which defines "Promoter". In all aforesaid three identically situated companies, who were granted registration, the agreement executed by JIL/JAL were identical. The reason given for this by learned Senior Counsel appearing for respondent-Authority in its reply is that these permissions were automatically granted as the website set up was in initial stage and all the permissions were granted on the basis of self certification. The agreement of the respondent that they would not like to continue with this wrong practice as they have realized their mistake. It was also argued on behalf of the Authority that they are not recalling their registrations as significant third party right has been created and if the registration is recalled then the interest of the flat buyers/customers/allottees might be adversely affected. If that be so, then how can the application of the petitioner was rejected on 06.07.2023 and permission was not accorded to the petitioners in the second and third application and they were made to run from pillar to post, while at the same time on 09.10.2023, they granted registration to yet another company namely, M/s Golf Lake LLP., which had come with the project of Trecento Residents-A.

127. Learned counsel for the petitioner, in reply to the apprehensions raised by UPRERA that, if JIL/JAL decided not to sign, what will happen to the allottees, in response he further submitted that the respondents have not read properly the clauses of the Assignment Agreement as well as the General Power of Attorney executed between them, which specifically allows the petitioner to execute the deed in

favour of the allottees, and Association of allottees on behalf of JIL and JAL. When the petitioner takes the full responsibility to complete all the functions, responsibilities and obligations of the promoter there is no reason for UPRERA to force the petitioner to ask JIL/JAL to sign the said deed and come up as a co-promoter. He further submitted that the object of UPRERA is only to ensure timely completion of the project and to watch the interest of the allottees and as per RERA Act, in case the builder fails to deliver the project or fails to complete his obligation, in that case UPRERA at best can impose refund of money along with the penalty.

**ANALYSIS BY THE COURT**

**HISTORY OF THE ACT**

128. Before proceeding with the matter, the Court would like to delve deep into the objects and statement of the RERA Act, followed by the provisions of the Act and the Rules framed thereunder.

129. The erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs) in consonance with the Ministry of Law & Justice, Government of India enacted the Real Estate (Regulation and Development Bill). After approval of the Union Cabinet on 4.6.2013, said Bill was introduced in Rajya Sabha on 14.8.2013. Thereafter on 23.9.2013 this Bill was referred to the Standing Committee of Urban Development for examination. The Standing Committee sought public opinion and analysed the memoranda/suggestions received from various stake holders/experts, developer associations such as Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Real Estate Developers' Association of India (CREDAI), National Real Estate Development Council (NAREDCO) and other associations working in the field of real estate, on various provisions of the Bill. The Standing Committee also had the briefing of the representatives of the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Finance, Reserve Bank of India, National Housing Bank, Ministry of Consumer Affairs, Ministry of Law and Justice (Department of Legal Affairs and Legislative Department), State Bank of India and other banks. The Committee also heard views of NGOs working in the field of real estate and sought clarifications on various issues and thereafter the RERA Act was enacted.

130. Initially, the real estate sector was largely unregulated and the professional and standardization was completely absent and lacking. To bring in the standardization and professionalism in the real estate sector, so there was a need to set up a Real Estate Regulatory Authority to ensure that development was carried out in an efficient and transparent manner and also to protect the interest of consumers in real estate sector and to establish an Appellate Authority to hear the appeals from the decisions of UPRERA. To achieve this object, a bill was introduced known as The Real Estate(Regulation and Development) Bill, 2013 to ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction cost. The statement of objects and reasons of RERA Act reads as under:-

*"The Real Estate (Regulation and Development) Bill, 2013, inter alia, provides for the following, namely:-*

*"(a) to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;*

*(b) to make the registration of real estate project compulsory in case where the area of land proposed to be developed exceed one thousand square meters or number of apartments proposed to be developed exceed twelve;*

*(c) to impose an obligation upon the real estate agent not to facilitate sale or purchase of any plot, apartment or building, as the case may be, without registering himself with the Authority;*

*(d) to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;*

*(e) to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the powers conferred on it and to perform the functions assigned to it under the proposed legislation;*

*(f) the functions of the Authority shall, inter alia, include-(i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (ii) to publish and maintain a website of records of all real estate projects for which registration has been given, with such details as may be prescribed; (iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation;*

*(g) to establish an Advisory Council by the Central Government to advice and recommend the Central Government on-(i) matters concerning the implementation of the proposed legislation; (ii) major questions of policy; (iii) protection of consumer interest; (iv) growth and development of the real estate sector;*

*(h) to establish the Real Estate Appellate Tribunal by the appropriate Government to hear appeals from the direction, decision or order of the Authority or the adjudicating officer;*

*(i) to appoint an adjudicating officer by the Authority for adjudging compensation under sections 12, 14 and 16 of the proposed legislation,*

*(1) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;*

*(k) to empower the appropriate Government to supersede the Authority on certain circumstances specified in the proposed legislation;*

*(l) to empower the appropriate Government to issue directions to the Authority and obtain reports and returns from it."*

131. In the bill, there was an attempt to balance the interests of consumers as well as promoters and also to impose certain responsibilities on both of them. In this bill, it was imperative that the promoter cannot sell or offer to sale, or invite people to purchase any plot, building without proper registration with UPRERA. It was also to impose liability upon the promoter to pay such compensation to the allottees in the manner as provided under the proposed legislation, in case, he fails to discharge his obligation imposed on him under the proposed legislation. The other object was to establish an Authority, Advisory Council and Appellate Tribunal. This bill later on after getting the assent of the President

became the Real Estate (Regulation and Development) Act, 2016.

132. The object and scheme of the Real Estate (Regulation and Development) Act, 2016 was to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

133. It is evidently clear that UPRERA has only to assure that the land on which the development was to be carried out has clear title, and is free from all encumbrances while registering a project, and whatever the promoter does, has to be transparently shown on the website of the Authority. The Authority has to ensure timely development of the project and in case the same is not done, the promoter can be penalised for the same.

134. RERA Act was introduced with sole intention of improving the eco-system to ensure consumer protection, transparency and fair and ethical business practices in matters of sale and purchase of properties in the real estate sector. RERA provides for institution of a uniform regulatory environment, aimed at protecting the interests of all stakeholders. Infact, adjudicatory mechanism for speedy adjudication of justice was to be set up .

135. The relevant Section of the Act and Rules of RERA Act, which are important for adjudication of this case, are being reproduced below for ready reference :

*'2(zk) "**promoter**" means,—*

*(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or*

*(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or*

*(iii) any development authority or any other public body in respect of allottees of—*

*(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or*

*(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or*

*(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or*

*(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder*

*of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or*

*(vi) such other person who constructs any building or apartment for sale to the general public.*

*Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;*

*x x x x*

***Section 3. Prior registration of real estate project with Real Estate Regulatory Authority.--****(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:*

*Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:*

*Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.*

*(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—*

*(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:*

*Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;*

*(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;*

*(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.*

*Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.*

*x x x x*

***Section 4: Application for registration of real estate projects.***

*4. (1) Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed.*

*(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely:—*

*(a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;*

*(b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;ll or some of the apartments to other persons and includes his assignees*

*(c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;*

*(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;*

*(e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;*

*(f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;*

*(g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;*

*(h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas appurtenant with the apartment, if any;*

*(i) the number and area of garage for sale in the project;*

*(j) the names and addresses of his real estate agents, if any, for the proposed project;*

*(k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;*

*(l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—*

*(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;*

*(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;*

*(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;*

*(D) that seventy per cent. of the amounts realised for the real estate project*

*from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:*

*Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:*

*Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:*

*Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.*

*Explanation.— For the purpose of this clause, the term "scheduled bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;*

*(E) that he shall take all the pending approvals on time, from the competent authorities;*

*(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and*

*(m) such other information and documents as may be prescribed.*

*x x x x*

***Section 5. Grant of registration.-*** *(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days.*

*(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or*

*(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:*

*Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.*

***(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.***

*(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (l) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.*

*x x x x*

***Section 6.-Extension of registration.-****The registration granted under section 5 may be extended by the Authority on an application made by the*

*promoter, due to force majeure, in such form and on payment of such fee as may be prescribed:*

*Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:*

*Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.*

*Explanation.-- For the purpose of this section, the expression force majeure shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.*

*x x x x*

***Section 7. Revocation of registration***.

*(1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that—*

*(a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;*

*(b) the promoter violates any of the terms or conditions of the approval given by the competent authority;*

*(c) the promoter is involved in any kind of unfair practice or irregularities.*

*Explanation. — For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—*

*(A) the practice of making any statement, whether in writing or by visible representation which,—*

*(i) falsely represents that the services are of a particular standard or grade;*

*(ii) represents that the promoter has approval or affiliation which such promoter does not have;*

*(iii) makes a false or misleading representation concerning the services;*

*(B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;*

*(d) the promoter indulges in any fraudulent practices.*

*(2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.*

*(3) The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.*

*(4) The Authority, upon the revocation of the registration,—*

*(a) shall debar the promoter from accessing its website in relation to that*

*project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;*

*(b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;*

*(c) shall direct the bank holding the project bank account, specified under sub-clause (D) of clause (l) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;*

*(d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.*

*x x x x*

*17. Transfer of title. -(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title ll or some of the apartments to other persons and includes his assigneesin the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:*

*Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*

*(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:*

*Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the [completion] certificate.*

***18. Return of amount and compensation.-…..***

*(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—*

*(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*

*(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*

*(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.*

*(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.*

*……*

*34. The functions of the Authority shall include—*

*……..*

*(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;*

*(emphasis supplied)*

136. Section 4 of RERA Act deals with application for registration of real estate projects. As per Section 4, every promoter shall make an application for registration of the real estate project and for that promoter has to enclose the mandatory documents. Section 11(4) of the RERA Act lays down the obligation of the promoter. Section 11(4)(a) specifically states that the promoter shall be responsible for all obligation, responsibilities and function till the conveyance of the apartments, plots or the building, as the case may be, to the allottees or the common areas to the Association of allottees. Section 18 of RERA Act provides for return of amount and compensation. If the petitioner/promoter fails to complete or in unable to give possession of an apartment as per terms of the agreement for sale or transfer the common area to the Association of Allottees and to provide the other basic facilities like road, electricity, sewerage etc. he shall be liable to compensate the allottee to any loss caused to him as if there is a defect in the title or the project is not being developed as provided under this Act. If for any reason if the Promoter fails to discharge any obligation imposed on him under the Act or the Rules/Regulations made therein, he shall be liable to pay such compensation to the allottees in the manner as provided under the Act. The interest of the allottees is completely secured by the aforesaid provision and UPRERA is always at liberty to proceed against the petitioner, if he defaults or is unable to meet the obligations.

137. Further, the rights of the allottees under the RERA Act including Section 19 can be claimed against the Promoter as per the terms of the contract between the parties. Under Section 34(f) of the RERA Act, UPRERA is required to ensure compliance by the promoter of its obligations, which obligations have been undertaken by him. Section 32 deals with functions of authority for promotion of real estate sector. Under this section there are certain guidelines for the Authority for making recommendation to the appropriate Government or the competent authority, as the case may be, in order to facilitate

growth and promotion of a healthy, transparent, efficient and competitive real estate sector. Section 38 talks about powers of authority. By this Section, RERA has been empowered to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents. This Section further enunciates that the Authority shall be guided by the principles of natural justice and, subject to other provisions of the Act and rules made thereunder, the Authority shall have powers to regulate its own procedure.

138. Rule 3 of RERA Rules in Chapter II lays down the mandatory documents which has to be furnished by the promoter for registration of the project. Rule 3(d) states that only a copy of the title deed of the promoter of the land has to be supplied by the promoter if the land is owned by them. Rule 3(e) lays down that the details of encumbrances on the land on which the development is to be carried out has to be mentioned and Rule 3(f) postulates the possibility when the developer does not own the title of the land but he is only developing, in that case the promoter needs to submit the consent of the owner of the land along with the copy of proper agreement with the person who has the title.

139. As per Rule 3(4) of these Rules, 2016, a declaration has to be submitted under Clause 1 of sub-section 2 of Section 4 in the form B. Form B along with the Rules specifically in the first clause clarifies that the promoter who owns the land can develop the land or anybody else on behalf of the promoter can develop the land. Form A under Rule 3(2) (which is an application for registration of the project) also recognizes that if promoter is not the owner of the land on which the development is to be carried out, the consent of the owner of the land along with the copy of the collaboration agreement or any other agreement entered between them and the copy of the title has to be furnished. As per clause 9 and 10 of Form A the project proponent has to give the boundary wall and the locations of the project and also a proforma of allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottees. Rule 1 of U.P. Real Estate (Regulation and Development) (Agreement for sale/lease) Rules, 2018, sets out a proforma for agreement of sale. Even in that proforma the Statute recognizes that if the project proponent is not the owner of the land, all he has to mention is about the development agreement/any other agreement which should be registered in the office of Registrar.

140. Rule 3 of RERA Rules, lays down information and documents to be furnished by the promoter for registration of the Project. Rule 3(1)(f) states that where the promoter is not the owner of the land on which development is proposed, details of the consent of the owner of the land along with copy of the collaboration agreement, development agreement, joint development agreement or any other agreement restricting the title of the land has to be submitted. As per Rule 14(1)(e)(vi)(E), where the promoter is not the owner of the land on which development is proposed, he has to submit copy of the collaboration or any other agreement has to be placed. These rules further goes to show that two kinds of promoters have been recognized, first is one who constructs and the other, who causes to construct. The RERA Act as well as Rules, 2016 itself recognize a party who

is developing a project on somebody's land as a promoter(s).

141. A plain reading of Section 2(zk)(i) shows that a promoter is a person "who constructs or causes to be constructed an independent building consisting of apartments for the purpose of selling". Further, Section 2(zk)(v) also defines the promoter as any other person who acts as a builder, developer holding the power of attorney from the owner of the land on which the apartment is to be constructed. A plain reading of this section shows that the promoter is defined as a person who has been assigned development rights in respect of a project for the purpose of constructing and selling the apartments. The Parliament in its wisdom has used the word 'or' and not 'and' and hence the promoter need not be the owner of the land, but can be a person who is developing the land even on the basis of power of attorney. When the definition is not ambiguous, it has to be read as it is, and the scope of promoter cannot be expanded.

142. On the touchstone of above provisions we find that in the present case, the promoter is not the owner of the land, so he will fall under the category of Rule 3 (f). All these documents sought under the Rules have been furnished and inspite of completing all the formalities as laid down under Rule 3 of Rules 2016 yet the respondents have illegally held back the registration. There is no Section, Rules or Clause under the RERA Act or Rules, which makes it mandatory for the owner to be a Promoter.

143. It is apparent that a promoter is the one who is responsible for constructing the project or causes to be constructed and is responsible for selling the project. In this case, on a plain reading of the definition the petitioner falls within the category of the promoter as he is constructing and selling the project and also have the necessary agreements from the owner of the land.

**DOES JIL NEEDS TO BE CO-PROMOTER**

144. As per Section 2(zk) of the RERA Act, the word 'promoter' has been defined, which is comprehensive and not inclusive definition, which shows that the person who has been assigned development rights in a project for the purpose of selling apartments would qualify as being a "promoter". RERA does not require owner of the land to be a promoter, infact the other consequences in the rule makes it clear that the promoter could be the owner OR the person who is developing the project on his land. The definition of 'promoter' is not ambiguous, hence, no other meaning could be assigned to the expression than what is stated in Section 2(zk) of the RERA Act. The attempt of the respondent/RERA to expand the definition of word 'promoter' to include the landowner would not be correct.

145. While drafting the Act, the legislature intended for two parties to be made co-promoters and they have expressly said so in the "Explanation" to Section 2(zk) wherein it has been provided that "For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified", under this Act or the rules and regulations made thereunder. The words

"cause it to be constructed" in Section 2(zk) have to be read in context of the entire subsection and further apply only to a promoter who is responsible for construction.

146. Earlier, the Hon'ble Supreme Court in the matters of **P. Kasilingam vs. P.S.G. College of Technology** and **Punjab Land Development and Reclamation Corporation Ltd. Chandigarh vs. Presiding Officer, Labour Court, Chandigarh** has held that when a definition used the word "means", it means that such definition is hard and fast definition and no other meaning can be assigned to the expression than what is put down in the definition.

147. Bombay High Court in the matter of **Vaidehi Akash Housing (P) Ltd. vs. New D.N. Nagar Co-op Housing Society Union Ltd.** has clearly held that a society, who is owner of the property, who has entered into an agreement with the developer, there the society cannot be treated as a promoter and cannot be foisted with the responsibilities of the promoter in relation to the projects made by the promoter.

148. Similar view was taken by Bombay High Court in the matter of **Goregaon Pearl CHSL vs. Dr. Seema Mahadev Paryekar and others** wherein it is settled that being owner of the land would not essentially make them the promoter and they would not suffer the consequence of being a promoter.

149. The forms annexed to U.P. Real Estate (Regulation and Development)(Agreement for Sale/Lease) Rules, 2018 provides standard form of agreement to sale/lease which clearly contemplates a situation where the owner is not a promoter. This goes to show the builder who do not own the land can be a promoter alone. It further shows the intent of the Legislature that the promoter need not be the owner. The person who constructs and sells is the promoter even if he is carrying on the construction activities on someone else's land, provided that a valid agreement has to be there between the owner of land and the developer. Therefore, in our considered opinion, JIL would not fall in the category of promoter for the project.

**APPLICATION UNDER SECTION 4 OF RERA ACT**

150. Section 4 of the RERA Act lays down how a promoter has to make an application for registration of his project under RERA Act. As per Section 4(1) every promoter has to make an application to the Authority for registration of the UPRERA project in the form and manner provided accompanied by the fees. Section 4(2) of the Act lays down that while making an application the promoter shall enclose the documents set out in the Section.

151. In this case, the petitioner has made an application as a developer wherein it was clearly stated by him that the land is owned by JIL. The fact is that said land is actually owned by YEIDA and leased out to JAL/JIL, who has given a permission by way of Assignment Deed to develop the project land on which the petitioner is supposed to construct/sell the apartments to the allottees. The petitioner apparently comes within definition of 'promoter' wherein he does not own the land but he is developing the land. The application filed by the petitioner on 02.06.2023 completes

all the formalities and has been accompanied by all the documents as contemplated under Section 4(2) of RERA Act. However, an objection was raised by UPRERA on 07.06.2023 that the petitioner may include JIL as a co-promoter. However, the first application of the petitioner was rejected on technical grounds on 06.07.2023 giving right to the petitioner to re-apply for registration of Towers 1 & 2 inter alia by providing (i) A copy of the Concession Agreement, (ii) A confirmation on which party will sign and execute the deed and which party will be the confirming party in the deed along-with the promoter to be executed in favour of the homebuyer, and (iii) A confirmation on which party will bear/pay the Farmer's additional compensation as demanded by YEIDA.

152. In response to the same, the petitioner made fresh application dated 21.07.2023 which was uploaded in UPRERA website on 31.07.2023. All the documents sought under Section 4(2) of RERA Act were annexed along with the application. In the second application, UPRERA for the first time took an objection on 22.08.2023 for Towers 1 & 2 and pointed out two defects wherein they stated that, the project land and approved map are not under the ownership of the petitioner and further asked to add the landowner JIL as the promoter. The second objection raised by them was asking the petitioner to provide a letter from M/s Suraksha Realtors Pvt. Ltd. and M/s Lakshadeep Investment and Finance Pvt. Ltd showing that the proposed land was not under the resolution plan which was accepted by the NCLT. The promoter immediately provided a letter, which was provided earlier as well from M/s Suraksha Realtors Pvt. Ltd. And M/s Lakshadeep Investment and Finance Pvt. Ltd, which goes to show that the proposed land was not under the resolution plan accepted by NCLT. As far as first objection was concerned, this Court is of the view that to add the landowner as promoter was contrary to the provisions of Section 2(zk) of RERA Act. Evidently, Section 2(zk) of the Act, which contains the definition of 'promoter', specifically lays down that the promoter can be a person who owns the land and wants to construct on it, or a promoter can just be a developer who is developing the apartments on the land owned by somebody else.

153. In the supplementary reply filed by UPRERA, the annexures confirm that all the details and documents as required to be filed by the petitioner have been received and they have marked 'no objection' to the same. This was reflected from the print out of the website of UPRERA, which was filed along with the supplementary reply. A plain perusal of the document uploaded shows that all the documents as required by UPRERA to be submitted, have been duly uploaded by the petitioner. Since Section 4(2) lays down a format and all the documents have to be uploaded in the particular format and it has been done so, since it is an online portal, no further document can be uploaded. The objections raised by UPRERA to include JIL as co-promoter was not a mandatory requirement as per the Act.

154. In view of the foregoing paragraph it is clear that the application filed by the petitioner was complete in all respect and the objections raised were the same which were raised earlier. Since the application was in proper format and accompanied by all the documents as laid down in Section 4(2), we find that there is

no illegality in the application and UPRERA cannot do a hair-splitting exercise and ask for further documents which are not even been asked for in Section 4(2) of the RERA Act.

155. Thus, in view of clear provisions of the Act, this Court is of the firm view that it is not open for UPRERA to impose the condition on the petitioner to get JIL/JAL sign the application as a co-promoter. The application filed by the petitioner under the provisions of the Act and Rules of RERA was complete and there was no occasion for UPRERA to raise an objection, which is not contemplated under the Act and also to hold back the application for more than a period of thirty days.

**DEEMED PROVISION**

156. To examine the import of Deemed provision, it is imperative to refer Section 5 of RERA Act, which is again reproduced below:-

***Section 5. Grant of registration.-*** *(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days.*

*(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or*

*(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:*

*Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.*

***(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.***

*(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (l) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.*

157. Section 5 lays down provision for grant of registration. Section 5(1) clearly lays down that on receipt of the application under sub-section(1) of Section 4, the Authority shall within a period of thirty days grant the registration or reject the application for the reasons to be recorded in writing. It also provides that no application shall be rejected without giving opportunity of hearing to the applicant. Section 5(2) lays down that if the Authority fails to grant the registration or reject the application, as the case may be, the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to

fill therein the details of the proposed project.

158. In the instant case, the petitioner had initially made an application for Towers 1 & 2 on 02.06.2023 and for that an objection was raised on 07.06.2023 by the UPRERA and the same has been complied with. UPRERA was still not satisfied, hence, physical hearing took place on 23.06.2023. Thereafter, vide order 06.07.2023, UPRERA rejected the application of the petitioner with a liberty that the petitioner can move a fresh application within three months. In response to this letter/rejection order, the petitioner made a fresh application for Towers 1 & 2 on 31.07.2023. Along with the application, the three specific queries raised in rejection order dated 26.07.2023 were properly answered. Not only the Concession Agreement executed between YEIDA and JAL/JIL was provided but also further agreements between JAL and JIL, Assignment Agreement and General Power of Attorney and further contract letters from JIL/JAL between the petitioner and JIL/JAL were provided to the Authority. In response to second query the petitioner specifically stated that JIL has executed an Assessment Agreement as well as Power of Attorney in favour of the petitioner.

159. A plain reading of both these agreements shows that JIL has empowered the petitioner to execute sub-lease deed in favour of the allottees. Further, JIL has also issued confirmation letter to UPRERA to satisfy their queries. In response to the third query of payment of extra compensation to the farmers it was made clear that the petitioner would pay the additional compensation to the farmers by way of demand draft to the tune of ₹6.49 crores. With the application dated 31.07.2023, all the three queries raised by UPRERA were properly answered. It is on 22.08.2024 that a fresh query has been raised by UPRERA that the project map is not under the ownership of the promoter. Secondly, they asked the Promoter to provide letters from Suraksha Realtors Pvt. Ltd. and Lakshdeep Investments and Finance Private Limited that the land do not come under the resolution plan. Reply to this objection was given on 29.08.2023 wherein all the queries raised by the respondents were completely answered. In the meanwhile, on 23.08.2023, the petitioner made second application for Towers 3 & 4. Since all the queries were answered, but still RERA did not allow the application for registration though it was complete in all respects.

160. Hon'ble Supreme Court in **Bhavnagar University's case (supra)** has rightly held that when a public functionary is required to do a certain thing within a specified time period, the same is ordinarily directory but when the consequence for inaction on the part of the statutory authorities within such specified time is specifically provided, it becomes imperative.

161. Hon'ble Supreme Court in **Sharif-Ud-Din's case (supra)** has specifically held that, whenever a Statute prescribes that a particular act has to be dealt with in a particular manner and also lays down for failure to comply with the said requirement, would lead to specific consequence, it would be difficult to hold that the requirement is not mandatory and specific consequence should not follow.

162. Hon'ble Supreme Court in the matter of **Kehar Singh v. State (Delhi Admn.)** has held as follows:-

*"231. During the last several years, the 'golden rule' has been given a*

*go-by. We now look for the "intention" of the legislature or the 'purpose' of the statute. First, we examine the words of the statute. If the words are precise and cover the situation on hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine the act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-on relation…."*

163. Similar view has been taken by Hon'ble Supreme Court in the matter of **District Mining Officer vs. Tata Iron & Steel Co.** wherein it has been held as under :-

*"A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature. The function of the courts is only to expound and not to legislate. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is also a cardinal principle of construction that external aids are brought in by widening the concept of context as including not only other enacting provisions of the same statute, but is preamble, the exiting state of law, other statutes in pari materia and the mischief which the statute was intended to remedy."*

164. Argument of the learned counsel for the respondents, that the application of the petitioner was not complete and had deficiencies/shortcomings, hence, the same was kept pending by UPRERA, giving opportunity to the petitioner to complete the deficiencies, but since the petitioner did not cure the defects, hence, he cannot get benefit of Section 5(2), cannot be accepted as it is the **mandatory duty** of UPRERA to act in accordance to the provisions of the Act, and the UPRERA cannot hide from its statutory obligations on the ground that the application was incomplete and was pending. As per Section 5(2) of the Act, UPRERA had only two options to be exercised within thirty days,- (a) to grant registration (b) reject the application. As per the Act, it was mandatory for UPRERA to exercise one of these options within stipulated time of thirty days. However, in this case, UPRERA did not exercise the above options. Section 5(2) of the RERA Act clearly lays down that in case registration is not granted or rejected within a period of thirty days, the project shall be deemed to have been registered within seven days after the expiry of thirty days and thereafter UPRERA had to provide registration number, login Id and password to the applicant/petitioner for accessing the website of the Authority and to create his web page. This provision of Section 5(2) has been embedded in the Act with sole purpose to strangulate the ill practices going on in certain authorities. It is mandatory for UPRERA to have taken call of either granting or rejecting the

registration within stipulated time and since the same was not done, Section 5(2) of the Act comes into play. If UPRERA had serious objections on the application of the petitioner, and if they thought it necessary to include JIL as promoter, and if the same was not done within stipulated time, they ought to have rejected the application. UPRERA cannot keep any application pending beyond the statutory period of thirty days.

165. When the words of a section in the Act is unambiguous, it is presumed that the legislature has deliberately and consciously used the words for achieving the purpose of the Act. Such a situation had been considered in legal maxim "A Verbis Legis Non Est Recedendum" which means "From the words of law there must be no departure". The Court has to decide on the footing that the legislature intended what has been said in the Act. A statute is required to be interpreted without doing any violence to the language used therein. This ratio has been followed by Hon'ble Supreme Court in the matter of **Hardeep Singh vs. State of Punjab and others.**

166. Similar view has been taken by Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers vs. State of U.P.** wherein the court has held as under :-

*"It is well established principle of interpretation of law that the court should read the section in literal sense and cannot rewrite it to suit its convenience, nor does any canon of construction permits the court to read the section in such a manner as to render it to some extent otiose."*

167. The Legislature while framing the Act could have well anticipated of such a situation, and to curve all the ills, which comes from keeping the application pending, this clause of 'deemed approval' was brought into the Act.

168. Since, the application of the petitioner was kept pending much beyond the period of thirty days, hence, as per Section 5(2) of the RERA Act, the project of the petitioner is deemed to have been registered and UPRERA is bound to provide the petitioner registration number, login Id and password to the applicant/petitioner for accessing the website of the Authority and to create his web page.

169. The Legislature in its wisdom has enacted Section 5 of the Act which states that any application moved under Section 4 has to be allowed or rejected within a period of thirty days, failing which the application will be deemed to have been approved. Definitely, this provision has been introduced by the Legislature to address the mischiefs which could possibly happen. This Section 5(2) was an answer to the prospective ills in the system whether to grant registration, the officers of the authorities could harass the promoter or extract a pound of flesh.

**ASSIGNMENT AGREEMENT AND GENERAL POWER OF ATTORNEY**

170. It is an admitted fact between the parties that Assignment Agreement dated 31.07.2017 was executed between JIL/JAL and the petitioner. In its Clause 1c, "Common Areas & Facilities" and in Clause 1f , "Shared Areas and Facilities" had been defined. Clause 4 mentions Assignment of Development Rights. Clause 2.4 (vi) allows the petitioner to execute

sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5. Clause 2.6 gave the petitioner all rights to deal with the development rights including but not limited to right to sell, enter into any arrangement with any third parties, to allot and enter into arrangement for sub-lease, renting, license of units in the project land. Clause 2.7 makes it clear that by this Assignment Agreement, JIL/JAL is not executing any sub-lease or the ownership rights. However, the Developer has the right to cause JIL and execute sub-lease of impartible and undivided share in the development land.

171. As per Clause 8.1, JIL/JAL is obliged to make necessary arrangement of electricity supply, water supply, sewage system and drainage system as a part of Shared Areas and Facilities similar to those made available to other sub-projects/plots in Jaypee Greens, Wish Town, Noida. Clause 8.2 also gave right to way to the roads adjoining the development land and was entitled to enter upon such roads for the purpose of accessing the project land. As per Clause 10.5 of the Assignment Agreement after completion of the project, the Developer would get occupancy/completion certificate thereof, JIL/JAL along with the Developer shall execute conveyance deed in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL/JAL would further provide impartible and undivided sub-lease rights to the customers/owners of the flats. It was further clarified that the flat owners would have proportionate share in the undivided land on which the building and the towers were constructed and for this JIL/JAL executed a power of attorney in favour of the Developer to transfer the conveyance right and title to the Association/body or Association of allottees/customers.

172. A plain reading of the Assignment Agreement read with general Power of Attorney answers all the apprehensions raised by the respondents. The petitioner by means of the agreement has right to built and sell the apartments made on the contracted area, and also has right to transfer undivided portion of the land on which the project has been made in favour of the Association of Allottees, and also has a right to provide water/sewerage/road/electricity etc. to the project on behalf of JIL/JAL.

**REGISTRATION GRANTED TO SIMILARLY SITUATED DEVELOPERS**

173. It has been brought to the notice of the Court that few companies, who had identical Assignment Agreement from JIL/JAL and General Power of Attorney has made application with UPRERA and their projects were granted registration. The companies are as follows:-

(i) Mahagum Manorialle (Registration granted on 22.07.2017)

(ii) Kalpatru Vista (Registration granted on 22.01.2018)

(iii) Genx Estate LLP Project (Registration granted on 17.08.2018)

174. The case set up by the petitioner is that all these promoters had identical agreement as that of the petitioner while the application of the petitioner has been rejected but their application for grant of registration has been accepted by UPRERA, Response given by UPRERA for them is that as per the Act, UPRERA has set up a website, on which on the basis

of self certification, the aforesaid three projects were granted automatic registration without scrutinization of their documents. It was later on that UPRERA realized that number of promoters were defaulting, and thereafter, they started scrutinizing the documents and a Circular dated November 27, 2018 was issued by UPRERA wherein it was said that automatic registration would not be granted and the application would be scrutinized.

175. It has been argued on behalf of the petitioner that the registration certificate has been issued to M/s Golf Lake LLP in October, 2019 aforesaid company much after rejection of the application of the petitioner. This goes to show that UPRERA has adopted a pick and choose method wherein they have earlier granted permission to similarly situated companies whereas they have rejected the application of the petitioner. In response to aforesaid, UPRERA submitted that since Golf Lake LLP had purchased the land in an auction and had become the developer, hence, there was no need for them to make JIL/JAL as co-promoter.

176. It is evident that first the projects were granted registration on the basis of self certification it happened because of technical glitch and the teething problem. They got the automatic registration without their application being scrutinized, once RERA realized the mistake, they started scrutinizing the applications, hence, the ratio laid down in the matter of **Doiwala Sehkari Shram Samvida Samiti Ltd. (supra)** will be applicable and the petitioner cannot claim the negative parity. Moreover, as far as the last registration granted to M/s Golf Lake LLP is concerned, they have bought the land in auction and has become the owner, hence, there were no need for them to get the owner to sign as a co-promoter. Case of M/s Golf Lake LLP is different from that of the petitioner's case.

177. The stand of the respondents in aforesaid respect is well accepted and the petitioner cannot ask for negative parity on the ground of similarly situated companies who had been granted registration whereas the petitioner has been refused for registration.

**CONDUCT OF UPRERA**

178. It is not in dispute that the petitioner has filed the second application on on 31.07.2023 and when after expiry of stipulated time period of thirty days, neither the application was rejected nor the registration number, login Id and password were issued to the petitioner, which ought to have issued within a period of seven days after expiry of thirty days as per the deeming provision under Section 5 of the Act, the petitioner had no choice but to file the instant writ petition. The main ground in the writ petition was that under Section 5 of the RERA Act, the petitioner gets the deemed registration, and hence, all the formalities post registration has to be complied with. On the first date of hearing i.e. 17.05.2024, while passing an order the Court has observed as under:-

*"5. It is informed that two simultaneous proceedings under Section 3/59 and Section 4 of the Real Estate (Regulation and Development) Act, 2016 (RERA Act) are ongoing against the petitioner. So far as the proceeding under Section 3/59 of the RERA Act is concerned, the same entails imprisonment and penalty and in case it is finalized on the next date fixed, i.e. 23.05.2024, the petitioner would*

*suffer irreparable loss and injury even though on the ground of medical exigency the matter is adjourned. Suffice to indicate, on the next date, the parties shall appear in response to the impugned notice but no final decision shall be taken till 29.05.2024."*

179. It is evident from the record/order sheets of this petition that once the matter was adjourned on the ground of illness of Sri Anil Tiwari, learned Senior Advocate appearing on behalf of UPRERA and this Court vide order dated 17.05.2024 specifically directed the Authority to not take any decision till 29.05.2024. On the next date of listing i.e. 29.05.2024, the matter was adjourned till 31.05.2024, and the interim order, granted earlier, was extended. Despite of such clear direction by this Court, the application preferred by the petitioner under Section 4 of the RERA Act was rejected by the Authority vide order dated 28.05.2024. Such conduct of UPRERA is nothing but an endeavour to just overreach the order of this Court and in our view, the same is not appreciable.

180. In addition to above, an affidavit was filed by respondents on 28.05.2024, which was sworn on 27.05.2024, wherein there was not even an iota of suggestion that the rejection has already taken place on 16.05.2024 in Authority's 147th Meeting. When the rejection order was already passed on 16.05.2024, it ought to have been brought to the notice of the Court in the said affidavit. It was only on 29.06.2024 that it was communicated to the petitioner that the application stands rejected in a meeting, which was held on 16.05.2024. It has been argued that the entire exercise seems to be a back dated exercise, just to overreach the orders of this Court. In spite of a clear direction by this Court, the application of the petitioner was rejected which appears just to ensure that no adverse order is passed against the Authority, on the next date of hearing, which was barely two days away.

181. Further, it is settled that once a matter is subjudice and a question of law is pending consideration before a court of law, the Authority ought not to act with undue haste and interfere in the adjudication process of the Court and any attempt of the authority to decide the same matter, which is pending before the court, would be an overreach. **[Seimens Aktiengeselischaft and Seimens Limited vs. Delhi Metro Rail Corporation Ltd. and others, Sarku Engineering Services and others vs. Union of India and others].**

182. Though it has been argued by learned counsel for the petitioner vehemently on the conduct of RERA, but we refrain ourselves to pass any observation on the conduct of RERA.

**APPREHENSIONS OF UPRERA**

183. All the apprehensions raised by learned Senior Counsel appearing for UPRERA, regarding putting the interest of allottees/customers in jeopardy, has been very well taken care of in Sections 18, 32, 38 and 40 of the Act itself.

184. An apprehension was raised by counsel for the respondents that in case JIL/JAL is not made a co-promoter, there could be a chance that the common area of the building as well as amenities like water supply, sewage system, electricity, road etc., which fall in the domain of JIL/JAL, could not be provided to the allottees. No authority or the court could move on

apprehensions, specially when, the apprehension is far-fetched. The Act is absolutely clear that it does not interfere in the ownership rights of the owner and it is only there to take care of interest of the allottees, in case, the project is not completed or handed over in time to the allottee, the Authority has to ensure the refund of his money along with interest. Section 18 of the RERA Act is answer to the apprehensions raised by learned counsel for the respondents wherein return of amount and compensation has been laid down.

185. Hon'ble Supreme Court in the matter of **S. Rangarajan vs. P. Jagjivan Ram** has observed that, "The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression."

## CONCLUSION

A. The definition of the Promoter is clear that a person, who does not own the land but is constructing for selling would fall under the definition of "promoter" as per Section 2(zk) of the RERA Act. There is no provision under the Act which calls for the owner of the land to co-sign as a promoter. Hence, the objections raised by the UPRERA for not according the registration to the petitioner, on this ground, is baseless and incorrect.

B. Section 5 (2) of the Act is clear that UPRERA has only two choices either allow the application for registration of the project within 30 days, or reject the same, but for any reason if the same is kept pending beyond the prescribed period of 30 days it would amount to a "deemed registration". Hence, the application of the petitioner is deemed to have been registered after lapse of the mandatory period, since the same was not rejected, and it is mandatory on UPRERA to provide the registration number, Login ID and Password to the petitioner.

C. Once the project is deemed to have been approved under the deeming provision, it is beyond the jurisdiction of UPRERA to reject the application. The application could only be rejected as per Section 7 of the RERA Act.

D. The petitioner is not entitled for the negative parity with the other builders as their registration was granted on self certification and that too without scrutinizing, the act of UPRERA is justified on this account.

E. In view of the above discussions, the order and rejection of the petitioner's application taken in the meeting dated 16.05.2024 and communicated on 23.06.2024 are set aside.

F. As per Section 5 (2) of the RERA Act, the petitioner is entitled to the benefit of deemed approval, hence, the advertisement given by the third party would not be an offence under Section 3 of the RERA Act and no penalty under the RERA Act can be imposed on the petitioner.

186. The instant writ petition, accordingly, stands **allowed**.

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**(2024) 10 ILRA 1013**
**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 24.10.2024**

**BEFORE**

**THE HON'BLE RAJAN ROY, J.**
**THE HON'BLE OM PRAKASH SHUKLA, J.**

Writ A No. 1382 of 2022

**Anil Kumar ...Petitioner**
**Versus**
**State of U.P. & Anr. ...Respondents**

**Counsel for the Petitioner:**

Sheikh Wali Uz Zaman

**Counsel for the Respondents:**
C.S.C., Gaurav Mehrotra

**A. Service Law – Compulsory Retirement - An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior. The order has to be passed by the competent authority on forming an opinion that it is in public interest to retire a government servant compulsorily. The order is passed on a subjective satisfaction of the Government/competent authority. Principle of natural justice has no place in the context of an order of compulsory retirement.**

The Screening Committee or the competent authority as the case may be has to consider the entire service record before taking a decision in the matter. Of course, the records pertaining to the later years may be given more importance. F.R. 56 (C) read with Explanation (ii) empowers the St. Government with an absolute right to retire an employee on attaining the age of fifty years. Deadwood need to be removed to maintain efficiency in service. Integrity of a government employee is foremost consideration in public service.

1. If conduct of a government employee becomes unbecoming to the public interest or obstructs the efficiency in public services, the government has absolute right to compulsorily retire such an employee in public interest.

2. Even uncommunicated entries in the Confidential Record can be taken into consideration for compulsory retirement. Compulsory retirement cannot be imposed as a punitive measure nor can it be passed as a shortcut to avoid departmental inquiry when such course is much desirable. Merely because the officer has been given promotions after the adverse entries/material by itself would not attract the principle of washing off the said entries especially in a case of a judicial officer. (Para 7)

Apart from assessment of the work and conduct of the petitioner as fair for the year 1996-97 and 2007-2008, the Screening Committee also considered a warning by the Administrative Judge, Saharanpur dated 21.07.2000 to the effect -'the officer, Sri Anil Kumar, Civil Judge (Senior Division), Deoband, Saharanpur is warned for addressing him as a VIP level officer'. The officer in some correspondence had referred to himself as a VIP level officer, therefore, the aforesaid warning was ordered to be placed by the Administrative Judge in his confidential report for the relevant year. Apart from it, for the year 1999- 2000, there were adverse remarks against the petitioner regarding not taking proper interest in disposal of execution cases which was ordered by the Administrative Judge on 08.01.2000 to be communicated to him so that he may make a representation against the same. The officer submitted the said representation which was rejected by the Administrative Committee on 22.03.2002. The aforesaid warning which was placed in the confidential report and the rejection of the petitioner's representation as aforesaid was never challenged by him. (Para 27)

In the opinion the District Judge, petitioner's private character brought down the image of administration of justice. Flaws were detected in maintenance of Presiding Officer's diary and listing of cases by the officer. Flaws were detected in the judgments rendered by the petitioner wherein according to the District Judge, the points for determination u/s 354(b) Cr.P.C. were not determined by the officer and nothing had been discussed as to the credibility of the side of prosecution (whether fully credible or partly credible), nor anything had been discussed as to the place of occurrence and motive and in this manner, as per the District Judge, the decision arrived at by the officer were not sound and reasoned. (Para 28)

**B. Once the master-servant relationship ceased then the Disciplinary proceedings should have been dropped and should not have continued any further as there was no provision under which such proceedings could have continued thereafter unless of course a decision was taken under Civil Services Regulation 351A for forfeiture/withholding etc of pension etc** but no such decision had been

taken to continue the proceedings under the said provision.

In the said report (dated 23.12.2021), the petitioner was exonerated of Charge No.1 and 2 which were similar to the adverse remarks made by the District Judge in the A.C.R. for the year 2012-13 and the report mentioned hereinabove. Much emphasis has been laid by the petitioner that this exoneration in the inquiry report which was accepted by the Administrative Committee on 10.01.2022 was itself sufficient to show that remarks of the District Judge and the report sent by him which was taken into consideration by the Screening Committee and thereafter, by the Administrative Committee and the Full Court of the High Court were unjustified and therefore, the basis for the satisfaction recorded for compulsory retirement of the petitioner was not tenable on facts and in law.

**However, the said exoneration by the Inquiry Judge is absolutely without jurisdiction. The Inquiry report dated 23.12.2021 has no legal significance in the eyes of law.** So far as the dropping of charges by the Administrative Committee meeting dated 10.01.2022 while considering the inquiry report dated 23.12.2021 is concerned, the said decision appears to have been in view of the fact that the petitioner had already compulsorily retired and no purpose would be served as punishment could not have been imposed on a retired employee.

Additionally, this plea is liable to be rejected because the inquiry report in this case was without jurisdiction and therefore, no advantage could enure to the petitioner on account of its submission. Moreover, the subjective satisfaction arrived at by the District Judge in the A.C.R. recorded by him for the year 2012-13 and in his report which led to a vigilance inquiry does not get washed away by this inquiry report. (Para 31)

**C. Merely because a chargesheet had been issued to him and a disciplinary proceeding had been initiated did not preclude the High court from considering the petitioner for compulsory retirement.** The law does not preclude the High Court from doing so. Once a decision to compulsorily retire the petitioner was taken, it was implied therein that the disciplinary proceedings which had been initiated for imposing a punishment stood dropped but merely because the Inquiry Judge may not have been informed about the said fact resulting in an inquiry report dated 23.12.2021 would not enure to the benefit of the petitioner. **Proceedings for compulsory retirement and disciplinary proceedings are two distinct proceedings**. (Para 35)

**D. The assessment of the work and conduct of a judicial officer by his immediate superior is of immense importance especially in view of the report of the Vigilance Officer. The law is settled that a single adverse remark regarding integrity of a judicial officer is sufficient for his compulsory retirement.** In this case, there is sufficient material to sustain the order of compulsory retirement and also subjective satisfaction arrived at in this regard. As observed by the Supreme Court of India, it is not always possible to have positive evidence in matters of integrity of a judicial officer and the assessment by the immediate superior officer regarding his work and conduct including his integrity should not be brushed aside lightly, unless of course, any malafide is proved which is not the case here. Therefore, the decision of the Screening Committee, the Administrative Committee and the Full Court based on the material before it, are required to be given due weightage. (Para 35)

**Writ Petition dismissed**. (E-4)

**Precedent followed:**

1. Arun Kumar Saxena Vs High Court of Judicature at Allahabad through R.G. & anr., 2018 SC OnLine All 5728 (Para 6)

2. Raman Kumar Saxena Vs St. of U.P., 2008 SCC OnLine All 1230 (Para 6)

3. Ram Muriti Yadav Vs St. of U.P. & anr., (2020) 1 SCC 801 (Para 6)

4. Pyare Mohan Lal Vs St. of Jharkhand & ors., (2010) 10 SCC 693 (Para 6)

5. Shiv Kant Tripathi Vs St. of U.P. & ors., 2008 SCC OnLine All 70 (Para 6)

6. Rajendra Singh Verma Vs Lt. Governor (NCT) of Delhi, (2011) 10 SCC 1 (Para 6)

7. Ram Kumar Tripathi Vs St. of U.P. & ors., judgment and order dated 04.09.2018 in W.P. No. 10551 (S/B) of 2018) (Para 6)

8. Rajasthan High Court Vs Ved Priya & anr., 2020 SCC OnLine 337 (Para 6)

9. Registrar General, HC of Patna Vs Pandey Gajendra Prasad & ors., 2012 (6) SCC 357 (Para 6)

10. Baikuntha Nath Das & anr. Vs Chief District Medical Officer, AIR 1992 SC 1020 (Para 6)

11. Arun Kumar Gupta Vs St. of Jharkhand & anr., judgment and order dated 27.02.2020 in W.P. (Civil) No. 190 of 2018) (Para 6)

12. HC of Judicature, Rajasthan Vs Bhanwar Lal Lamror & ors., (2021) 8 SCC 377 (Para 6)

13. St. of U.P. Vs Vijay Kumar Jha, (2002) 3 SCC 641 (Para 6)

14. Ram Murit Yadav Vs St. of U.P., judgment and order dated 02.05.2018 in W.P. No. 17566 (S/B) of 2016 (Para 6)

15. Shyam Shankar-II Vs St. of U.P. & ors., judgment and order dated 16.03.2018 in W.P. No. 17566 (S/B) of 2016) (Para 6)

16. Shrirang Yadavrao Waghmare Vs St. of Mah. & ors., judgment and order dated 16.09.2019, Civil appeal No. 7306 of 2019

17. Gurpal Singh Vs High Court of Judicature of Raj., (2012) 2 SCC 94 (Para 6)

18. R.C. Chandel Vs High Court of M.P. & anr., (2012) 8 SCC 58 (Para 6)

19. Muzaffar Hussain Vs St. of U.P. & anr., 2002 SCC OnLine SC 567

20. U.O.I. Vs K.K. Dhawan, (1993) 2 SCC 56 (Para 9)

21. U.O.I. Vs Duli Chand, (2006) 5 SCC 680 (Para 9)

22. T.A. Naqshbandi Vs St. of J&K, (2003) 9 SCC 592 (Para 10)

23. High Court of Bombay Vs Shashikant S. Patil, (2011) 10 SCC 1 (Para 10)

24. Nawal Singh Vs St. of U.P. & anr., (2003) All LJ 2491 (Para 14)

25. U.O.I. Vs M.E. Reddy, (1980) 2 SCC 15 (Para 15)

26. Swatantra Singh Vs St. of Har., (1997) 4 SCC 14 (Para 16)

27. Tarak Singh Vs Jyoti Basu, (2005) 1 SCC 201 (Para 19)

28. Nand Kumar Verma Vs St. of Jharkhand & ors., (2012) 3 SCC 580 (Para 21)

29. M.S. Bindra Vs U.O.I., (1998) 7 SCC 310 (Para 22)

**Precedent distinguished:**

1. Ram Ekbal Sharma Vs St. of Bihar & anr., (1993) 3 SCC 396 (Para 5)

2. Madan Mohan Choudhary Vs St. of Bihar & ors., (2001) 3 SCC 314(Para 5)

3. St. of Gujarat Vs Umedbhai M. Patel, 2009 (1) SCC (L&S) 663 (Para 5)

4. Madhya Pradesh St. Cooperative Dairy Federation Ltd. & anr. Vs Rajnesh Kumar Jamindar & ors., 2012 (1) SCC (L&S) 663 (Para 5)

5. Nand Kumar Verma Vs St. of Jharkhand & ors., 2019 (10) SCC 640 (Para 5)

6. Krishna Prasad Verma (D) through Lrs. Vs St. of Bihar, (2022) LiveLaw (SC) 128 (Para 5)

7. Central Industrial Security Force Vs HC (GD) Om Prakash (Para 5)

8. Avinash Chandra Tripathi Vs St. of U.P. & anr., Writ Petition No. 33451 of 2016, decided on 31.05.2018 (Para 5)

**Present petition challenges the recommendations of the Screening Committee dated 11.06.2020 and 15.06.2020, the Resolution of Full Court of the Allahabad High Court dated 25.11.2021 for his compulsory retirement as also his compulsory retirement order dated 29.11.2024. ReinSt.ment in service with all consequential benefits of seniority, arrears of salary etc. has been sought.**

(Delivered by Hon'ble Rajan Roy, J.)

(1) Heard Sri Sheikh Wali Uz Zaman, learned counsel for the petitioner, Sri Gaurav Mehrotra, learned counsel for the High Court, Sri M.K. Dwivedi, learned Standing Counsel for State-respondent.

(2) By means of this petition, the petitioner, a compulsorily retired judicial officer in the State of U.P., has challenged the recommendations of the Screening Committee dated 11.06.2020 and 15.06.2020, the Resolution of Full Court of the Allahabad High Court dated 25.11.2021 for his compulsory retirement as also his compulsory retirement order dated 29.11.2024. He has sought his reinstatement in service with all consequential benefits of seniority, arrears of salary etc.

(3) The facts of the case in brief are that the petitioner was appointed on the post of Munsif/ Civil Judge (Junior Division) and became a member of U.P. Nyayik Sewa on 22.03.1996. He was promoted as Civil Judge (Senior Division) on 15.12.2003. Thereafter, he was further promoted to Higher Judicial Service and was posted as Additional District Judge on 16.08.2013. For the year 2012-13, the District Judge, Badaun recorded an adverse Confidential Report and did not certify his integrity for the said period. Vide his letter dated 24.09.2016 addressed to the Registrar General, he communicated various instances of misconduct on his part requiring a full-fledged inquiry especially with regard to his integrity and the properties amassed by him. Based thereon, a vigilance inquiry was ordered by Hon'ble the Chief Justice on 11.05.2013 which was registered as Vigilance Inquiry No.28/2013. The Vigilance Officer submitted his report on 04.03.2016 wherein he found the allegations to be correct. The matter was placed before the Administrative Committee of the High Court which accepted the report in its meeting dated 14.09.2016 and 16.11.2016 and recommended a regular departmental proceeding against the petitioner, which was in fact initiated, bearing D.P. No.12/2016. The Administrative Judge did not record his comments for the A.C.R period 2013-14 on account of pendency of the vigilance inquiry at the relevant time. The compulsory retirement of the judicial officer was considered in the year 2020 by a Screening Committee of the High Court in its meeting dated 11.06.2020 and 15.06.2020. In these meetings, service records of the petitioner were also scrutinized and the Screening Committee recommended his compulsory retirement taking into considering his entire service record. The recommendations of the Screening Committee were placed before the Administrative Committee of the High Court which in its meeting date 18.11.2021 accepted the recommendations of the Screening Committee dated 11.06.2020 and 15.06.2020 and recommended withdrawal of judicial work of the petitioner as also his compulsory retirement to the Full Court.

The matter was placed before the Full Court which in its meeting dated 25.11.2021, on a consideration of entire material before it, opined in its wisdom for compulsory retirement of the petitioner.

(4) Based on the aforesaid exercise, the State Government passed the order of compulsory retirement on 29.11.2021 in exercise of its powers under Fundamental Rule 56(C). Be that as it may, for some explicable reason, the Inquiry Judge who had been assigned D.P. No.12/2016 was not intimated about the aforesaid compulsory retirement of the petitioner. Consequently, he went ahead with the inquiry and even the petitioner himself, it appears, did not inform him about the said fact and ultimately, the Inquiry Judge submitted a report on 23.12.2021 exonerating the petitioner. The inquiry report was placed before the Administrative Committee which was informed about compulsory retirement of the petitioner and accordingly, it dropped the charges against the petitioner in its meeting dated 10.01.2022 and this decision of the Administrative Committee was communicated to the District & Sessions Judge, Bulandshahr on 09.02.2022. Against the aforesaid background, the petitioner has filed this petition seeking the reliefs as mentioned earlier.

(5) The contention of learned counsel for the petitioner in nutshell was that based on the material on record, no prudent person could have arrived at the conclusion that the petitioner was a deadwood who had outlived its utility for the judicial services, therefore, the impugned compulsory retirement is liable to be quashed. Compulsory retirement could not have been resorted as a shortcut to avoid result of the disciplinary proceedings. The fact that the Inquiry Judge subsequently exonerated the petitioner of the charges leveled against him and the Administrative Committee accepted the same is itself proof of the fact that the remarks of the District Judge pertaining to the A.C.R. period 2012-13 were unfounded and a result of malafide. Therefore, this material, that is, the remarks of District Judge in this regard and the report of Vigilance Officer cannot be made the basis for sustaining the order of compulsory retirement and his subsequent exoneration itself shows that the compulsory retirement was illegal and without any factual and legal basis. Learned counsel also alleged malafide against the then District Judge. However, we find that the said District Judge has not been impleaded as an opposite party in the writ petition, therefore, the allegations cannot be looked into. The Screening Committee had taken into consideration the chargesheet issued to the petitioner in disciplinary proceedings and the report of Vigilance Officer which was the basis for initiation of disciplinary proceedings and therefore, in view of the subsequent exoneration, these material cannot form the basis for the petitioner's compulsory retirement and in fact, a shortcut method was adopted to compulsorily retire the petitioner without waiting for the result of disciplinary proceedings. The Screening Committee did not consider the work done by the petitioner nor the entire service record but has considered irrelevant material such as entries for the year 1996-1997 and 2007-2008 which were not adverse. The order of compulsory retirement has been passed in colourable exercise of power without there being any material to sustain the same, therefore, it is liable to be quashed. Learned counsel for the petitioner relied upon various decisions in support of his contention which are

reported in 1990 (3) SCC 504 **'Ram Ekbal Sharma vs. State of Bihar & anr.'; (1993) 3 SCC 396 'Madan Mohan Choudhary vs. State of Bihar & Ors.'; (2001) 3 SCC 314 'State of Gujarat vs. Umedbhai M. Patel'; 2009 (15) SCC 221 'Madhya Pradesh State Cooperative Dairy Federation Limited and Anr. vs. Rajnesh Kumar Jamindar & Ors.';** 2012 (1) SCC (L&S) 663 **'Nand Kumar Verma vs. State of Jharkhand & Ors.'; 2019 (10) SCC 640 'Krishna Prasad Verma (D) Thr. Lrs. vs. State of Bihar'**; (2022) LiveLaw (SC) 128 **'Central Industrial Security Force vs. HC (GD) OM Prakash'** and judgment passed by Division Bench of Allahabad High Court passed in Writ-A No.33451 of 2016 **'Avinash Chandra Tripathi vs. State of U.P. & Anr.'** on 31.05.2018.

(6) On the other hand, Sri Gaurav Mehrotra, learned counsel for the High Court first and foremost invited our attention to the scope of judicial review of an order of compulsory retirement in a case involving a judicial officer. He submitted that the said scope was very limited and would be confined to cases where the order has been passed without any material or malafide. He submitted that sufficiency of material is not open for consideration for the High Court under Article 226 of the Constitution of India and it is only the decision making process which can be seen while evaluating the validity of an order of compulsory retirement, that too, pertaining to a judicial officer. He also emphasized upon the fact that the decision has been taken firstly by the Screening Committee comprising of Hon'ble Judges of the High Court and thereafter, by the senior most Judges of the High Court who were part of Administrative Committee and then the Full Court of the High Court presided by Hon'ble the Chief Justice, therefore, due and proper weightage has to be given to the satisfaction arrived at by the High Court and also subsequently by the State Government in this regard and an order of compulsory retirement of a judicial officer is not be interfered lightly. A judicial officer has to maintain highest standards of conduct and integrity throughout his career, therefore, his evaluation has to be on a higher platform than that of an ordinary officer. The Screening Committee as also the High Court has formed a subjective satisfaction on the basis of objective material available before it and such satisfaction is not to be interfered lightly on the judicial side. It is not a case where there is no material for sustaining the order of compulsory retirement. As regards subsequent exoneration of the petitioner in the inquiry wherein the charges were similar to those referred in the remarks of the District Judge for the A.C.R. 2012-13, he submitted that once the master-servant relationship had ceased on the compulsory retirement of the petitioner then any subsequent report exonerating him would be of no consequence rather it would be without jurisdiction. As regards acceptance of the said report by the Administrative Committee, he submitted that the Committee appears to have accepted the report presumably because the petitioner had already been retired and no punishment could be imposed upon him based on such inquiry even if the Committee took a different view that what had been taken by the Inquiry Judge. Therefore, it appears that only for this reason the report was accepted as it was veritably of no consequence so far as imposition of punishment upon the officer is concerned. He took us through the material which was considered by the Screening Committee for recommending compulsory retirement of the petitioner. He

emphasized that the entire service record of the petitioner had been considered by the Screening Committee and a subjective satisfaction had been recorded based on such consideration. He also emphasized the fact that the general reputation of a judicial officer is also a factor to be taken into consideration in the matter of compulsory retirement and in every case there may not be tangible proof pointing towards lack of integrity or grave misconduct. In such cases, compulsory retirement is justified and there are catena of decisions on this aspect. A wrong judicial order may not entail disciplinary proceedings but it can certainly be taken into consideration for recording the Annual Confidential Report. He also contended that the judgments relied upon by the petitioner are not applicable as the facts in those cases were different. The Screening Committee had not taken into consideration the report of the Inquiry Judge as it was not available by then and in fact, the said report could not have been submitted after the compulsory retirement of the petitioner. The High Court was justified in compulsorily retiring the petitioner and the resolutions of the Administrative Committee and the Full Court in this regard veritably amounted to dropping the disciplinary proceedings against the petitioner but merely because the said inquiry continued even after the petitioner's compulsory retirement will not enure to the benefit of the petitioner and he cannot be permitted to take advantage of the same. He also submitted that the adverse material which is the basis for compulsory retirement has never been challenged by the petitioner, therefore, its validity cannot be seen in these proceedings. The collective wisdom of the Full Court is to be given due respect and weightage. He took us through various decisions relied upon by him which are **'Arun Kumar Saxena vs. High Court of Judicature at Allahabad Thru' R.G. and** Another' 2018 SCC OnLine All 5728; **'Raman Kumar Saxena vs. State of U.P. and Ors.**' 2008 SCC OnLine All 1230; **'Ram Murti Yadav vs. State of U.P. & Another'** (2020) 1 SCC 801; **'Pyare Mohan Lal vs. State of Jharkhand and Ors.**' (2010) 10 SCC 693; **'Shiv Kant Tripathi vs. State of U.P. & Ors.**' 2008 SCC OnLine All 70; **'Rajendra Singh Verma vs. Lt. Governor (NCT of Delhi)**' (2011) 10 SCC 1; **'Ram Kumar Tripathi vs. State of U.P. and Ors.' (Judgment and Order dated 04.09.2018 in W.P. No. 10551 (S/B) of 2018); 'Rajasthan High Court vs. Ved Priya and another'** 2020 SCC OnLine 337**; 'Registrar General, HC of Patna vs. Pandey Gajendra Prasad and Ors.**' 2012 (6) SCC 357**; 'Baikuntha Nath Das & another vs. Chief District Medical Officer'** AIR 1992 SC 1020**; 'Arun Kumar Gupta Vs. State of Jharkhand and Anr.' [Judgment and Order** dt. 27.02.2020 **in W.P. (Civil) No.190 of 2018]; 'HC of Judicature, Rajasthan vs. Bhanwar Lal Lamror & Ors.'** (2021) 8 SCC 377**; 'State of U.P. vs. Vijay Kumar Jain'** (2002) 3 SCC 641**; 'Ram Murti Yadav vs. State of U.P. and Ors.' [Judgment and order dt.** 02.05.2018 **in W.P. No. 17566 (S/B) of 2016]; 'Shyam Shankar-II vs. State of U.P. and Ors.' [Judgment and Order** dt. 16.03.2018 **in W.P. No. 17566 (S/B) of 2016]; 'Shrirang Yadavrao Waghmare vs. State of Maharastra and Others' Judgment and Order dated 16.09.2019 [Civil Appeal No. 7306 of 2019]; 'Gurpal Singh Vs. High Court of Judicature of Rajasthan'** (2012) 2 SCC 94; **'R.C. Chandel Vs. High Court of Madhya Pradesh and Another'** (2012) 8 SCC 58 **and 'Muzaffar Hussain vs. State of U.P. and Anr.'** 2002 SCC OnLine SC 567**.**

(7) Before proceeding to consider the facts and issues involved in this petition, we would first of all like to dwell upon the law on the subject of compulsory retirement of a judicial officer. An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior. The order has to be passed by the competent authority on forming an opinion that it is in public interest to retire a government servant compulsorily. The order is passed on a subjective satisfaction of the Government/ competent authority. Principle of natural justice has no place in the context of an order of compulsory retirement. The Screening Committee or the competent authority as the case may be has to consider the entire service record before taking a decision in the matter. Of course, the records pertaining to the later years may be given more importance. F.R. 56 (C) read with Explanation (ii) empowers the State Government with an absolute right to retire an employee on attaining the age of fifty years. Deadwood need to be removed to maintain efficiency in service. Integrity of a government employee is foremost consideration in public service1. If conduct of a government employee becomes unbecoming to the public interest or obstructs the efficiency in public services, the government has absolute right to compulsorily retire such an employee in public interest. A government's right to compulsorily retire is a method to ensure a efficiency in public service2. Even uncommunicated entries in the Confidential Record can be taken into consideration for compulsory retirement. Compulsory retirement cannot be imposed as a punitive measure nor can it be passed as a shortcut to avoid departmental inquiry when such course is much desirable. Merely because the officer has been given promotions after the adverse entries/ material by itself would not attract the principle of washing off the said entries especially in a case of a judicial officer3.

(8) We may in this very context refer to certain decisions regarding scope of judicial review of an order of compulsory retirement of a judicial officer. We may in this context refer to decision of Hon'ble the Supreme Court of India in the case of **Pyare Mohan Lal (supra)** wherein it was *inter alia* held that single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement4. The case of a Judicial Officer is required to be examined, treating him to be differently from other wings of the society, as he is serving the State in a different capacity. The case of a Judicial Officer is considered by a Committee of Judges of the High Court duly constituted by Hon'ble the Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non- application of mind or malafide.

(9) We may in this very context refer to decision of Hon'ble the Supreme Court in the case of **Ram Murti Yadav (supra)** wherein after noticing the fact that the service records of the appellant therein had been examined by the Screening Committee, the Full Court as also by the Division Bench of the High Court it was held that the scope for judicial review of an order of compulsory retirement based on the subjective satisfaction of the employer is extremely narrow and restricted. Only if it is found to be based on arbitrary or capricious grounds, vitiated by malafides, overlooks relevant materials, could there be

limited scope for interference. The court, in judicial review, cannot sit in judgment over the same as an Appellate Authority. The submission in the said case that compulsory retirement could not have been ordered for mere error of judgment in decision making was repelled with the observation that the same merited no consideration in view of the decision in **K.K. Dhawan5** and **Duli Chand6.**

(10) In **Ram Murti Yadav (supra),** Hon'ble the Supreme Court reiterated that a single adverse entry could suffice for an order of compulsory retirement as held in **Pyare Mohan Lal (supra).** It referred to another decision of Supreme Court rendered in **'T.A. Naqshbandi vs. State of J&K'7** regarding scope of judicial review in such matters wherein it has been held that judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions of administration of justice with which it was concerned in the said case, by going into the correctness as such of ACRs or the assessment made by the Committee and approval accorded by the Full Court of the High Court. It then referred to the decision in the case of **'Rajendra Singh Verma vs. State (NCT of Delhi)8**' wherein the principles laid down in **'High Court of Bombay vs. Shashikant S. Patil'9** were reiterated and it was observed that in case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the Judges of the High Court who go into the question and it is possible that in all cases evidence would not be forthcoming about integrity doubtful of a judicial officer.

(11) It then once again referred to the observation in **Rajendra Singh Verma (supra)** that if that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ court under Article 226 or this Court under Article 32 would not interfere with the order.

(12) It also considered the decision of Supreme Court in **'Ram Ekbal Sharma vs. State of Bihar'10** and observed that, that was a decision where the issue was that the form of the order was not conclusive and veil could be lifted to determine if it was ordered as punishment and the said decision was not found relevant to the issues involved. It further went on to observe as under:-

*"14. A person entering the judicial service no doubt has career aspirations including promotions. An order of compulsory retirement undoubtedly affects the career aspirations. Having said so, we must also sound a caution that*

*judicial service is not like any other service. A person discharging judicial duties acts on behalf of the State in discharge of its sovereign functions. Dispensation of justice is not only an onerous duty but has been considered as akin to discharge of a pious duty, and therefore, is a very serious matter. The standards of probity, conduct, integrity that may be relevant for discharge of duties by a careerist in another job cannot be the same for a judicial officer. A judge holds the office of a public trust. Impeccable integrity, unimpeachable independence with moral values embodied to the core are absolute imperatives which brooks no compromise. A judge is the pillar of the entire justice system and the public has a right to demand virtually irreproachable conduct from anyone performing a judicial function. Judges must strive for the highest standards of integrity in both their professional and personal lives.*

*15. It has to be kept in mind that a person seeking justice, has the first exposure to the justice delivery system at the level of subordinate judiciary, and thus a sense of injustice can have serious repercussions not only on that individual but can have its fall out in the society as well. It is, therefore, absolutely necessary that the ordinary litigant must have complete faith at this level and no impression can be afforded to be given to a litigant which may even create a perception to the contrary as the consequences can be very damaging. The standard or yardstick for judging the conduct of the judicial officer, therefore, has necessarily to be strict. Having said so, we must also observe that it is not every inadvertent flaw or error that will make a judicial officer culpable. The State Judicial Academies undoubtedly has a stellar role to perform in this regard. A bona fide error may need correction and counselling. But a conduct which creates a perception beyond the ordinary cannot be countenanced. For a trained legal mind, a judicial order speaks for itself."*

(13) In the case of **Rajendra Singh Verma (supra),** it was observed as under:-

***'191. Further, in case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the judges of the High Court who go into the question and it is possible that in all cases evidence would not be forth coming about integrity doubtful of a Judicial Officer. As observed by this Court in High Court of Punjab & Haryana v.s. Ishwar Chand Jain (1999) 4 SCC 579, at times, the Full Court has to act on the collective wisdom of all the Judges and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of an officer and gain notoriety much faster than the smoke. Sometimes there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported by evidence.***

***192. Normally, the adverse entry reflecting on the integrity would be based on formulations of impressions which would be result of multiple factors***

***simultaneously playing in the mind. Though the perceptions may differ, in the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in the confidential rolls to judicial review. Sometimes, if the general reputation of an employee is not good though there may not be any tangible material against him, he may be compulsorily retired in public interest. The duty conferred on the appropriate authority to consider the question of continuance of a judicial officer beyond a particular age is an absolute one. If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ court under Article 226 or this Court under Article 32 would not interfere with the order."***

(14) On the same lines, a Division Bench of this Court in the case of **'Nawal Singh vs. State of U.P. & Anr.'** (2003) All LJ 2491 :-

*"Further, it is to be reiterated that the object of compulsory retirement is to weed out the dead wood in order to maintain high standard of efficiency and honesty to keep judicial service unpolluted. It empowers the authority to retire officers of doubtful integrity which depends upon overall impression gathered by the higher officers and it is impossible to prove by positive evidence that a particular officer is dishonest "*

(15) Hon'ble the Supreme Court of India in the case of **'Union of India vs. M.E. Reddy11'** observed with respect to general reputation, honesty and integrity of an officer as under:-

*"17. .. The superior officer may make certain remarks while assessing the work and conduct of the subordinate officer based on his personal supervision or contact. Some of those remarks may be purely innocuous, or may be connected with general reputation of honesty or integrity that a particular officer enjoys. It will indeed be difficult if not impossible to prove by positive evidence that a particular officer is dishonest but those who has had the opportunity to watch the performance of the said officer from close quarters are in a position to know the nature and character not only of his performance but also of the reputation that he enjoys..."*

(16) In the case of **'Swatantra Singh vs. State of Haryana'12**, similar observations were made as under:-

*"5. It is sad but a bitter reality that corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety*

*much faster than the smoke. Sometimes, there may not be concrete or material evidence to make it part of the record. It would, therefore, may be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported be evidence, like the remarks made by the Superintendent of Police. More often the corrupt officer manipulates in such a way and leaves no traceable evidence to be made part of the record for being cited as specific instance. It would, thus, appear that the order does not contain or the officer writing the report could not give particulars of the corrupt activities of the petitioner. He honestly assessed that the petitioner would prove himself efficient officer, provided he controls his temptation for corruption. That would clearly indicate the fallibility of the petitioner, vis-a-vis the alleged acts of corruption. Under these circumstances, it cannot be said that the remarks made in the confidential report are vague without any particulars and, therefore, cannot be sustained. It is seen that the officers made the remarks on the basis of the reputation of the petitioner. It was, therefore, for him to improve his conduct, prove honesty and integrity in future in which even, obviously, the authority would appreciate and made necessary remarks for the subsequent Period."*

(17) The limited scope of judicial review in such matters was emphasized by Hon'ble the Supreme Court by a three Judge Bench of Supreme Court of India in the case of **'Rajasthan High Court vs. Ved Priya & anr.'13** wherein it was observed that the amplitude of such jurisdiction cannot be enlarged to sit as an 'appellate authority', and hence care must be taken to not hold another possible interpretation on the same set of material or substitute the Court's opinion for that of the disciplinary authority. This is especially true given the responsibility and powers bestowed upon the High Court under Article 235 of the Constitution. The collective wisdom of the Full Court deserves due respect, weightage and consideration in the process of judicial review. Article 235 of the Constitution of India deals with control of the High Court over subordinate courts.

(18) Again, in the case of **'Registrar General, HC of Patna vs. Pandey Gajendra Prasad and Ors.'14**,the Supreme Court observed as under:-

*"23. There is nothing on record to even remotely suggest that the evaluation made, firstly by the Standing Committee and then by the Full Court, was so arbitrary, capricious or so irrational so as to shock the conscience of the Division Bench to justify its interference with the unanimous opinion of the Full Court. As regards the observation of the Division Bench on the reputation of the first respondent based on his ACRs, it would suffice to note that apart from the fact that an ACR does not necessarily project the overall profile of a judicial officer, the entire personal file of the respondent was before the Full Court when a conscious unanimous decision was taken to award the punishment of his dismissal from service. It is also well settled that in cases of such assessment, evaluation and formulation of opinion, a vast range of multiple factors play a vital and important role and no single factor should be allowed to be blown out of proportion either to decry or deify issues to be resolved or claims sought to be considered or asserted. In the very nature of such things, it would be difficult, rather*

*almost impossible to subject such an exercise undertaken by the Full Court, to judicial review, save and except in an extra-ordinary case when the court is convinced that some exceptional thing which ought not to have taken place has really happened and not merely because there could be another possible view or there is some grievance with the exercise undertaken by the Committee/Full Court. [(See: Syed T.A. Naqshbandi."*

(19) In a case reported in (2021) 8 SCC 377 **'HC of Judicature, Rajasthan vs. Bhanwar Lal Lamror & Ors.'**, Hon'ble the Supreme Court observed that High Court on the judicial side could have interfered with the order of compulsory retirement if it found that there was absolutely no record or material whatsoever as referred to in the recommendations made by the Administrative Committee, or that the Committee relied on irrelevant material, or that apposite material was overlooked and discarded. It further observed that the High Court's view would have been acceptable if it found patent illegality, breach of procedure causing prejudice to respondent before it, or imposition of a gravely disproportionate measure. It noticed in the said case that administrative committee had averted to entire service record including the pending disciplinary inquiry regarding integrity of the respondent and in this context, it observed that while considering the entire service record of a judicial officer even if there is a solitary remark of lack and breach of integrity, that may be sufficient for a Judicial Officer to be compulsory retired as expounded in **'Tarak Singh Vs. Jyoti Basu'** reported in (2005) 1 SCC 201.

(20) It went on to observe that it was not open to the High Court to substitute its own view for the satisfaction arrived at by the Full Court of the High Court regarding necessity or otherwise of the respondent continuing in the Judicial Services. It was also not open to the High Court to re-write the annual confidential reports by taking over the role of inspecting or confirming authority. In the said case, the disciplinary proceedings had been initiated and were pending at the time of compulsory retirement of the judicial officer and were dropped subsequent to his compulsory retirement.

(21) We may also refer to the Division Bench judgment of this Court rendered in the case of **Arun Kumar Saxena (supra)** wherein also the disciplinary proceedings were dropped subsequently but a similar contention as has been raised herein that in view of the exoneration of the petitioner subsequently, the order of compulsory retirement cannot be sustained was not accepted. It was observed that exoneration in the departmental inquiry does not completely wipe out the material on the basis of which impression was gathered by the reporting judge i.e. the District Judge concerned, as regards the integrity and general reputation of the petitioner is concerned. Reference was made in this regard to the case of **'Nand Kumar Verma vs. State of Jharkhand & Ors.'15** wherein it has been observed in para no.38 as under:-

*"Moreover, the District and Sessions Judge had the opportunity to watch the functioning of the appellant from close quarters, who have reported favourably regarding the appellant's overall performance except about his disposal, in the appellant's recent ACR for the year 1997-98 and 1998-99. In view of this, the greater importance is to be given*

*to the opinion or remarks made by the immediate superior officer as to the functioning of the concerned judicial officer for the purpose of his compulsory retirement. The immediate superior is better placed to observe, analyse, scrutinize from close quarters and then, to comment upon his working, overall efficiency, and reputation." (Emphasis Supplied)*

(22) In this context, the Supreme Court referred to para no.193 of the judgment in the case of **Rajendra Singh Verma (supra)** wherein the earlier decision in **'M.S. Bindra vs. Union of India'16** was considered wherein it was inter alia observed as under:-

*"193. Further this Court in M.S. Bindra's case (Supra) has used the phrase 'preponderance of probability' to be applied before recording adverse entry regarding integrity of a judicial officer. There is no manner of doubt that the authority which is entrusted with a duty of writing ACR does not have right to tarnish the reputation of a judicial officer without any basis and without any `material' on record, but at the same time other equally important interest is also to be safeguarded i.e. ensuring that the corruption does not creep in judicial services and all possible attempts must be made to remove such a virus so that it should not spread and become infectious. When even verbal repeated complaints are received against a judicial officer or on enquiries, discreet or otherwise, the general impression created in the minds of those making inquiries or the Full Court is that concerned judicial officer does not carry good reputation, such discreet inquiry and or verbal repeated complaints would constitute material on the basis of which ACR indicating that the integrity of the officer is doubtful can be recorded. While undertaking judicial review, the Court in an appropriate case may still quash the decision of the Full Court on administrative side if it is found that there is no basis or material on which the ACR of the judicial officer was recorded, but while undertaking this exercise of judicial review and trying to find out whether there is any material on record or not, it is the duty of the Court to keep in mind the nature of function being discharged by the judicial officer, the delicate nature of the exercise to be performed by the High Court on administrative side while recording the ACR and the mechanism/system adopted in recording such ACR." (Emphasis Supplied)*

*.. 195. It is a matter of common knowledge that the complaints which are made against a judicial officer, orally or in writing are dealt with by the Inspecting Judge or the High Court with great caution. Knowing that most of such complaints are frivolous and by disgruntled elements, there is generally a tendency to discard them. However, when the suspicion arises regarding integrity of a judicial officer, whether on the basis of complaints or information received from other sources and a committee is formed to look into the same, as was done in the instant case and the committee undertakes the task by gathering information from various sources as are available to it, on the basis of which a perception about the concerned judicial officer is formed, it would be difficult for the Court either under Article 226 or for this Court under Article 32 to interfere with such an exercise. Such an opinion and impression formed consciously and rationally after the enquiries of the nature mentioned above would definitely constitute material for recording adverse report in respect of an officer. Such an impression is not readily formed but after*

*Court's circumspection, deliberation, etc. and thus it is a case of preponderance of probability for entertaining a doubt about integrity of an official which is based on substance, matter, information etc. Therefore, the contention that without material or basis the adverse entries were recorded in the ACR of the appellants cannot be upheld and is hereby rejected."*

(Emphasis Supplied) "

(23) Referring to the same, it was observed by the Division Bench in **Arun Kumar Saxena (supra)** that from a reading of the said judgment it is clear that impression created in the mind of the reporting officer (which in that context was the District Judge) about the integrity of an officer placed under him is of importance and is not to be questioned ordinarily on the basis of insufficiency of material because such impression may be drawn on the basis of repeated oral complaints, enquiries, discreet or otherwise. In a departmental enquiry, the charges are to be substantiated not on the basis of impression but on the basis of cogent material. Under the circumstances, if, in a departmental enquiry, there is exoneration from the charges, the general impression that a reporting officer had gathered about an officer posted under him is not wiped out completely. Such an impression can therefore form basis as to whether integrity of the incumbent is to be certified or not. Accordingly, the Co-ordinate Bench opined in the facts of the said case that exoneration of the petitioner in the departmental enquiry, which was drawn on some of the instances cited in the ACR to draw impression about the integrity of the petitioner, cannot be made basis to hold that the ACR of the petitioner for the relevant year was rendered on no material or was now rendered worthless.

(24) Now, we proceed to consider the facts and issues involved in this case against the aforesaid legal background.

(25) We have perused the original records including the recommendation of the Screening Committee, the Administrative Committee, the Full Court of the High Court and the ultimate order passed by the State Government compulsorily retiring the petitioner. We find from a perusal of the minutes of the Screening Committee that it has considered the case of the petitioner for compulsory retirement in the light of various Supreme Court decisions referred therein some of which have been referred hereinabove. The Committee deliberated on 11.06.2020 and 15.06.2020 and scrutinized the service record of the concerned officer. The entire service record was available before the Screening Committee and the same has also been produced before us, therefore, it was seen by the Screening Committee.

(26) After taking into consideration decisive factors, relevant record and on an objective analysis of subjective impression of record of the petitioner, it found that his continuance was no longer in public interest and that he had outlived its utility which required immediate action and accordingly, it recommended compulsory retirement of the petitioner under Fundamental Rules 56 (C). While considering the entire service record of the petitioner, it specifically mentioned the entries for the year 1996-97 and 2007-2008, the annual confidential entry for the year 1999-2000, the warning of the Administrative Judge dated 21.07.2000, the adverse Annual Confidential Report of the District Judge, Badaun for the year 2012-13 rating him as a poor officer clearly remarking that his integrity was lacking,

the report of the Vigilance Officer in Vigilance Inquiry No.28/2013 which was accepted by the Administrative Committee in its meeting dated 16.11.2016, the chargesheet against the petitioner in Departmental Inquiry No.12/2016 and taking into consideration the overall service record of the officer, the Committee accordingly recommended that he be compulsorily retired. In this process, the representation of the petitioner dated 19.04.2018 for recording an entry regarding his integrity as being certified for the year 2016-17 regarding which the Administrative Judge had not recorded the entry as the vigilance inquiry against him was pending, was rejected by the Administrative Committee itself.

(27) When we peruse the original records, we find that apart from assessment of the work and conduct of the petitioner as fair for the year 1996-97 and 2007-2008, the Screening Committee also considered a warning by the Administrative Judge, Saharanpur dated 21.07.2000 to the effect - 'the officer, Sri Anil Kumar, Civil Judge (Senior Division), Deoband, Saharanpur is warned for addressing him as a VIP level officer'. The officer in some correspondence had referred to himself as a VIP level officer, therefore, the aforesaid warning was ordered to be placed by the Administrative Judge in his confidential report for the relevant year. Apart from it, for the year 1999-2000, there were adverse remarks against the petitioner regarding not taking proper interest in disposal of execution cases which was ordered by the Administrative Judge on 08.01.2000 to be communicated to him so that he may make a representation against the same. The officer submitted the said representation which was rejected by the Administrative Committee on 22.03.2002. The aforesaid warning which was placed in the confidential report and the rejection of the petitioner's representation as aforesaid was never challenged by him.

(28) While assessing the work and conduct of the officer-petitioner for the year 2012-13, the District Judge, Badaun made adverse observations, interalia, to the effect that judgments and orders were not made in accordance with legal proposition of law whereby it revealed that the Presiding Officer did not perform his official duties sincerely and uprightly thereby yielding suspicion over his integrity and for the said reasons, integrity of the officer can well be said to be positively lacking. Copy of his report in this regard was also annexed for ready reference. There were other adverse remarks in the said A.C.R. for the year 2012-13 which are on record. For the reasons given by him as mentioned hereinabove, his private character was also not appreciated in as much as in the opinion the District Judge, it brought down the image of administration of justice. Flaws were detected in maintenance of Presiding Officer's diary and listing of cases by the officer. Flaws were detected in the judgments rendered by the petitioner wherein according to the District Judge, the points for determination under Section 354(b) Cr.P.C. were not determined by the officer and nothing had been discussed as to the credibility of the side of prosecution (whether fully credible or partly credible), nor anything had been discussed as to the place of occurrence and motive and in this manner, as per the District Judge, the decision arrived at by the officer were not sound and reasoned. He also opined that the officer had no effective control over his office and advice for deciding oldest cases which was given in the monthly meeting of

the judicial officer was not followed by the officer rather it was always ignored. The report annexed with the A.C.R. is a lengthy report running into nineteen pages which was also before the Screening Committee and was taken into consideration as it was part of the A.C.R. 2012-13. Various instances have been mentioned therein which as per the then District Judge, Badaun clearly indicated that the officer was deciding cases contrary to the settled position of law and that he was not discharging his duties sincerely and honestly which created a doubt as regards his integrity. He opined that the officer cannot be said to be fair and impartial in dealing with public and bar. The overall assessment of the petitioner by the said officer was poor. Accordingly, he recommended that a vigilance inquiry was necessary with regard to his property amassed by him and the sources used in this regard. Accordingly, he sent the said report to the Registrar General of the High Court.

(29) As already mentioned in the earlier part of the judgment, based on the aforesaid, the Chief Justice ordered vigilance inquiry on 11.05.2013. Vigilance Officer conducted the inquiry and submitted his report on 04.03.2016 wherein he found the allegations to be proved. This vigilance inquiry report was considered by the Administrative Committee in its meeting dated 14.09.2016 and 16.11.2016 and accordingly, regular disciplinary proceedings were initiated against the officer.

(30) The Screening Committee has taken into consideration the aforesaid reports to form an opinion that the petitioner was a deadwood and had outlived its utility requiring his compulsory retirement in public interest in terms of F.R.56(C). Now, the said recommendation of the Screening Committee dated 11.06.2020 and 15.06.2020 was accepted by the Administrative Committee in its meeting dated 18.11.2021 and thereafter, the matter was placed before the Full Court which also accepted the recommendations and recorded a satisfaction that the petitioner was liable to be compulsorily retired in public interest and in pursuance thereof, issued the order of compulsory retirement of the petitioner in public interest under F.R. 56C on 29.11.2021.

(31) Once the master-servant relationship ceased then the Disciplinary proceedings bearing No.12/2016 should have been dropped and should not have continued any further as there was no provision under which such proceedings could have continued thereafter unless of course a decision was taken under Civil Services Regulation 351A for forfeiture/ withholding etc of pension etc but no such decision had been taken to continue the proceedings under the said provision. It appears that the Inquiry Officer was not informed about the compulsory retirement of the petitioner and the inquiry report was submitted subsequently on 23.12.2021 in ignorance of the fact that the petitioner had already retired. In the said report, the petitioner was exonerated of Charge No.1 and 2 which were similar to the adverse remarks made by the District Judge in the A.C.R. for the year 2012-13 and the report mentioned hereinabove. Much emphasis has been laid by learned counsel for the petitioner that this exoneration in the inquiry report which was accepted by the Administrative Committee on 10.01.2022 was itself sufficient to show that remarks of the District Judge and the report sent by him which was taken into consideration by

the Screening Committee and thereafter, by the Administrative Committee and the Full Court of the High Court were unjustified and therefore, the basis for the satisfaction recorded for compulsory retirement of the petitioner was not tenable on facts and in law. However, as already observed hereinabove, the said exoneration by the Inquiry Judge is absolutely without jurisdiction. The Inquiry report dated 23.12.2021 has no legal significance in the eyes of law as once the master-servant relationship ceased there was no way that the said inquiry could have continued which was for purpose of imposition of any punishment especially as it was not continued for the purpose mentioned in Article 351A of the Civil Services Regulation and there is nothing on record to show to the contrary. So far as the dropping of charges by the Administrative Committee meeting dated 10.01.2022 while considering the inquiry report dated 23.12.2021 is concerned, the said decision appears to have been in view of the fact that the petitioner had already compulsorily retired and no purpose would be served as punishment could not have been imposed on a retired employee. Moreover, as already discussed hereinabove, a Co-ordinate Bench of this Court in the case of **Arun Kumar Saxena (supra)** had an occasion to consider a similar plea and for the legal reasoning propounded therein, it rejected the said plea and for the same reason, this plea in this case is also liable to be rejected. Additionally, this plea is liable to be rejected because the inquiry report in this case was without jurisdiction and therefore, no advantage could enure to the petitioner on account of its submission. We have also gone through the inquiry report. Moreover, as already discussed, the subjective satisfaction arrived at by the District Judge in the A.C.R. recorded by him for the year 2012-13 and in his report which led to a vigilance inquiry does not get washed away by this inquiry report for the reasons already given by the Co-ordinate Bench of this Court in the case of Arun **Kumar Saxena (supra)** and as already discussed hereinabove, this plea raised by the petitioner's counsel is therefore rejected.

(32) The Screening Committee considered the A.C.R. for the year 2012-13, the report of the District Judge and the report of the Vigilance Officer which was available before it and the report of Inquiry Judge had not come by then and, based on the aforesaid material as also the entire service record, it recommended compulsory retirement of the petitioner.

(33) It is not a case where there was no material before the Screening Committee or the Administrative Committee or the Full Court of the High Court for compulsory retirement of the petitioner. The material was very much there and based on such material, a subjective satisfaction was recorded by the Screening Committee, the Administrative Committee and the Full Court of the High Court and therefore, the opinion expressed by the said Committees which consists of sitting High Court Judges has to be given due weightage and cannot be brushed aside cursorily as stated by Hon'ble the Supreme Court in a catena of decisions which have already been discussed. As regards the malafide alleged, the District Judge has not been impleaded as a party in these proceedings, therefore, the same cannot be considered. The allegations even otherwise are vague.

(34) As regards the rating of the petitioner as 'average' by the District Judge for the year 2016-17, the Administrative

Judge upgraded the said categorization to 'Good' but did not record any opinion on the integrity of the petitioner on account of pendency of vigilance inquiry against him. The petitioner submitted a representation in this regard on 19.04.2018 which was considered and rejected by the Administrative Committee in its meeting dated 11.06.2020 and 15.06.2020 while considering compulsory retirement of the petitioner. Therefore, the Administrative Committee refused to certify the integrity of the petitioner for the said year.

(35) As regards the contention of learned counsel for the petitioner that compulsory retirement was resorted as a shortcut to avoid disciplinary proceedings without waiting for its result, we are not satisfied with this contention in view of the law already discussed hereinabove. Considering the nature of the material against the petitioner and the report of Vigilance Officer which was before the Screening Committee, merely because a chargesheet had been issued to him and a disciplinary proceeding had been initiated did not preclude the High court from considering the petitioner for compulsory retirement. The law discussed hereinabove did not preclude the High Court from doing so. In fact, once a decision to compulsorily retire the petitioner was taken, it was implied therein that the disciplinary proceedings which had been initiated for imposing a punishment stood dropped but merely because the Inquiry Judge may not have been informed about the said fact resulting in an inquiry report dated 23.12.2021 would not enure to the benefit of the petitioner as already discussed. Proceedings for compulsory retirement and disciplinary proceedings are two distinct proceedings as already discussed in the case of Arun Kumar Saxena (supra). Moreover, judicial decisions may not entail disciplinary proceedings but the same can certainly form the basis for an opinion while recording annual confidential reports and also for assessing the work and conduct of a judicial officer as was done by the District Judge, Badaun and the said exercise can culminate in a report by Vigilance Officer which was a material which could have been taken for consideration by the Screening Committee as has been done rightly so and the decision arrived at cannot be said to be one without any material or so apparently arbitrary or capricious so as to warrant our interference in the matter. A subjective satisfaction recorded by the Screening Committee, the Administrative Committee and the Full Court of this High Court does not require any interference in the facts as noticed hereinabove. The assessment of the work and conduct of a judicial officer by his immediate superior is of immense importance as has been opined by Hon'ble the Supreme Court in the case of **Nand Kumar Verma (supra)** and **Rajendra Singh Verma (supra)** especially in view of the report of the Vigilance Officer. The law is settled that a single adverse remark regarding integrity of a judicial officer is sufficient for his compulsory retirement. In this case, there is sufficient material to sustain the order of compulsory retirement and also subjective satisfaction arrived at in this regard. As observed by the Supreme Court of India, it is not always possible to have positive evidence in matters of integrity of a judicial officer and the assessment by the immediate superior officer regarding his work and conduct including his integrity should not be brushed aside lightly, unless of course, any malafide is proved which is not the case here. Therefore, the decision of the Screening Committee, the Administrative

Committee and the Full Court based on the material before it, are required to be given due weightage. Decisions relied by the petitioner do not help his cause in view of the above discussion.

(36) For all these reasons, we do not find merit in the writ petition. It is, accordingly, **dismissed.**

(37) The Bench Secretary shall return the original records pertaining to the disciplinary proceedings in question and the vigilance inquiry to Sri Gaurav Mehrotra, learned counsel for the High Court.

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