APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.10.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Criminal Appeal No. 18 of 1986

Raj Guru and Ors. Appellants
Versus
State ..Opp. Party

Counsel for the Petitioner:
Sri Pratap Narain Misra, Sri Brijesh Sahai, Sri Janardan Yadav
Sri Narendra Kumar, Sri Rajiv Lochan Shukla, Sri S.K. Dubey

Counsel for the Respondents:
A.G.A., Sri S.M. Mishra

Cr.P.C. Section 374 (2)-Criminal Appeal-against conviction life imprisonment-under Section 302 read with 34 IPC-on ground of matterial contradictions between version of FIR and prosecution witness, delayed FIR based on connected prosecution story-held-from evidence available on record-all prosecution witnesses being trustworthy-having no ground to disbelieve them-considering entire evidence as well as all aspects relevant points for determination of case-conclusion drawn by Trail Court based on judicious analysis as per verdict of Apex Court-rightly placed reliance upon prosecution witness-no ground for interference made out-Appeal dismissed.

Held: Para-79
Perusal of impugned judgement and order passed by trial court shows that trial court has gone through entire evidence available on record and has considered all aspects and relevant points for determination of the case at length. The conclusions drawn and findings recorded by trial court are based on judicious analysis of facts and evidence in the light of various judicial pronouncements of Hon'ble Apex Court.

Case Law discussed:
AIR 2011 SC 255; (2009) 14 SCC 494;(AIR 2009) SC 2573); 2010 Cri. L.J. 3889 (SC); 2012 (IV) SCC 124; AIR 2011 S.C. 280; (2008) 1 SCC (Cri.) 91; A.I.R. 2011 S.C. 255; A.I.R. 2011 S.C. 280; 1977 Cr.L.J. 642 SC; (2010) 13 SCC 657; A.I.R. 2009 SC 152.

(Delivered by Hon'ble Akhtar Husain Khan, J)

1. Accused-appellants Raj Guru Mishr, Gorakh Dubey and Paras Dubey have filed this criminal appeal under Section 374 (2) Cr.P.C. against judgement and order dated 23.12.1985 passed by Sessions Judge, Azamgarh in Session Trial No. 463 of 1983 (State Vs. Raj Guru and others), under Sections 302/34 I.P.C., P.S. Kandhrapur, District Azamgarh whereby learned Sessions Judge has convicted accused-appellants Raj Guru, Gorakh Dubey and Paras Dubey for offence punishable under Section 302 I.P.C. read with Section 34 I.P.C. and sentenced each of them to imprisonment for life thereunder.

2. Accused-appellant Gorakh Dubey is reported dead. Appeal abated in respect of him.

3. Sri Brijesh Sahai and Sri Rajiv Lochan Shukla, learned counsel appeared for accused-appellants and Sri Narendra Kumar Singh Yadav, learned AGA appeared for the State respondent as well as Sri S.M. Mishra, appeared for complainant.

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

5. According to first information report Ex. Ka-1 in brief prosecution case

is that complainant Jagdamba Dubey son of Sri Dudh Nath Dubey is resident of village Kapsa, P.S. Kandhrapur, District Azamgarh. On the date of occurrence i.e. on 11.5.1981 at about 7 p.m. after sunset, complainant Jagdamba Dubey was going along with Shesh Nath Dubey and Durga Prasad Dubey @ Keertan Dubey of his own village and one Maheep Pasi resident of village Kohadi Khurd to see Dwarpooja in village Chevta. At the same time, Ram Prakat Dubey was coming from Jhajhava Pokhar towards his house and in the east of said Pokhar accused Gorakh Dubey and Paras Dubey were standing towards west in their Chak along with co-accused Raj Guru Mishr. As soon as Ram Prakat Dubey came at Chak road suddenly said three accused began to assault him, after having encircled him. Ram Prakat Dubey sustained injuries of bomb blast, Katta and Lathi.

6. According to F.I.R. Ex. Ka.-1, accused-appellant Gorakh Dubey had Bomb in his hand, accused-appellant Paras Dubey had Katta and accused-appellant Raj Guru had Lathi.

7. According to F.I.R. Ex. Ka-1, when complainant and other persons accompanying him raised alarm accused appellant ran towards south, thereafter, other persons came on spot and arranged to send injured Ram Prakat Dubey to Sadar Hospital for medical treatment. Thereafter, complainant Jagdamba Dubey went to P.S. Kandhrapur and presented written report i.e. Ex. Ka.-1.

8. In first information report (Ex. Ka-1) a note has been written that due to fear, complainant did not go Kandhrapur straightway, he went to Kaptanganj through canal and in Kaptanganj due to unavailability of conveyance delay has been caused in reaching P.S. Kandhrapur.

9. On the basis of first information report (Ex. Ka-1) Crime No. 99 of 1981, under Section 307 I.P.C. was registered in P.S. Kandhrapur on 11.5.1981 at 22.00 p.m. against accused Gorakh Nath Dubey, Paras Dubey and Raj Guru Mishr. On 12.5.1981, an information was received from Sadar Hospital to P.S. Kotwali, Azamgarh regarding death of injured Ram Prakat Dubey. Thereafter, an information was sent to P.S. Kandhrapur through R.T. Set by P.S. Kotwali regarding death of injured Ram Prakat Dubey whereupon crime was converted into Section 302 I.P.C. on 12.5.1981 and entry of conversion of crime was made in Rapat No. 17 of G.D. Dated 12.5.1981 of P.S. Kandharapur.

10. Inquest report of deceased Ram Prakat Dubey was prepared by police of P.S. Kotwali and dead body was sent for post-morterm in sealed cover, after having complete necessary formalities.

11. Investigation was completed by police of P.S. Kandharapur in accordance with law and after having completed investigation police submitted charge-sheet against all accused under Sections 307 and 302 I.P.C. whereupon concerned Magistrate took cognizance and after compliance of Section 207 Cr.P.C. committed the case to the Court of Session for trial of all accused. Thereafter Sessions Trial No. 463 of 1983 was registered in the Session Court of District Azamgarh.

12. Learned Sessions Judge, Azamgarh framed charge against accused Raj Guru Mishra, Gorakh Dubey and Paras Dubey for offence punishable under

Sections 302 read with Section 34 I.P.C. All the accused pleaded not guilty and claimed to be tried.

13. Prosecution examined P.W. 1, complainant Shesh Nath Dubey, P.W. 2, Durga Prasad Dubey, P.W. 3, complainant Jagdamba Dubey, P.W. 4 Dr. K.S. Mishra, P.W. 5 Head Moharrir Achhaibar dubey, P.W. 6, Head Constable Mishri Lal Gupta and P.W. 7, Investigation Officer Sahdeo Mishra (S.I.).

14. After prosecution evidence statement of all accused were recorded under Section 313 Cr.P.C. All of them stated that they have been falsely implicated due to enmity. No evidence was adduced on behalf of accused in defence.

15. Learned Sessions Judge, Azamgarh heard the arguments of both the parties and passed impugned judgement and order dated 23.12.1985 whereby he has convicted and sentenced accused-appellants as mentioned above.

16. Learned counsel for the accused-appellants contended that the accused-appellants are innocent and has been falsely implicated.

17. Learned counsel for the accused-appellants contended that the medical evidence and post-morterm report are inconsistent with the version of F.I.R.

18. Learned counsel for the accused-appellants contended that there is material contradiction between version of F.I.R. and statement of witnesses of fact and occurrence.

19. Learned counsel for the accused-appellants further contended that F.I.R. is delayed and prosecution story is concocted.

20. Learned counsel for the accused-appellants contended that witnesses of occurrence examined by prosecution are related to deceased Ram Prakat Dubey. Their testimony may not be relied to convict the accused appellant.

21. Learned counsel for the accused-appellants prayed that appeal should be allowed and all accused-appellants should be acquitted.

22. Learned AGA contended that conviction and sentence recorded by trial court is in accordance with evidence and law. There is no sufficient ground to interfere in the impugned judgement and order passed by the trial court.

23. Learned AGA prayed that appeal should be dismissed.

24. We have considered the submissions made by the parties.

25. Out of seven witnesses examined by prosecution, P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey are witnesses of fact and occurrence. These witnesses have supported version of prosecution in their statements on oath with variation. All of them have stated that accused-appellant Raj Guru assaulted deceased Ram Prakat Dubey with Lathi while accused-appellant Paras Dubey assaulted deceased Ram Prakat Dubey with Katar. They have stated that accused-appellant Paras Dubey had Katta

in his left hand and Katar in his right hand but used Katar for causing injury to deceased Ram Prakat Dubey. All of them have stated that accused-appellant Gorakh had bomb in his hand. All of them have stated that Katta (country made pistol) and bomb were used for threatening. P.W. 3 Jagdamba Dubey, complainant has proved first information report (Ex. Ka-1) also in his statement.

26. P.W. 4 Dr. K.S. Mishra has stated on oath that on 12.5.2981, he was posted as Medical Officer in District Hospital, Azamgarh. On that date at 4.00 p.m. he conducted post-morterm of deceased Ram Prakat Dubey son of Lallan Dubey, resident of village Kapsa, Police Station Kandharapur. The dead body was identified by Constable No. 160 Bhrigunath Yadav, P.S. Kotwali.

27. P.W. 4 Dr. K.S. Mishra has proved post-morterm report of deceased Ram Prakat Dubey (Ex. Ka-2). He has stated in his statement that the death of deceased Ram Prakat Dubey might have occurred on 11.5.1981 at about 10.30 p.m. He has further stated that anti-morterm injuries found on his body were sufficient to cause death in ordinary course. P.W. 4 Dr. K.S. Mishra has stated in his statement on oath that inquest report of deceased Ram Prakat Dubey, Challan Nash, Photo Nash, letter to C.M.O., letter of information regarding death of Ram Prakat Dubey and copy of G.D. dated 12.5.1981 of P.S. Kotwali were received along with dead body and on the said papers, he had signed. Trial court has marked (Ex. Ka-3 to Ex. Ka-8) on said papers.

28. P.W. 5 head Moharrir, Achhaibar Dubey has stated in his statement on oath that on 12.5.1981, he was posted as Head Moharrir at P.S. Kotwali Azamgarh. He has stated that on that date at 7.10 a.m. Ram Subodh, Ward Boy presented memo dated 11.5.1981 regarding death of Ram Prakat Dubey son of Lallan Dubey resident of Kapsa, P.S. Kandharapur, District Azamgarh. He made entry of said memo in G.D. He has proved copy of the said G.D. as Ex. Ka-8).

29. P.W. 6 Head Constable Mishri Lal Gupta has stated in his statement that on 11.5.1981 he was posted as Head Constable at P.S. Kandharapur. He has stated that on that date at 22.00 p.m., complainant Jagdamba Dubey presented written report (Ex. Ka-1) in P.S. Kandharapur on the basis of which he registered Crime No. 99 of 1981 under Section 307 I.P.C. and prepared Chick report (Ex. Ka-9). He has stated that at the same time he made entry regarding registration of Crime in G.D. He has proved copy of G.D. relating to registration of crime (Ex. Ka-10) also.

30. P.W. 6, Head Constable Mishri Lal Gupta ha stated that chick F.I.R. (Ex. Ka-9) bears signature of S.I. Sahdeo Mishra also. He has stated that Sahdeo Mishra had been entrusted investigation. P.W. 6, Head Constable Mishri Lal Gupta has further stated that on 12.5.1981, an information was received by R.T. Set to his police station from P.S. Kotwali that injured Ram Prakat Dubey has died whereupon crime under Section 307 I.P.C. was converted into Section 302 I.P.C. and an entry was made in G.D. He has proved copy of G.D. regarding conversion of crime (Ex. Ka-11) also.

31. P.W. 7 I.O., Sub Inspector Sahdeo Mishra, has stated in his statement that on 11.5.1981, he was posted as Station

Officer at P.S. Kandharapur. Crime No. 99 of 1981 under Section 307 I.P.C. was registered on 11.5.1981 at his police station and he took investigation into his hand. He recorded statement of complainant Jagdamba Dubey and went to place of occurrence. He searched the accused but could not trace them. Thereafter, on 12.5.1981, he recorded statement of witnesses Mahesh Pasi and Shesh Nath Dubey and inspected place of occurrence. He has proved site plan of place of occurrence (Ex. Ka-12) in his statement.

32. P.W. 7, S.I. Sahdeo Mishra has stated in his statement that he took Blood stained earth and plain earth from the place of occurrence and kept in sealed container. He recovered a peace of Lathi as well as blood stained residue of Lathi and kept in sealed cover. He has further stated that one fired cartridge was also recovered from the place of occurrence. He has stated that four broken teeth were also recovered from the place of occurrence. He kept all the said articles recovered from the place of occurrence in sealed cover and prepared recovery memo of all above articles (Ex. Ka-13).

33. P.W. 7, S.I. Sahdeo Mishra has stated in his statement that he made search of houses of accused-appellant Gorakh, Paras and Raj Guru and prepared search memos (Ex. Ka-14 and 15).

34. P.W. 7 Sahdeoi Mishra has stated in his statement that he went to Sadar Hospital, Azamgarh on the same day and recorded statement of Durga Prasad Dubey @ Keertan Dubey son of deceased.

35. P.W. 7 S.I. Sahdeo Mishra has stated that the case was converted into Section 302 I.P.C. on receiving information regarding death of Ram Prakat Dubey.

36. P.W. 7 S.I. Sahdeo Mishra has stated that on 13.5.1981 he made search of accused-appellant and executed process under Sections 82 / 83 Cr.P.C.

37. P.W. 7 S.I. Sahdeo Mishra has stated that he completed investigation in accordance with law and submitted charge-sheet against accused Paras Dubey, Gorakh Dubey and Raj Guru. He has proved charge-sheet (Ex. Ka.14) in his statement.

38. All the accused appellants have stated in their statements under Section 313 Cr.P.C. that they have been falsely implicated .

39. Accused-appellant Gorakh Dubey (now deceased) has stated in his statement under Section 313 Cr.P.C. that they have enmity with P.W. 3 complainant Jagadamba Dubey. They have no enmity with deceased Ram Prakat Dubey. Jagadamba Dubey has falsely implicated them due to animosity.

40. We have examined the evidence in the light of contentions of parties.

41. In F.I.R. it has been mentioned that accused appellant Gorakh Dubey had bomb in his hand, accused Paras Dubey had Katta and accused Raj Guru had Lathi. But in statements on oath before trial court all the three witnesses of fact and occurrence, namely, P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey have stated that accused Raj Guru had Lathi, accused Gorakh Dubey had bomb and accused

Paras Dubey had Katta in his left hand and Katar in his right hand. Defence has given suggestion to P.W. 7 I.O. Sahdeo Mishra, S.I. in cross-examination that after post-morterm he has introduced Katar in the hand of accused Paras Dubey in statements of witnesses recorded under Section 161 Cr.P.C. P.W. 7 S.I. Sahdeo Mishra has negatived the suggestion of defence. P.W. 7 Sahdeo Mishra has stated in examination-in-Chief that he recorded statement of complainant P.W. 3 Jagdamba Dubey under Section 161 Cr.p.C. just after registration of crime and went to place of occurrence. He has further stated in examination-in-chief that he recorded statement of P.W. 1 Shesh Nath Dubey on 12.5.1981 and on the same day he went to Sadar Hospital and recorded statement of P.W. 2 Durga Prasad Dubey. In cross-examination he has stated that he recorded statement of Durga Prasad Dubey P.W. 2 on 12.5.1981 at 3.00 p.m. Post-morterm of deceased Ram Prakat Dubey has been conducted on 12.5.1981 at 4.00 p.m. Thus it is apparent that statements of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey have been recorded by S.I., P.W. 7 Shahdeo Mishra before post-morterm of deceased and all of the said witnesses have stated in their statements recorded under Section 161 Cr.P.C. that accused Paras Dubey had Katar also. Thus it is apparent that these witnesses have not introduced Katar for first time before Court. Katar has been stated by P.W. 3 complainant Jagdamba Dubey in his statement recorded under Section 161 Cr.P.C. immediately after registration of F.I.R. There is no sufficient ground to believe that statements of witnesses recorded under Section 161 Cr.P.C. are anti time. Illustration (e) of Section 114 of Evidence Act provides that court may presume that "the judicial and official acts have been regularly performed." Therefore, under Section 114 of Evidence Act presumption arises that case diary has been properly maintained by I.O.

42. In view of facts mentioned above, we are of the view that non-mentioning of Katar in the hands of accused appellant Paras Dubey in F.I.R. is an accidental slip or mistake of complainant P.W. 3 Jagdamba Dubey and merely on this ground prosecution case should not be discarded.

43. P.W. 1 Shesh Nath Dubey has stated that all the accused encircled Ram Prakat Dubey and accused Raj Guru began to assault him with Lathi. Having received injuries Ram Prakat Dubey fell down then accused Paras Dubey, who had Katta in his left hand and Katar in his right hand assaulted him with Katar. He has further stated that accused Gorakh Dubey gave threatening by show of bomb and said who ever come forward, he shall be killed. P.W. 1 Shesh Nath Dubey has further stated in his statement on oath that when after having heard noise Jagat Pradhan, Jangali Singh and Dalsingar Yadav began to come from the village the accused fired with Katta and thrown bomb and ran away towards south.

44. P.W. 2 Durga Prasad Dubey has stated in his statement on oath before trial court that all the three accused encircled his father now deceased Ram Prakat Dubey and Raj Guru began to assault him with lathi. His father fell down after having received injuries then accused Paras assaulted him with Katar. P.W. 2 Durga Prasad Dubey has further stated that accused Paras had Katta in his left

hand and Katar in his right hand. He has further stated that accused Paras threatened by Katta and stated who ever come forward, he shall kill him. P.W. 2 Durga Prasad Dubey has stated in his statement that accused Gorakh Dubey had bomb in his left hand and was making exhortation. P.W. 2 Durga Prasad Dubey has stated in cross-examination that his father was caused injuries not with bomb and Katta but threatening were given by bomb and katta.

45. P.W. 3 Jagdamba Dubey has also stated in his statement that accused Paras Dubey, Gorakh Dubey and Raj Guru encircled Ram Prakat Dubey and accused Raj Guru began to assault him with lathi. Ram Prakat Dubey fell down after having received injuries then accused Paras Dubey assaulted him with Katar. He has further stated that Paras Dubey was threatening by Katta and said that who ever come, he shall be killed. P.W. 3 Jagdamba Dubey has stated in his statement that accused Gorakh Dubey had bomb in his hand and he was making exhortation and was saying that who ever come he shall be killed. P.W. 3 complainant Jagdamba Dubey has stated in cross-examination at page 12 (page 66 of paper book) that he had seen accused Gorakh Dubey throwing bomb on deceased Ram Prakat Dubey. He has further stated in cross-examination on the same page that he has seen Paras Dubey making fire with Katta at Ram Prakat Dubey.

46. Description of statements of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey mentioned above shows that all of them have stated that accused Raj Guru Mishr had Lathi, accused Gorakh Dubey had bomb and accused Paras Dubey had Katta and Katar both but Ram Prakat Dubey (now deceased) was caused injuries by Lathi and Katar. All of them have stated that Katta and Bomb were used for threatening. Statement of P.W. 1 Shesh Nath Dubey and statement of P.W. 3 complainant Jagdamba Dubey mentioned above, clearly show that bomb was thrown and katta was fired.

47. Recovery memo (Ex. Ka-13) as well as statement of P.W. 7 Investigating Officer, S.I. Sahdeo Mishra shows that fired cartridge as well as broken piece of lathi were recovered from the place of occurrence. The said recovery memo (Ex. Ka-13) as well as statement of P.W. 7 Sahdeo Mishra shows that four broken teeth were also recovered from the place of occurrence.

48. Perusal of post-morterm report of deceased Ram Prakat (Ex. Ka-2) as well as statement of P.W. 4 Dr. K.S. Mishra shows that 21 anti-morterm injuries were found on the dead body of deceased Ram Prakat Dubey. Description of 21 anti-morterm injuries found on the dead body of deceased Ram Prakat Dubey has been given in the judgement of trial court as well as in post-morterm report (Ex. Ka-2).

49. Description of anti-morterm injuries mentioned in the post-morterm report (Ex. Ka-2) shows that injury no. 21 was multiple abraded contusion 16 cm x 16 cm on back at the right scapular region.

50. Perusal of post-morterm report (Ex. Ka-2) shows that buccal cavity was disfigured. As mentioned above four broken teeth have also been recovered

from the place of occurrence. Therefore, considering the nature of injuries of deceased Ram Prakat Dubey as well as four broken teeth recovered from the place of occurrence, it is apparent that deceased Ram Prakat Dubey had suffered injuries of explosion of bomb also.

51. P.W. 4 Dr. K.S. Mishra has stated in his statement that the incised wounds found on the dead body of deceased may be caused by Katar. He has not stated about the weapon of remaining injuries found on the body of deceased. Description of anti-morterm injures mentioned in post-morterm report (Ex. Ka-2) as well as statement of P.W. 4 Dr. K.S. Mishra show that out of 21 anti-morterim injuries found on the dead body of the deceased Ram Prakat Dubey, 8 injuries were lacerated wound, 7 injuries were incised wound, 3 injuries were contusion, 2 injuries were abraded contusion and one injury was sub-conjuntival haemorrhage.

52. In view of the discussion made above, we are of the view that deceased Ram Prakat Dubey had suffered injuries of bomb blast also and throwing of bomb at the time of occurrence by accused Gorakh Dubey is proved by statement of witnesses P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey.

53. In case of bomb blast, it is difficult to see movement of splinters of bomb causing injuries because of smoke arising out of explosion. Later on injuries themselves shall speak their cause. As concluded above, nature of injuries shows that deceased Ram Prakat Dubey had suffered bomb injuries also. Therefore, the complainant Jagdamba Dubey, P.W. 3 has rightly mentioned in F.I.R. (Ex. Ka.-1) that deceased Ram Prakat Dubey has suffered injuries of bomb and throwing of bomb by accused-appellant Gorakh Dubey now deceased is fully proved with statements of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey.

54. As mentioned above one fired cartridge has been recovered from place of occurrence and it has been proved that fire has also been made by Katta at the time of occurrence. Therefore, mention of fire arm (Katta) injury in F.I.R. does not lead to infer that complainant had not seen occurrence.

55. In view of the discussion made above, we are of the view that there is no material contradiction between version of F.I.R. (Ex. Ka-1) and statements of witnesses namely, P.W. 1 Shesh Nath Dubey, P.W. Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey. Non mentioning of Katar in F.I.R. (Ex. Ka-1) is an accidental slip or mistake of complainant Jagdamba Dubey and in view of statements of witnesses recorded by I.O. it cannot be said that Katar has been introduced for the first time before Court with legal advice.

56. In the case of Ranjit Singh and others Vs. State of Madhya Pradesh, A.I.R. 2011 SC 255, Hon'ble Apex Court has placed reliance on its previous judgement rendered in the case of Prem Singh and others Vs. State of Haryana, (2009) 14 SCC 494; (AIR 2009 SC 2573), wherein Hon'ble Apex court has held as under:

"It is now a well settled principle of law that the doctrine "falsus in uno, falsus in omnibus" has no application in India.

In view of above, the law can be summarised to the effect that the aforesaid legal maxim is not applicable in India and the court has to assess to what extent the deposition of a witness can be relied upon. The Court has to separate the falsehood from the truth and it is only in exceptional circumstances when it is not possible to separate the grain from the chaff because they are inextricably mixed up, that the whole evidence of such a witness can be discarded."

57. In the case of State of U.P. Vs. Krishna Master and others; 2010 Cri. L.J. 3889 (SC) Hon'ble Apex Court has held that "prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof."

58. In the case of State of U.P. Vs. Krishna Master and others (supra), Hon'ble Apex Court has further held that "the basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole."

59. In the case of Sampath Kumar Vs. Inspector of Police, Krishnagiri 2012 (IV) SCC 124, Hon'ble Apex Court held that "minor contradictions are bound to appear in the statement of truthful witnesses as memory sometimes plays false, sense of observation differs from person to person."

60. We have perused the entire statements of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey. In view of above pronouncements of Hon'ble Apex Court we are of the view that there is no material contradiction in their statements to disbelieve them.

61. In F.I.R. specific mention has been made that at the time of occurrence complainant Jagdamba Dubey was going to village Chevta to see Dwarpooja along with P.W. 1 Shesh Nath Dubey, P.W. 2, Durga Prasad Dubey and one Mahip Pasi, resident of village Kohadi Khurd. P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey, all have stated in their statement on oath that at the time of occurrence they were going to village chevta to see Dwarpooja along with one Mahip Pasi but the defence has not cross-examined all the said three witnesses on the point of Dwarpooja and has not given them suggestion in cross-examination that there was no Dwarpooja in the village Chevta on the date of occurrence or they were not going to village Chevta to see Dwarpooja on the date of occurrence. Therefore, the version of prosecution that P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey were going to village Chevta to see Dwarpooja at the time of occurrence is un-challenged and there is no sufficient ground to disbelieve the statements on oath given by all the three witnesses in this respect. It has also not been challenged by defence that the place of occurrence is not on the chack road leading from the village of the complainant to village Chevta. After considering the all facts and circumstances of the case, we are of the view that the presence of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey

at the time and place of occurrence is highly probable and there is no ground to disbelieve them.

62. P.W. 1 Shesh Nath Dubey has admitted in cross-examination at page 5 and 6 (Page 22 and 23 of paper book) that he is step brother of father of the deceased Ram Prakat Dubey. He has also admitted in cross-examination at page 6 (Page 23 of paper book) that P.W. 3 complainant Jagdamba Dubey is son of his step brother Doodh Nath Dubey. Admittedly, P.W. 2 Durga Prasad Dubey is son of deceased. Thus, it is apparent that all the three witnesses are related to deceased and belong to same family. But Hon'ble Apex Court has consistently held that testimony of witnesses may not be discarded merely on the ground of relationship. For reference following pronouncements of Hon'ble Apex Court may be cited.

(1) Brahm Swaroop and another Vs. State of U.P. A.I.R. 2011 S.C. 280.

(2) Vithal Vs. State of Maharastra (2008) 1 SCC (Crl.) 91

(3) Ranjit Singh and others Vs. State of Madhya Pradesh A.I.R. 2011 S.C. 255

63. P.W. 1 Shesh Nath Dubey has stated in his statement on oath that there was chack road between chack of deceased Ram Prakat Dubey and that of accused Gorakh Dubey and Paras Dubey. He has further stated in his statement that about 5 or 6 days before occurrence, accused were making encroachment on said chack road by cutting the chack road into their chack. Deceased Ram Prakat Dubey prohibited them whereupon an altercation took place between them.

64. P.W. 2 Durga Prasad Dubey and P.W. 3 complainant Jagdamba Dubey both have also stated in their statement on oath that about 4 to 5 days before occurrence there had been an altercation between Ram Prakat Dubey (Now deceased) and accused-appellants Paras Dubey and Gorakh Dubey regarding encroachment on chack road.

65. P.W. 7, S.I., Sahdeo Mishra, Investigating Officer has shown chack road in site plan (Ex. Ka.-12). He has shown in site plan (Ex. Ka. 12) chack road ploughed in chak of accused-appellants. Thus, the statements of P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey regarding encroachment of chack road by accused-appellants are corroborated by site plan (Ex. Ka-12).

66. In view of above, after having gone through the whole evidence on record as well as facts and circumstances of the case, we are of the view that cause or motive for the occurrence alleged by the prosecution has been fully proved. Morevoer, in the case of Brahm Swaroop and another Vs. State of U.P. A.I.R. 2011 S.C. 280 Hon'ble Apex Court has held that "if evidence of the eye witnesses is trustworthy and believed by the court, the question of motive becomes total irrelevant."

67. Perusal of statement of P.W. 6 Mishri Lal, Head Moharrir as well as Chick F.I.R. (Ex. Ka-9) and G.D. relating to registration of Crime (Ex. Ka-10) shows that F.I.R. has been lodged at P.S. Kandharapur at 10.00 p.m. Time of occurrence has been alleged 7.00 p.m. Thus, it is apparent that F.I.R. has been lodged in police station Kandharapur within 3 hours of occurrence. Distance of police station Kandharapur from the place

of occurrence is four mile as is apparent from Chick F.I.R. (Ex. Ka-9). P.W. 3 complainant Jagdamba Dubey has written a note in F.I.R. (Ex. Ka-1) that due to fear, he could not go to police station Kandharapur straight way. He went to Kaptanganj through canal and due to non availability of conveyance delay was caused in reaching police station Kandharapur. P.W. 3 Jagdamba Dubey complainant has stated in his statement on oath that after occurrence injured Ram Prakat Dubey was carried to Kaptanganj by his son P.W. 2 Durga Prasad Dubey and others on cot. He went to his house and wrote F.I.R. (Ex. Ka-1). Thereafter, he went to Kaptanganj where he met with injured Ram Prakat Dubey and others and thereafter a tempo was made available, by which they carried Ram Prakat Dubey to Azamgarh hospital. He also accompanied them and dropped tempo in the way at Kandharapur. Thereafter, he went to P.S. Kandharapur and presented report (Ex. Ka-1). Thus, it is apparent that there is a reasonable explanation for delay in lodging F.I.R. Moreover, F.I.R. lodged within 3 hours of occurrence may not be said to be delayed F.I.R.

68. Defence has given suggestion to P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey that deceased Ram Prakat Dubey has been killed in darkness at late night by other persons and none has seen the occurrence. All the said witnesses have negatives the suggestion of defence and there is no sufficient ground to disbelieve the time of occurrence alleged by prosecution.

69. In view of above, we are of the view that F.I.R. is prompt and there is no chance of concoction in version of F.I.R.

70. The time of occurrence alleged by prosecution is 7.00 p.m. on 11th May, 1981 sunset will be at 6.55 p.m. Thus, it is apparent that at about 7 p.m. darkness shall not prevail. Therefore, without any source of light occurrence may be seen by witnesses.

71. Statement of P.W. 4, Dr. K.S. Mishra as well as post-morterm report (Ex. Ka-2) shows that out of 21 anti-morterm injuries found on the dead body of deceased Ram Prakat Dubey, there were incised wounds, lacerated wounds, contusions, abraded contusions and sub-conjuntival haemorrhage in left eye. Contusion and lacerated wounds may be caused by blunt object and Lathi is a blunt object, incised wounds may be caused by sharp edged weapon and Katar is a sharp edged weapon.

72. In view of conclusion drawn above, it is apparent that injury no. 21 and condition of buccal cavity shows that deceased had suffered bomb blast injuries also. Therefore, having considered all the facts and circumstances of the case and evidence on record, we are of the view that post-morterm report (Ex. Ka-2) as well as statement of P.W. 4 K.S. Mishra fully corroborates the version of F.I.R. and ocular evidence adduced by the prosecution. Time of death is also corroborated by post-morterm report (Ex. Ka-2) as well as statement of P.W. 4 Dr. K.S. Mishra.

73. Statement of P.W. 7, S.I. Sahdeo Mishra as well as recovery memo (Ex. Ka-13) shows that one fired cartridge pellets and four broken teeth have been recovered from the place of occurrence by I.O. I.O. has taken blood stained earth also from the place of occurrence.

Defence has not challenged place of occurrence. Defence has merely suggested that deceased Ram Prakat Dubey has been assaulted in darkness at late night by other persons and none has seen the occurrence. Therefore, considering all the facts and circumstances of the case as well as evidence on record, we are of the view that place of occurrence alleged by prosecution is proved beyond doubt.

74. In view of discussion made and conclusions drawn above, after having gone through whole facts and circumstances of the case as well as evidence on record, we are of the view that P.W. 1 Shesh Nath Dubey, P.W. 2 Durga Prasad Dubey and P.W. 3 Jagdamba Dubey are trustworthy witnesses and there is no sufficient ground to disbelieve their testimony.

75. In the case of Narpal Singh Vs. State of Haryana 1977 Cr.L.J., 642 SC, Hon'ble Apex Court held that, "If the witnesses examined are believed, the question of inference for non-examination does not arise."

76. In view of this pronouncement of Hon'ble Apex Court no adverse inference may be drawn against prosecution for non-examination of other witnesses of occurrence.

77. Accused-appellant Gorakh Dubey (now deceased) has stated in statement under Section 313 Cr.P.C. that he had no enmity with deceased Ram Prakat Dubey. He has enmity with complainant Jagdamba Dubey and Jagdamba Dubey has falsely implicated him due to animosity. In view of this statement of accused-appellant Gorakh dubey there is no reason for giving false evidence against him by P.W. 2 Durga Prasad Dubey son of deceased Ram Prakat Dubey, who has also fully supported version of F.I.R. in his statement.

78. In view of discussion made above, we are of the view that evidence adduced by prosecution is sufficient to convict surviving accused-appellants Raj Guru Mishra and Paras Dubey for offence punishable under Sections 302 / 34 I.P.C.

79. Perusal of impugned judgement and order passed by trial court shows that trial court has gone through entire evidence available on record and has considered all aspects and relevant points for determination of the case at length. The conclusions drawn and findings recorded by trial court are based on judicious analysis of facts and evidence in the light of various judicial pronouncements of Hon'ble Apex Court.

80. In view of discussion made and conclusion drawn above, we are of the view that the learned trial court has rightly placed reliance upon evidence adduced by prosecution to convict surviving accused appellants for offence punishable under section 302 read with section 34 I.P.C.

81. In the case of Sunil Kumar Sambhudayal Gupta (Dr.) and others vs. State of Maharashtra, (2010) 13 SCC 657, Hon'ble Apex Court has placed reliance on its previous judgement rendered in the case of State Vs. Saravanan; A.I.R. 2009 SC 152, wherein Hon'ble Apex court has held as under:

"The trial court, after going through the entire evidence, must form an opinion

about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons."

82. In view of this pronouncement of Hon'ble Apex Court as well as discussion made and conclusion drawn above, we are of the view that there is no sufficient ground to disturb the findings as well as conviction recorded by trial court.

83. Sentence awarded by learned trial court is not excessive and State has not filed appeal for enhancement of sentence.

84. In view of discussion made and conclusion drawn above, we are of the view that there is no sufficient ground for interference in the impugned judgement and order passed by learned trial court. Appeal has no merit and is liable to be dismissed.

85. Appeal is dismissed accordingly.

86. Surviving accused appellants Paras Dubey and Raj Guru are on bail. They shall surrender before the trial court for serving sentence within 30 days from the date of judgement of this Court, failing which trial court shall ensure their arrest and shall send them to jail for serving sentence in accordance with law.

87. Office is directed to send copy of judgement to trial court for securing compliance.

88. Lower court record shall be returned to the concerned court immediately.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2014

BEFORE
THE HON'BLE DEVENDRA PRATAP SINGH, J.

Election Petition No. 19 of 2012

Prabhat Pandey ...Petitioner
Versus
Dimple Yadav & Anr. ...Respondents

Counsel for the Petitioner:
In Person, Sri Asit Kumar Roy, Sri M.P. Sinha, Sri Pradeep Verma, Sri Rajenndra Kumar Pandey, Sri Sunil Kumar Tiwari, Sri Vijai Prakash Shukla

Counsel for the Respondents:
Sri K.R. Singh, Sri Bhopendra Nath Singh Sri H.P. Dubey, Sri Shivam Yadav

Representation of People Act 1951-Section 86(1)-Application to dismiss election petition-on ground of non disclosure of particulars of corrupt practices-as per requirement of section 100(i)(b) of the Act-total absence of charge either bribery or undue influence in affidavit filed in support of petition-affidavit-not conformity with prescribed format in terms of order XVI Rule 15(4) CPC-even on objection-no effort made to remove the same-being a practicing lawyer-held-Court has no option except to allow the application and dismiss the petition.

Held: Para-54
Applying, generally the principles propounded in the above mentioned decisions, especially those extracted by the three judge decision in G M Siddeshwar's case (supra) and in Azhar Hussain' case (supra), five things are absolutely clear: (a) Full material facts of corrupt practice are missing, especially the pivotal fact of consent; (b) there is total non compliance of proviso to Section 83(1) and therefore it is not as contemplated by Section 81; © total lack of statement of complete cause of action in violation of Order VII Rule 11 (a) of CPC read with Section 83 of the Act; (d)

merely because the returned candidate was the wife of the sitting Chief Minister, it cannot be presumed that the alleged action of the Returning Officer and the claimed action of her workers and party leaders could be presumed to have been taken with her consent, without there being specific, clear and unambiguous pleadings to that effect and (e) even if the respondent had not appeared to oppose the petition, being a half baked petition, court could not have given the verdict in favour of the petitioner.

Case Law discussed:
AIR 1954 SC 210; AIR 1982 SC 983; AIR 1964 SC 1366; (1970) 3 SCC 647 (2); AIR 1984 SC 309; 1994 Supp. (2) Supreme Court Cases 446; 2009 (10) SCC 541; AIR 1969 SC 1201; AIR 1984 SC 621; (1996(1) SCC 399); 2000(8) SCC 191; 2012(V) SCC 511; 2013 (4) SCC 799.

(Delivered by Hon'ble Devendra Pratap Singh, J.)

1. Heard learned counsel for the parties on a combined application under Order 6 Rule 16 read with Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as the "CPC") alongwith another application under Section 86(1) of the Representation of People Act, 1951 (hereinafter referred to as the "Act") and also perused the record.

2. The present election petition has been filed challenging the election of Smt. Dimpal Yadav, respondent no.1, from the Kannauj Lok Sabha Constituency No.42 in the By Election held in accordance to the programme.

3. Briefly, the facts are that Sri Akhilesh Yadav, the husband of the respondent no.1 and Leader of the Samajwadi Party (hereinafter referred as the "SP") was the elected representative of the Constituency. In the Assembly election held for the State of U.P. in March 2012, the SP came to power and Sri Akhilesh Yadav became the Chief Minister and thus vacated the seat. The Election Commission of India issued a notification on 30th of May 2012 and notified the following programme for the By Election :

Last date of filing nomination - 6.6.2012
Date of scrutiny of nomination - 7.6.2012
Date of withdrawal -9.6.2012
Date of polling -24.6.2012
Date of counting of votes - 27.6.2012

4. In pursuance thereof, three candidates, including the respondent no.1 had filed their respective nominations. However, the two other candidates withdrew their candidature and accordingly, the respondent no.1 was declared elected unopposed. It is pleaded that the Voters Party International (hereinafter referred to as the "VPI"), a non political organization, has a huge membership in and around Kannauj and, therefore, its Central Committee nominated the petitioner, one of its active members, to contest the seat. It is further pleaded that the petitioner, in accordance with the directions of the Central Committee, prepared his nomination papers, but members of the SP and its leaders, with the help of the District Administration, did not allow the petitioner to file his nomination, thus the present petition.

5. It is urged on behalf of the respondents in support of the two applications that the petition is not maintainable as it has not been filed by any "candidate" or "elector", as provided

in Section 81 of the Act and, therefore, it has to be thrown out on this ground alone. It is also asserted that the pleadings do not disclose a complete cause of action as there is no pleading, even if accepting all the incidents as correct, that the alleged incidents were committed with the consent and knowledge of the respondent no.1. It is further urged that the petition is based only on corrupt practices, but the affidavit in support of the allegation as prescribed by the proviso to Section 83 (1) of the Act, has not been filed and, therefore, also the petition does not disclose a complete cause of action and cannot be put to trial.

6. To the contrary, it is contended that the petitioner made all possible efforts to file his nomination papers within the time prescribed after depositing the security, but due to the influence of the respondent no.1, the Returning Officer did not accept it and supporters of respondent no.1 snatched away and tore the nomination papers. It is further urged that all the material facts and particulars have been given with specific details and it discloses complete cause of action. It is also urged that being the wife of the sitting Chief Minister, she was exercising undue influence on the District Administration, including the District Magistrate and also local leaders of SP were working in unison to ensure that she gets elected unopposed. It is further urged that the affidavit has already been filed and the second affidavit was not required. It is also urged that the petition cannot be dismissed at the threshold as Section 83 of the Act does not find mention in Section 86. Lastly it is urged that "consent" on the facts pleaded can be presumed because the respondent no. 1 colluded with the Returning Officer and that is why the nomination papers were not accepted and she had full knowledge of these facts.

7. Before the Court deals with the arguments of the respective parties, it would be appropriate to examine the nature of the proceedings under the Act.

8. The Constitution Bench of the Apex Court, more than half a century ago, in Jagan Nath vs. Jaswant Singh & others (AIR 1954 SC 210) commented upon the proceedings of an election petition under the Act in the following words :

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however have any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.

It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that

law or by corrupt practices. In cases where the election law does not prescribe the consequence, or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Tribunal entrusted with the trial of the case is not affected."

It further went on to declare that :

" It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

9. It went on to reiterate the position in Jyoti Basu & others vs. Debi Ghosal & others (AIR 1982 SC 983) in the following words :

"A right to elect, fundamental though it is to democracy is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. ....."

10. In Mohan Singh vs Bhanwar Lal (AIR 1964 SC 1366), the apex court while dealing with the challenge on grounds of corrupt practices, speaking through Justice Shah, commented that :

"The onus of establishing a corrupt practice is undoubtedly on the person who sets it up, and the onus is not discharged on proof of mere preponderance of probability, as in the trial of a civil suit; the corrupt practice must be established beyond reasonable doubt by evidence which is clear and unambiguous"

11. Again it reiterated the position in Mahant Shreo Nath v. Choudhry Ranbir Singh (1970) 3 SCC 647 (2), as follows :

"A plea in an election petition that a candidate or his election agent or any person with his consent has committed a corrupt practice raises a grave charge, proof of which results in disqualification from taking part in elections for six years. The charge in its very nature must be established by clear and cogent evidence by those who seek to prove it. The Court does not hold such a charge proved merely on preponderance of probability; the Court requires that the conduct attributed to the offender is proved by evidence which establishes it beyond reasonable doubt."

12. This position remains unaltered till date.

13. It is evident from the aforesaid decisions that the right to challenge an election is not a common law right but the right has specially been conferred by the Act for maintaining the purity of election. However, when a candidate employs or adopts any of the corrupt practices mentioned in the Act, his election should be set aside where the corrupt practice is proved. But, the procedure prescribed by the Act for challenging the election must be strictly followed and in case there is non-compliance of the mandatory provisions or there is any deviation, the Court will have no other alternative than to dismiss the election petition. Charge of corrupt practice has to be proved beyond reasonable doubt like in criminal cases.

14. Let us now consider the relevant provisions of the Constitution, the Act and CPC which have a direct bearing on the decision of this case.

15. Article 329(b) of the Constitution of India bars any challenge to the election of either Houses of Parliament except through an election petition as provided under the Act, in the following words :

"329. Bar to interference by Court in electoral matters-

(a).....

(b) no election to either house of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

16. In pursuance of the powers conferred by the Constitution, the Act was promulgated wherein Part VI deals with disputes regarding Elections and therein Section 80 provides that no election shall be called in question except through an election petition under the Act which runs as below :

"80- Election petitions- No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

Section 81 of the same Part of the Act provides as to who and on what ground can file an election petition challenging the election :

"81. Presentation of petitions- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are

more than one returned candidate at the election and dates of their election are different, the later of those two dates.

The same Part contains Section 79 sub-clause (b) which defines the word "candidate", while sub-clause (d) defines "electoral right" as follows :

"79. Definitions: In this Part and in Part VII unless the context otherwise requires,-

(a).....

(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election.

(c).....

(d) "electoral right" means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election:

Section 100 of the same Part provides for the grounds on which an election may be held to be void as follows:

"100. Grounds for declaring election to be void- (1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) .....

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) .....

(i) .....

(ii) by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent, or

(iii) .....

iv. by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,the High Court shall declare the election of the returned candidate to be void."

In the same Part Section 83 mandates as to what should be the contents of an election petition, as under :

"83. Contents of petition- (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

Section 86(1) of the same Part mandates as to when an election petition

can be dismissed summarily, in the following words :

"86. Trial of election petitions- (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98".

17. Part VII of the Act deals with Corrupt Practices and Electoral Offences wherein Section 123 is a deeming clause in respect to corrupt practices and provides as below :-

"123. Corrupt practices- The following shall be deemed to be corrupt practices for the purposes of this Act-

(1)"Bribery", that is to say,-

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

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

(b) .....

(B) .....

(a) .....

(b) .....

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

2. Under influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right:

Provided that-

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who-

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) ..... shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) .....

(3) .....

(4) .....

(5) .....

(6) .....

7. The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance other than the giving of vote for the furtherance of the prospects of that candidate's election, from any person

whether or not in the service of the Government or belonging to any of the following classes, namely :-

(a) gazetted officers;

(b) .....

(c).....

(d) members of police forces

(e).....

(f) .....

(g) such other class of persons in the service of the Government as may be prescribed:

(h) ....."

18. Section 87 of the Act provides that an election petition shall be tried as nearly as possible in accordance to the procedure prescribed under the CPC. The relevant provisions of CPC which have a bearing in the decision of this petition are quoted below :

Order VI Rule XV of C.P.C. provides as under :

"15. Verification of pleadings :- (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2).....

(3) .....

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings."

and Order VI Rule XVI reads as under :

"16. Striking out pleadings- The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

(c) which is otherwise an abuse of the process of the Court."

Order VII Rule XI makes a provision for rejecting a plaint, as under:

"11. Rejection of plaint- The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) .....

(c) .....

(d).....

(e).....

(f).....

19. Let us first consider whether the petition is liable to be thrown out on the ground that it has neither been filed by a "Candidate' nor any "Elector'

20. It is not the case of the petitioner that he was an electorate of that constituency, but it has been filed as a "Candidate'. It is a pleaded fact that he did not, or rather, could not file his nomination papers. It is amply pleaded that he firstly made an effort to file it on 5th June, 2012 at about 2 pm, tendered his papers to the Returning Officer along with security deposit in cash, but she refused to accept it without disclosing any reason, presumably on the ground that he should deposit the security amount in the Treasury and submit the receipt. He made another effort on 6th June, 2012 after depositing the security in the Treasury, but he was prevented from filing it and his papers were snatched and torn by the supporters of respondent no 1 and he was

confined to an unknown place and released only after the period of filing had elapsed. He also alleges that the nomination papers were faxed to the Election Commission and also sent by registered post to it. Copy of the nomination papers together with the security deposit receipt which was sought to be filed is also annexed with the petition and has not been shown to be wanting in any respect. No doubt the definition of "Candidate' as mentioned in section 79 confines itself to Parts VI and VII, but help can also be sought from section 34, which reads as under:

"34. Deposits- (1) A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited-

(a) in the case of an election from a Parliamentary constituency (a sum of twenty-five thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of twelve thousand five hundred rupees]; and

(b).....

(2) Any sum required to be deposited under sub-section (1) shall not be deemed to have been deposited under that sub-section unless at the time of delivery of the nomination paper [under sub-section (1) or, as the case may be, sub-section (1-A) of section 33] the candidate has either deposited or caused to be deposited that sum with the returning officer in cash or enclosed with the nomination paper a receipt showing that the said sum has been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury."

21. Thus, it is clear that if the pleadings are to be believed, he did tender the nomination papers and the security in cash on 5th, but it was unlawfully refused to be accepted. This is a question which can be considered only after evidence is led by the parties. The effort made on 6th also is a question which can de decided after evidence. What else was expected of the petitioner than to tender his papers ? The definition of the word "Candidate' is in two parts. "Candidate' means a person who has either in fact filed his nomination papers, or, a person who claims to have been nominated. The case of the petitioner squarely falls in the second part. As already herein above commented upon, copy of nomination papers together with security deposit receipt has been filed but the respondents do not claim that it is defective in any respect. The Apex Court in the case of Charan Lal Sahu vs Giani Zail Singh (AIR 1984 SC 309) was considering an identical provision and definition occurring in Presidential and Vice Presidential Elections Act, where an election petition was filed by a person whose nomination papers were rejected as it was not proposed by the required number of the electors. It went on to hold in paragraph 12:

"Thus, the occasion for a person to make a claim that he was duly nominated can arise only if his nomination paper complies with the statutory requirements which govern the filing of nomination papers and not otherwise. The claim that he was "duly' nominated necessarily implies and involves the claim that his nomination papers conformed to the requirements of the statute. Therefore, a contestant whose nomination paper is not subscribed by at least ten electors as proposers and ten electors as seconders as required by S. 5B (1)(a) of the Act cannot claim to have been duly nominated

any more than a contestant who had not subscribed his assent to his own nomination can. The claim of a contestant that he was duly nominated must arise out of his compliance with the provisions of the Act. Otherwise, a person who had not filed any nomination paper at all but who had only informed the Returning Officer orally that he desired to contest the election could also contend that he "claims to have been duly nominated as a candidate".

22. Therefore, it is still open to the petitioner to prove that his pleadings are truthful and he did tender his nomination papers complete in all respects, together with security deposit, to the Returning Officer. Accordingly, at this stage it cannot be said that the petition can be thrown out on this ground. Thus, the argument is rejected.

23. Let us now consider whether all the material facts for constituting any corrupt practice have been disclosed and a complete cause of action has been stated and whether any affidavit in conformity with the proviso to Section 83(1) has been filed because the petition is based only on corrupt practices.

24. Before dealing with the material facts and cause of action, it would be appropriate to consider the settled law on the issue.

25. The Apex Court in the case of Azhar Hussain vs. Rajiv Gandhi (AIR 1986 SC 1253), while considering whether the publications were made with the knowledge or consent of the returned candidate, has held that the consent should be detailed in the affidavit and it spelt out the requirement in the following words in paragraph 31:

"31. There is no averment to show that the publication was made with the knowledge or consent of the returned candidate when the book was published in June, 1983. In fact, in 1983 there was no question of having acted in anticipation of the future elections of 1985 and in anticipation of the respondent contesting the same. In the election petition even the offending paragraphs have not been quoted. The petitioner has set out in paragraphs (a) to (h) the inferences drawn by him or the purport according to him. This apart, the main deficiency arises in the following manner. The essence of the charge is that this book containing alleged objectionable material was distributed with the consent of the respondent. Even so strangely enough even a bare or bald averment is not made as to :

i whom the returned candidate gave consent;

ii in what manner and how; and

iii. when and in whose presence the consent was given,

to distribute these books in the constituency. Nor does it contain any material particulars as to in which locality it was distributed or to whom it was distributed, or on what date it was distributed. Nor are any facts mentioned which taken at their face value would show that there was consent on the part of the returned candidate. Under the circumstances it is difficult to comprehend how exception can be taken to the view taken by the High Court."

26. A three judge bench of the Apex Court in the case of Subhash Desai vs Sharad J Rao (1994 Supp (2) Supreme Court Cases 446) while considering the import of Section 86 vis a vis Section 83

of the Act after relying upon the decision in Azhar Hussain's Case, has held that :

" Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or where there has been non-compliance of Section 82 i.e. non-joinder of the necessary parties to the election petition; or for non-compliance of Section 117 i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of the election petition for non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it; so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and detail whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged, is bound to be prejudiced in defending himself of the charges, which have been leveled against him. In view of the repeated pronouncements of this Court, that the charge of corrupt practice is quasi-criminal in nature, the person challenging an election on the ground of corrupt practice, cannot take liberty of making any vague or reckless allegation, without taking the responsibility about the correctness thereof. Before the court proceeds to investigate such allegations, the court must be satisfied, that the material facts have been stated along with the full particulars of the corrupt practice, alleged by the petitioner, which have been duly supported by an affidavit. In cases where the court finds that neither material facts have been stated, nor full particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed, not under Section 86 but under the provisions of the Code of Civil Procedure, which are applicable read with Section 83(1) of the Act, saying that it does not disclose a cause of action...."

27. The aforesaid judgment in Azhar Hussain's case (supra) was again reiterated by the Apex Court in the case of Ram Sukh vs. Dinesh Aggarwal (2009 (10) SCC 541) where it held that even if a single material fact is not pleaded, the cause of action would be incomplete in the following words in paragraph 20 :

"20. The issue was again dealt with by this Court in Azhar Hussain v. Rajiv Gandhi. Referring to earlier pronouncements of this Court in Samant N. Balkrishna and Udhav Singh vs. Madhav Rao Scindia wherein it was observed that the omission of a single material fact would lead to incomplete cause of action and that an election petition without the material facts is not an election petition at all, the Bench in Azhar Hussain case held that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and omission of even a single material fact would amount to disobedience of the mandate of Section

83(1)(a) of the Act and an election petition can be and must be dismissed if it suffers from any such vice."

28. The principle enshrined in the above decision can be crystallized as such. The facts which constitute corrupt practice must be stated and should be correlated to one of the heads mentioned u/s 123 of the Act. The omission of a single material fact would lead to an incomplete cause of action and in the context of corrupt practice, all the basic facts which constitutes it, must be disclosed in the petition. In cases covered by section.100(1)(b) read with S.123(1)(b) and (2) consent of the candidate is of vital importance. This is not a matter of better particulars but a material fact and as such indispensable part of the cause of action. Better particulars may be furnished by amendment in the petition but not a material fact because, consent, in such cases is the link to connect the candidate with the action of another person which may amount to corrupt practice and lead topenal consequences. In Azhar Hussain's case(supra) the apex court has aptly propounded the litmus test of ascertaining what are material facts which ought to be pleaded for stating a complete cause of action as " whether the court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition."

29. Let us now consider the argument as to whether "connivance' and "knowledge' are sufficient to draw a presumption of consent and whether the returned candidate would be bound by the actions of his workers and party leaders. It has been settled in large number of decision that the charge of corrupt practice is quasi criminal in nature and has to be specifically pleaded and proved and no amount of evidence can cure a defective pleading.

30. The Apex Court in the case of Samant N. Balakrishna vs. George Fernandez & others (AIR 1969 SC 1201) has held that after the amendment to the Act, "knowledge' or "connivance' is not sufficient to infer consent, in the following words in paragraph 50 of the judgment :

"50. Now it may be stated that mere knowledge is not enough. Consent cannot be inferred from knowledge alone. Mr. Jethamalani relied upon the Taunton case, (1869) I O' M & H 181 at p.185 where Blackburn, J., said that one must see how much was being done for the candidate and the candidate then must take the good with the bad. There is difficulty in accepting this contention. Formerly the Indian Election Law mentioned 'knowledge and connivance' but now it insists on consent. Since reference to the earlier phrase has been dropped it is reasonable to think that the law requires some concrete proof, direct or circumstantial of consent, and not merely of knowledge and connivance. It is significant that the drafters of the election petition use the phrase "knowledge and connivance" and it is reasonable to think that they consulted the old Act and moulded the case round "knowledge and connivance" and thought that was sufficient."

31. In Daulat Ram Chauhan vs. Anand Sharma (AIR 1984 SC 621) it has further gone on to hold in paragraphs 18

and 19 that the consent should be explicitly pleaded in the following words :

"18. We must remember that in order to constitute corrupt practice, which entails not only the dismissal of the election petition but also other serious consequences like disbarring the candidate concerned from contesting future election for a period of six years, the allegations must be very strongly and narrowly construed to the very spirit and letter of the law. In other words, in order to constitute corrupt practices the following necessary particulars, statement of facts and essential ingredients must be contained in the pleadings :-

(1) Direct and detailed nature of the corrupt practice as defined in the Act.

(2) Details of every important particular must be stated giving the time place, names of persons, use of words and expressions, etc.

(3) It must clearly appear from the allegations that the corrupt practices alleged were indulged in by (a) the candidate himself (b) his authorised election agent or any other person with his express or implied consent.

19. A person may, due to sympathy or on his own, support the candidature of a particular candidate but unless a close and direct nexus is proved between the act of the person and the consent given to him by the candidate or his election agent, the same would not amount to a pleading of corrupt practice as contemplated by law. It cannot be left to time, chance or conjecture for the court to draw an inference by adopting an involved process of reasoning. In fine, the allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm."

32. In Charan Lal Sahu vs. Giani Zail Singh (supra) it has gone on to hold that "connivance" and "consent" are not one and the same thing in paras 30 and 31 :

"30. It is contended by Shri Shujatullah Khan who appears on behalf of the petitioners that connivance and consent are one and the same thing and there is no legal distinction between the two concepts..... The relevant question for consideration for the decision of the issue is whether there is any pleading in the petition to the effect that the offence of undue influence was committed with the consent of the returned candidate. Admittedly, there is no pleading of consent. It is then no answer to say that the petitioners have pleaded connivance and according to dictionaries connivance means consent. The plea of consent is one thing: the fact that connivance means consent (assuming that it does) is quite another. It is not open to a petitioner in an election petition to plead in terms of synonyms. In these petitions, pleadings have to be precise, specific and unambiguous so as to put the respondent on notice .The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary. "Connivance' may in certain situations amount to consent, which explains why the dictionaries give "consent' as one of the meanings of the word "connivance'. But it is not true to say that "connivance' invariably and necessarily means or amounts to consent, that is to say irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are ad idem. Connivance does not necessarily imply that parties are of one mind. They may or may not be,

depending upon the facts of the situation. That is why, in the absence of a pleading that the offence of undue influence was committed with the consent of the returned candidate, one of the ingredients of Section 18 (1) (a) remains unsatisfied.

31. The importance of a specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, "connivance' here, or whether the petitioner has used that expression as meaning "consent'. It is remarkable that in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word "consent' for the word "connivance' which occurs in the pleadings of the petitioners. "

33. In Ramakant Mayekar vs. Celine D'Silva (1996 (1) SCC 399) it has been held that action of a party leader ipso facto cannot be said to have been taken with the consent of the returned candidate. It has further been held that there can be no presumption in law with regard to consent in the following words in paragraph 32 :

"32. The requisite consent of the candidate cannot be assumed merely from the fact that the candidate belongs to the same political party of which the wrongdoer was a leader since there can be no presumption in law that there is consent of every candidate of the political party for every act done by every acknowledged leader of that party. The corrupt practice for which a candidate can be held vicariously guilty for an act of any other person who is not his agent in whose favour general authority is presumed, must be pleaded and proved to be with the consent of the candidate. Obviously, it is so because the penal consequences resulting from the finding of a corrupt practice against the candidate are visited on the candidate including the setting aside of his election. The High Court assumed for the purpose of pleading as well as proof that no specific pleading or proof of consent of the candidate was necessary if the act was attributed to any leader or even a member of the same political party...."

34. In the background of the principles enumerated above, let us now examine the grounds of challenge and the pleadings in its support.

35. Though three grounds have been mentioned in the petition, but the only substantial ground relates to corrupt practices, which have been raised by the petitioner for challenging the election. According to the petitioner the allegations of corrupt practices have been mentioned from paragraphs 8 to 12 in the petition and discloses the eight incidents to show how and at whose instance, the petitioner was prevented from filing his nomination papers. Let us examine the said paragraphs after noticing them. (The averments have been quoted in verbatim without attempting to correct the apparent grammatical errors or even where they

lack clear and unambiguous comprehension) :

"8. On 04.06.2012, Petitioner was traveling from Amethi to Kannauj by train to file his nomination papers before Respondent No.2 for contesting the election for the 42 Parliamentary Constituency. At about at Manimohi just before the Kannauj Railway Station some unknown persons/passengers caught hold of the petitioner and snatched the a brief case of the petitioner containing the documents related to the filing of nomination papers. Petitioner visited the office of the Railway Protection Force and Local Police station also to lodge the complaint GRP but both of them refused to entertain the complaint of the petitioner. Local police station denied lodging the complaint on the pretext that the police force was busy with the event of nomination of candidature by Smt. Dimple Yadav wife of sitting Chief Minister of U.P.

9. Petitioner visited the office of the Railway Protection Force and Local Police station to lodge the complaint GRP but both of them refused to entertain the complaint of the petitioner. Local police station denied to lodge the complaint on the pretext that the police force was busy with the event of nomination of candidature by Smt. Dimple Yadav, the wife of sitting Chief Minister of U.P.

10. Since petitioner had to file the nomination for contesting the Election petitioner chooses not to pursue the complaint anymore and concentrate his all effort and energy on filing of the Nomination Papers as last date of filing was next day on 06.06.2012".

36. In the three paragraphs he merely says that his brief case containing papers was snatched by unknown passengers/persons on 4th June near Kannauj railway station on the train and though he went to the GRP and RPF they did not register his complaint on the pretext that they were busy in the nomination of respondent no 1. There is absolutely no corrupt practice alleged or even hinted. Appears to be a pure law and order situation and has nothing to do with the cause of action required to file an election petition under the Act.

"11. On 05.06.2012, after preparing fresh set of papers, petitioner at about 2 pm reached the office of District Magistrate Kannauj who was also the Returning Officer to file his nomination paper for contesting the election for the 42 Kannauj Parliamentary Constituency. Respondent no.2 without giving any explanation refused to accept the nomination paper of the petitioner. At 5:41 PM a complaint against Ms. Shilva Kumari J, the DM of the Kannauj was lodged in the office of Chief Election Commission Nirvachan Sadan, Ashoka Road, New Delhi by email. Thereafter at about 6.30 PM one S. Nawab Singh Yadav a Samajwadi Party leader of Kannauj and Ex-Block Pramukh from Kannauj Sadar from his mobile No.9415473092 called Sh. Arun Kumar Baudh, the local resident and leader of VPI athis mobile No.9794198252 and stated that VPI candidate S. Prabhat Kumar Pandey should not file nomination for contesting election against Smt. Dimple Yadav who has filed her nomination today. He also stated that only Smt. Dimple Yadav the wife of sitting Chief Minister was entitled to represent his constituency in the Parliament, because her husband had recently vacated this seat to work as Chief

Minister of UP. It was stated that Sh. Akhilesh Yadav was representing the constituency before and, therefore, it's not only the will of Respondent No.1 but also of all the people of the constitution that Respondent No.1 represent the Constituency. On 06.06.2012, around 7 am Sh. Nawab Singh Yadav again made telephone to Sh. Arun Kumar Baudh and threatened to assault and kidnap the daughters of Sh. Baudh, if petitioner the candidate of his party dared to file the nomination papers against Respondent No.1".

37. In this paragraph the petitioner cites two incidents of 5th June, 2012. 1st instance of filing the papers. Here also no corrupt practice has been alleged against the respondent no 1, her election agent or anybody with her consent, except that his nomination was refused to be accepted without any reason. There is neither any allegation that the refusal of nomination papers by the Returning Officer was the result of undue influence, direction, consent or even knowledge of respondent no 1 or her election agent. The allegations as they stand can only give a cause of action against the respondent no2 for other action under the Act but not for challenging the election through an election petition under the Act.

38. 2nd instance of the phone call by Nawab Singh. Here also there is no allegation of any corrupt practice of undue influence. It is a call by Nawab Singh Yadav to Arun Kumar Baudh but there is no threat or intimidation pleaded, there is no assertion that the petitioner should not be allowed to file his nomination papers. It is only a communication of a fact between the two. The court fails to comprehend how this assertion, without anything more, creates any cause of action to enable the petitioner to file this petition on this ground. It is not only vexatious but total abuse of the process of law.

"12. On 06.06.2012, around 7 am Sh. Nawab Singh Yadav again made telephone to Sh. Arun Kumar Baudh and threatened to assault and kidnap the daughters of Sh. Baudh, if petitioner, the candidate of his party dared to file the nomination papers against Respondent No.1. Petitioner at about 10 am along with his proposers again made efforts to file nomination paper so as to contest election for the 42-Parlimamentary Constituency of Kannauj but he was manhandled and stopped from filing the nomination papers, party worker of Respondent No.1 also torn two sets of nomination papers and abducted two workers of "VPI' with the aid and support from the police and Civil Administration. Petitioner through an email narrated the whole incident to the Chief Election Commissioner at 10:30 AM with regard to kidnapping of the two workers and tearing of the nomination papers by the support of Respondent No.1 Sh. Bharat Ghandi mentor of the VPI made telephonic calls to the Personal Secretary of Chief Election Commissioner of India and Sh. Umesh Sharma, Chief Election in charge of the State of Uttar Pradesh at 11:37 am and 02:44 pm with regard to an irregularity and corrupt practices committed by Supporters of Respondent No.1 and officers of Respondent No.2 and with regard to undue influence of the Respondent No.1. Both of them gave oral assurance of providing security to the Petitioner but no security was ever provided to Petitioner. Smt. Anguri Dharia, an active member of VPI was

demonstrating against the irregularities committed by Respondent No.1 and Respondent No.2 and restraining Petitioner from filing nomination for contesting election for the 42-Kannauj Parliamentary Constituency alongwith other 500 workers of the VPI, when at about 12.30 she was approached by Manta Kanaujia a Samajwadi Party leader and was told to take to some person on her mobile phone having no.9415483403 who was Sh. Nawab Singh Yadav on his mobile No.9415473092. Sh. Nawab Singh invited Smt. Dharia to discuss the issue with Respondent No.1 and in lieu of that she would be granted any benefit of her choice. On not been convinced he stated that Respondent No.2 and Police administration was working on dictates of Respondent No.1 to pave her path for un-opposed victory in the election and therefore, she should not waste her time in demonstration. She was told that any media or TV Channels would not cover the demonstration and the agitation of the VPI as they had already been managed and taken care of and this will broadcast the contents which will be issued by the Lucknow State Office of the Samajwadi Party. Therefore, her demonstration was worthless and she would not find a single news item in print and electronic media of group kidnapping. He further threatened to assault the family members of Smt. Dharia too if she would not stop the demonstration. In that view of the matter and the inability to file the nomination and exercise the electoral rights vested in the petitioner, the petitioner soon thereafter the Chief Election Commissioner assured the petitioner that his nomination papers will be duly accepted. At about 1 pm got the Nomination Papers containing 21 pages were faxed and sent by Registered Post to the Election Commission of India, Head Office in New Delhi. Relying on the assurance given by the Chief Election Commissioner, the petitioner Prabhat Pandey called upon Respondent no.2 on CUG no.9454417555. Respondent No.2 directed petitioner to come at 1:30 pm to file the nomination and assured that of adequate security arrangement would be made to enable him to file the nomination papers. However, when at about 1.30 pm petitioner reached the office of the Respondent No.2, workers and her agents abducted him at gunpoint and detained him at about 1.45 pm. Petitioner was brought to a room where many other persons who also keen in contesting the election and were abducted were kept. At 7.30 am. Petitioner was released from the illegal detention in the nearby jungle of Kannauj. A true copy of the nomination papers, complaint and other documents are collectively filed as Annexure No.III to the election petition".

39. Paragraph 12 cites 5 instances of 6thJune, 2012. 1st with regard to the call by Nawab Singh Yadav to Arun Kumar Baudh and the threat. It is not even pleaded that the call was made by Nawab Singh Yadav with the consent or even knowledge of respondent no. 1 or her election agent. Who informed the petitioner about the call, what were the actual words used by Nawab Singn Yadav have also not been disclosed.

40. 2nd incident is with regard to snatching and tearing of the nomination papers and abducting two supporters by party workers of respondent no. 1 with the aid and support of Police and Civil Administration. Here also there is no averment that it was done with the

consent or even knowledge of the respondent no. 1 or her election agent. Even the names of the alleged party workers has not been disclosed. Neither the names of the police officers nor civil officers has been disclosed who aided and supported the party workers and in what manner did they extend support or help, has also not been disclosed.

41. 3rd incident is with regard to Smt. Anguri Dharia and the offer made to her by Nawab Singh Yadav. Again, it has not been disclosed who told the petitioner about it, whether offer was made with the consent of respondent no. 1 or her election agent has also not been alleged, leave alone the pleadings with regard to the exact words of offer. The allegation that respondent no. 2 and the administration was working on the dictates of respondent no. 1 for unopposed victory, is also highly vague. There is not even an averment before whom, when and in what words the diktat was issued. This is a very serous charge not only upon a senior officer but casts an aspersion upon the entire local administration and therefore also full details are imperative and it cannot be left to the sweet will of the petitioner to supply details at his own leisure to take the respondent no. 1 by complete surprise. The petitioner upon a query from the court could not point out even from the annexures as to whether the said details are mentioned therein.

42. 4th incident relates to the threat extended to Smt. Anguri Dharia. Again, it is not disclosed who informed the petitioner about it, what were the exact words and before whom it was extended has been suppressed.

43. 5th incident relates to abduction of the petitioner. Here also, the names of the persons abducting the petitioner has not been disclosed, who held the gun and the manner of abduction has also not been disclosed. Further, whether it was done on the direction or with the consent or even knowledge of the respondent no 1 has been suppressed.

44. It is evident from a perusal of the petition that there is absolutely not even a bald assertion that the respondent no.1 or her election agent had given her consent to any one for restraining the petitioner from filing his nomination papers. Further, even the details when the consent was given and before whom it was given has not been disclosed. Simply put, it lacks complete cause of action as the material fact of consent is missing. Though "Knowledge' and "Connivance' are not the same thing, but even that has not been pleaded. Further, the action of the alleged party leaders or the workers also cannot be attributed to the returned candidate without specific pleading on that behalf.

45. Let us now examine the affidavit. It would be appropriate to first notice the format as provided in Form 25 in view of rule 94A of the Conduct of Election Rules,1961.

FORM 25

AFFIDAVIT

I ..... the petitioner in the accompanying election petition calling in question the election of Shri/Smt. ..... (respondent No. ..... in the said petition) make solemn affirmation/oath and say-

(a) that the statements made in paragraphs ..... of the accompanying election petition about the commission of the corrupt practice of ..... and the particulars*

of such corrupt practice mentioned in paragraphs ..... of the same petition and in paragraphs ..... of the Schedule annexed thereto are true to my knowledge;

(b) that the statements made in paragraphs ..... of the said petition about the commission of the corrupt practice of ..... and the particulars of such corrupt practice given in paragraphs ..... of the said petition and in paragraphs ..... of the Schedule annexed thereto are true to my information;*

(c)

(d)

etc. Signature of deponent

Solemnly affirm by Shri/Smt. ..... before me ..... at ..... this..... day of .....20.....

Before the Magistrate of the first class/Notary/

Commissioner of Oaths}.

** Here specify the name of the corrupt practice}*

46. Let us now examine the affidavit which has been filed with the petition.

"IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
AFFIDAVIT
IN
ELECTION PETITION NO. OF 2012

(Under Section 80/81 of Representation of the people Act, 1951)

(District: Kannauj)

Prabhat Pandey ..... Petitioner

versus

Dimple Yadav & another ..... Respondents

Affidavit of Prabhat Pandey aged about 33 years, Son of Om Prakash Pandey, Resident of Sarvanpur, Antu Road, Amethi, CSM Nagar, Uttar Pradesh.

(Deponent)

I, the deponent abovenamed do hereby solemnly affirm and state on oath as under :-

1. That the deponent is the sole petitioner in the above Election Petition and his religion is Hindu and is practising Advocate of High Court at Judicature at Allahabad, having Enrollment No.UP2633/05 and as such fully acquainted with the facts, deposed to below.

2. That the contents of accompanying affidavit has been read over and explain to the deponent and the deponent has understood the same.

I, the deponent above named do hereby verify that the contents of paragraph nos. 1 to 2 and statement made in para no.1 to 35 of the election petition are true to my personal knowledge ..... of this affidavit are based on perusal of records; the contents of paragraph nos. ... of this affidavit are based on legal advice; which all I believe to be true that no part of it is false and nothing material has been concealed in it.

So Help Me God.

DEPONENT

I, Pradeep Verma, Advocate, High Court, Allahabad, do hereby declare that the person making this affidavit and alleging himself to be the deponent is known to me from the perusal of papers; produced before me in this case.

(ADVOCATE)

Solemnly affirmed before me on this 21st day of July, 2012 at about 11:00 a.m.

by the deponent who has been identified by the aforesaid person.

I have fully satisfied myself by examining the deponent that he understood the contents of this affidavit and its annexure which have been read over and explained to him by me.

OATH COMMISSIONER."

47. We may first consider the law which has been propounded and settled by the Apex Court with regard to filing of an affidavit as required by the proviso to Section 83 sub-clause (1) of the Act.

48. The Apex Court was considering the effect of non filing of affidavit as required by the proviso to Section 83(1) of the Act in the case of allegation of corrupt practice under Section 123 of the Act, in the case of Ravinder Singh vs. Janmeja Singh (2000 (8) SCC 191) and a two Judge Bench held to the following effect :

"9. Coming now to the charge of corrupt practice falling under Section 123(1) of the Act, for which material facts and particulars have been detailed in paras 28 to 39 of the election petition, we find that those allegations could not be put to trial either. There is no affidavit filed in support of the allegations of corrupt practice of bribery.

10. Proviso to Section 83 (1) of the Act lays down, in mandatory terms that where an election petitioner alleges any corrupt practice, the election petition shall also be accompanied by an affidavit, in the prescribed form, in support of the allegations of such practice and the particulars thereof. The affidavit, which has been filed in support of the election petition, does not at all deal with the charge of bribery falling under Section 123(1) of the Act. Leaving aside the questions that the affidavit is not even in the prescribed form- Form 25 of the Conduct of Elections Rules, the allegations of corrupt practice made in the election petition are not supported by the otherwise defective affidavit either. All the names of the informants which have been given in the affidavit relate to the corrupt practice under Section 123(4) of the affidavit in this respect is a verbatim reproduction of the verification clause of the election petition concerning corrupt practice under Section 123(4). No name of any informant has been mentioned in respect of the allegations of corrupt practice under Section 123(1) in the affidavit. In the absence of the requisite affidavit filed in support of the allegation of corrupt practice under Section 123(1) of the Act, as detailed in the election petition, no issue could be raised for trial.

11. Section 83 of the Act is mandatory in character and requires not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to present a full and complete picture of the action to be detailed in the election petition but under the proviso to Section 83(1) of the Act, the election petition leveling a charge of corrupt practice is required, by law, to be supported by an affidavit in which the election petitioner is obliged to disclose his source of information in respect of the commission of that corrupt practice. The reason for this insistence is obvious. It is necessary for an election petitioner to make such a charge with full responsibility and to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise.

In the absence of proper affidavit, in the prescribed form, filed in support of the corrupt practice of bribery, the allegation pertaining thereto, could not be put to trial - the defect being of a fatal nature."

49. In P.A.Mohammad Riyas Vs. M.K.Raghavan & others (2012 (V) SCC 511), again a two judge bench of the Apex Court was considering an appeal against the order of the High Court, which had dismissed the election petition at the threshold on the ground that though corrupt practice was alleged in the petition, but the affidavit to be filed alleging corrupt practice as required by clause (4) of Order VI Rule XV had not been filed, therefore, it did not disclose a complete cause of action. Considering the arguments as to whether a separate affidavit is required, it went on to hold in paragraph 44 to the following effect:

"44. In the present case, although allegations as to corrupt practices alleged to have been employed by the respondent had been mentioned in the body of the petition, the petition itself had not been verified in the manner specified in Order 6 Rule 15 of the Code of Civil Procedure. Sub-section (4) of Section 123 of the 1951 defines "corrupt practice" and the publication of various statements against the appellant which were not supported by affidavit could not, therefore, have been taken into consideration by the High Court while considering the election petition. In the absence of proper verification, it has to be accepted that the election petition was incomplete as it did not contain a complete cause of action."

50. It further repelled the arguments that though Section 83 of the Act is not mentioned in Section 86 of the Act, even then incomplete cause of action would relate to Section 81 of the Act and, therefore, the issue would be rendered unworthy of any trial in the following words :

"47. In our view, the objections taken by Mr. P. P. Rao must succeed, since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the 1951 Act came into play immediately in view of sub-section (1) which relates to trial of election petitions and provides that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the 1951 Act. Although Section 83 has not been mentioned in sub-section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the election petition remained incomplete. The petitioner had the opportunity of curing the defect, but it chose not to do so."

51. The correctness of the aforesaid decision in P A Mohd Riyas' case (supra) with regard to filing of the second affidavit in terms of Order VI Rule XV(4) was called in question by another two judge bench in G M Siddeshwar vs Prasanna Kumar (2013 (4) SCC 799). After noticing several of its decisions, including two Constitution Bench decisions in Murarka Radhey Shyam Ram Kumar vs Roop Singh Rathore (AIR 1964 SC 1545) Subbarao vs Election Tribunal (AIR 1964 1027) and a three judge decision in G. Mallikarjunappa vs Shamanur Shivshankarappa (2001 (4)

SCC 428, it referred the question to a larger bench.

52. On aforesaid reference, a three judge bench in GM Siddehwar vs Prasanna Kumar (2013 (4) SCC 799), after considering large number of decisions, extracted the following principle in paragraph 52 :

"52. The principles emerging from these decisions are that although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold." (emphasis supplied)

53. The election of the respondent no. 1 has been challenged on the ground of employing corrupt practice as mentioned in section 100(1)(b) of the Act. The charges are of using bribery as mentioned in section 123(1)(b) and of undue influence under section 123(2) of the Act. The affidavit which has been filed along with the petition does not at all deal with either the charge of bribery or undue influence, further it is not even in conformity with the prescribed format. The affidavit appears to be in terms of Order XVI Rule 15(4) CPC and cannot also be said to be even a defective affidavit which could be cured. A perusal of the Form 25 shows that the affidavit should disclose the nature of the corrupt practice with its particulars. Even the annexures filed in support of the petition are also to be sworn, but both the requirements are totally lacking. A specific objection was raised in the written statement filed by the respondent no.1 with regard to total absence of the affidavit as required by the proviso to Section 83(1) of the Act, but even then no effort was made by the petitioner to file it or to even seek permission of the Court to file the affidavit. Whether this total non compliance could be cured at a later stage is not a question which falls for consideration in this case, but it discloses the cavalier approach in making such charges but shunning the responsibility to stand by it. It has to be remembered, that the petitioner is not a layman but is a practicineg lawyer of this court

54. Applying, generally the principles propounded in the above mentioned decisions, especially those extracted by the three judge decision in G M Siddeshwar's case (supra) and in Azhar Hussain' case (supra), five things are absolutely clear: (a) Full material facts of corrupt practice are missing, especially the pivotal fact of consent; (b) there is total non compliance of proviso to Section 83(1) and therefore it is not as contemplated by Section 81; © total lack of statement of complete cause of action in violation of Order VII Rule 11 (a) of CPC read with Section 83 of the Act; (d) merely because the returned candidate was the wife of the sitting Chief Minister, it cannot be presumed that the alleged action of the Returning Officer and the claimed action of her workers and party leaders could be presumed to have been taken with her consent, without there being specific, clear and unambiguous pleadings to that effect and (e) even if the respondent had not appeared to oppose the petition, being a half baked petition, court could not have given the verdict in favour of the petitioner.

55. Therefore, there is not other option except to allow the two

applications and to dismiss the petition at the threshold as if fails the test of stating complete cause of action.

56. However, in the circumstances of the case, no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2014

BEFORE
THE HON'BLE MOHD. TAHIR, J.

Civil Misc. Transfer Application No. 19 of 2014

Smt. Payal Agarwal ... Applicant
Versus
Vinay Kumar Agarwal ...Opp. Party

Counsel for the Applicant:
Sri Vaibhav Kaushik

Counsel for the Opp. Party:
Sri Swetashwa Agarwal

Code of Civil Procedure Section-24- Transfer of divorce petition- pending before Family Court Lucknow to Muzaffarnagar-High Court at Allahabad-no jurisdiction-except Lucknow Bench-held-instead of rejection-liberty to file before appropriate Bench-record of transfer application-registry to send before Lucknow Bench.

Case Law discussed:
AIR 1976 SC 331; LAWS (All)-1997-12-59; AIR 1988 All 48; AIR 1953 All 99.

(Delivered by Hon'ble Mohd. Tahir, J.)

1. Case called out. Counsels for both the parties are present.

2. The applicant wife is seeking transfer of Divorce Petition No.1631 of 2013 (Vinay Kumar Agarwal vs. Smt. Payal Agarwal), u/s 13 of Hindu Marriage Act, pending before the Principal Judge, Family Court, Lucknow to Muzaffarnagar on the ground of her convenience and that certain proceedings between the parties are pending at Muzaffarnagar.

3. Heard learned counsels for both the parties on the point of maintainability of this transfer application in this Court at Allahabad and perused the record.

4. Admittedly, the case sought to be transferred relates to district Lucknow. According to the ruling of the Hon'ble Supreme Court given in the case of Nasiruddin vs. State Transport Appellate Tribunal, AIR 1976 SC 331 as well as the ruling of the Allahabad High Court given in the case of Jyotsan Dixit vs. Civil Judge, Khiri, reported in LAWS (All)-1997-12-59, this transfer application is not maintainable in this Court at Allahabad but the same is maintainable before Lucknow Bench of Allahabad High Court. In the case of Sushma vs. Vikramaditya, AIR 1988 All 48 also in which the Division Bench ruling of this Court, namely, Nem Chand vs. The State, AIR 1953 All 99 has been referred to, it has been held that a proceeding under Section 24 C.P.C. is to be initiated before the Bench within whose jurisdiction the suit sought to be transferred, is pending. In the case of Nasiruddin (supra), it has also been held that if any case has been mistakenly or inadvertently entertained at Allahabad, a direction should be made to the High Court Office to transmit the papers of the case to Lucknow instead of returning back the case for filing before the Judges at Lucknow.

5. Since the case at hand has been entertained at Allahabad vide order dated

27.1.2014, so it will not be proper for returning the same to the applicant for filing it before Lucknow Bench. Under these circumstances, this transfer application is transferred to the Lucknow Bench with notice to both the learned counsel. Record be sent to the Lucknow Bench within two weeks and the same be listed subject to permission of the court concerned.

6. Registry is directed to take necessary action for transferring this case to Lucknow Bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.09.2014

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Arbitration Application No. 34 of 2013

G K Traders Sole Proprietorship Applicant
Versus
UPPCL ...Opp. Party

Counsel for the Applicant:
Sri Jaspreet Singh

Counsel for the Opp. Party:
Sri M.P. Yadav

Arbitration and Reconciliation Act-1996-11(6)-Application for appointment of arbitrator-on ground award given by arbitrator-set-a-side by District Judge and remanded for fresh consideration-argument that remand without appointment of arbitration-hence present application-in absence of pleading about death of previous arbitrator-without opportunity of contradiction-can not be basis for appointment of new arbitrator-held-application not maintainable.

Held: Para-17

In the entire body of the application nowhere it has been stated that Shri R.D. Maheshwari has expired and that therefore it was necessary to appoint a new Arbitrator. It is only in the chronology list of dates and events that it has been stated that Shri R.D. Maheshwari had expired in the meantime. However, since this fact has not been categorically stated in the application under Section 11(6) of the Act, 1996 and does not appear to be correct in view of the categorical denial of his death in paragraph 3 of the counter affidavit and undenied by the applicant, I do not find any illegality or infirmity if the dispute has been remanded to Shri R.D. Maheshwari to consider afresh in the light of the observations made by the District Judge.

Case Law discussed:
(2006) 6 SCC 204; (2006) 10 SCC 763; (2012) 7 SCC 71.

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. This is an application filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (the Act, 1996) praying for appointment of an Arbitrator to resolve the dispute between the applicant and the respondent.

2. Briefly stated the facts of the case are that tenders were invited for sale of 15.6 Megawatt Power House at Chandausi District Moradabad. The said power plant was to be sold on "as is where is" basis. The applicant's bid was found to be the highest bid at Rs.2,21,56,000/-. The agreement was signed between the applicant and the respondent on 18.5.1996 but thereafter some dispute arose between the parties with regard to implementation of the contract. The applicant submitted an application before the Chairman/Managing Director of the U.P. Power Corporation Ltd. (U.P. PCL) to

nominate an Arbitrator. The Chairman/Managing Director, U.P. PCL by his letter dated 1.4.2002 appointed one Shri R.D. Maheshwari as the sole Arbitrator. Shri R.D. Maheshwari issued notices to the parties on 29.7.2002 calling upon them to appear before him on 16.8.2002. The arbitration proceedings proceeded before Shri R.D. Maheshwari and an award was given on 27.5.2007 by which the claim of the applicant as well as the counter claim of the respondent was rejected. Aggrieved the applicant filed an application before the Court of District Judge, Lucknow under section 34 of the Act, 1996 being R.S. No. 56 of 2007. The District Judge, Lucknow by his judgment dated 20.4.2013 set aside the award holding that the Arbitrator has ignored voluminous records and documents as well as oral evidence in the form of different letters issued by the Chief Engineer and it was held that it was also the obligation of the Arbitrator to refer to each and every substantive letter indicated by the parties in support of their respective contentions. The matter was referred to the Arbitrator with a direction to hear the learned counsel for the parties again and to pass award afresh by disposing of issues and every issue supported with reasons within a period of four months.

3. On receipt of the judgment of the District Judge, Lucknow, the applicant is stated to have approached the Chairman/Managing Director, U.P. PCL requesting him to appoint an Arbitrator to hear and decide the dispute in the light of the judgment passed by the District Judge, Lucknow. However, when no Arbitrator was appointed the applicant had no option but to file the present application before this Court under Section 11(6) of the Act, 1996.

4. I have heard Shri Jaspreet Singh, learned counsel for the applicant and Shri M.P. Yadav, learned counsel for the respondent-U.P. PCL and perused the documents on record.

5. The principal submission of the learned counsel for the applicant is that once the Arbitrator has given his award he had become functus officio and therefore on remand by the District Judge, Lucknow, the matter could not have been referred to or heard by the same Arbitrator and it was obligatory on the part of the respondent-Corporation to appoint another Arbitrator who would hear the matter afresh and it was only when the Chairman/Managing Director, U.P. PCL did not appoint an Arbitrator that this application under Section 11(6) of the Act, 1996 had to be filed for intervention of the High Court in appointing an Arbitrator. In support of his submission, learned counsel for the applicant has referred to the provisions of Section 14 and 15 of the Act, 1996 and he submitted that the mandate of an Arbitrator shall terminate if:

(a) he becomes de jure or de facto unable to perform his function or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate or as provided under Section 15 of the Act the mandate of the Arbitrator shall terminate.

6. Shri Jaspreet Singh, learned counsel for the applicant further referred to the provisions of Section 32 of the Act, 1996 and submitted that the arbitral proceedings shall be terminated by the final arbitral award or by order of the Arbitral Tribunal under sub section (2) and further submits that the Arbitral

Tribunal shall issue an order for the termination of the arbitral proceedings for the reasons mentioned in sub Section (2) of Section 32 and in the sub Section (3) of Section 32 the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings.

7. Shri M.P. Yadav, learned counsel for the respondent-U.P. PCL, on the other hand, submitted that the provisions of Sections 14 and 15 and 32 of the Act, 1996 would have no application to the facts of the present case inasmuch as the Act, 1996 itself came into force w.e.f. 22.8.1996 and since the agreement itself was entered into between the parties on 18.5.1996 therefore the Act, 1996 would not apply and the parties would be governed by the provisions of the Arbitration Act, 1940. He further submitted that on receipt of notice from the applicant to appoint an Arbitrator the matter was considered and it was decided that it was not necessary to appoint an Arbitrator as the District Judge, Lucknow had remanded the matter to the Arbitrator after setting aside his award and that Shri R.D. Maheshwari, the then Arbitrator was still alive and had not expired as wrongly stated in the application and that Shri R.D. Maheshwari was fully competent to hear the matter afresh.

8. In paragraph 3 of the counter affidavit filed by the respondents it has been stated that the Arbitrator had already been appointed and the matter had been remanded to him and therefore there was no need of appointment of another Arbitrator.

9. To be able to appreciate the submissions made by the learned counsel for the applicant it would be necessary to reproduce here the provisions of Sections 14, 15 and 32 of the Act, 1996:

"14. Failure or impossibility to act. - (1) The mandate of an arbitrator shall terminate if -

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2)If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3)If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

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 shal terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where 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.

32. Termination of proceedings.- (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the terminaton of the arbitral proceedings."

10. Learned counsel for the applicant submitted that since the Arbitrator has already given his award therefore he became de jure unable to perform his function. He further referred to the provisions of Section 15 of the Act to submit that the mandate of the Arbitrator had come to an end and therefore on remand the dispute could not have been referred to the same Arbitrator. He further referred to the provisions of Section 32 of the Act to submit that the mandate of the Arbitral Tribunal stood terminated with the termination of the arbitral proceedings and therefore the Arbitrator became functus officio and therefore incompetent to hear the dispute afresh. Reliance has been placed on the following judgments of the Supreme Court:

1.(2006) 6 SCC 204 (Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. and another)

2.(2006) 10 SCC 763 (National Highways Authority of India and another Vs. Bumihiway DDB Ltd. (JV) and others;

3.(2012) 7 SCC 71 (ACC Limited Vs. Global Cements Limited)

11. In paragraph 4 of the judgment in the case of Yashwith Construction (supra) the Supreme Court specifically referred to the provisions of Section 15 of the Act, 1996 and has observed that when the Arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorized originally by the arbitration agreement, promptly appointed a substitute arbitrator. The question therefore was whether in the absence of power vested upon the Managing Director could the substitute Arbitrator have been appointed. The Supreme Court held that what Section

15(2) contemplates is the appointment of a substitute Arbitrator or replacing of the Arbitrator by another according to Rules that were applicable to the appointment of the original Arbitrator who was being replaced and held that there was no failure on the part of the party concerned as per the arbitration agreement to fulfill his obligation in terms of the Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute Arbitrator. Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement.

12. In this case the Chief Justice of the High Court had declined to exercise his power under section 11(5) read with Section 15(2) of the Act, 1996 to appoint a substitute Arbitrator and the appointment of the substitute Arbitrator by the Managing Director after the resignation of the first Arbitrator was found to be valid. In my opinion the said judgment has no application to the facts of the present case.

13. In National Highways (supra) the Supreme Court was again considering the provisions of Section 15(2) of the Act and on the facts of that case held that the High Court had failed to appreciate that in accordance with Section 15(2) of the Act on termination of the mandate of the Presiding Arbitrator the two nominated Arbitrators were first required to arrive at a consensus and on their failure to arrive at a consensus only was the respondent no. 2 authorized to make the appointment. Unless respondent no. 2 failed to exercise its jurisdiction, the High Court could not assume jurisdiction under section 11(6) of the Act. This judgment also does not help to advance the submission of the learned counsel for the applicant.

14. In ACC Ltd. (supra) also the Court was considering the provisions of Sections 14 and 15 of the Act, 1996 particularly with regard to the appointment of a substitute Arbitrator and Supreme Court held that on the appointment of a substitute Arbitrator no application for appointment of independent Arbitrator under Section 11 of the Act, 1996 could be filed. This case also does not help the applicant.

15. The provisions of Sections 14, 15 and 32 of the Act, 1996 speak of termination of the mandate of the Arbitrator where he becomes de jure or de facto unable to perform his function or for other reasons fails to act without undue delay or withdraws from his office or the parties agree to termination of his mandate. In the present case the Arbitrator has neither withdrawn from his office nor has he avoided performance of his function de jure or de facto. All that has happened is that he gave an award which was set aside by the District Judge and the matter was remanded to the Arbitrator to consider the dispute afresh in the light of the observations made by the District Judge in his judgment. It is the clear stand of the respondents in paragraph 7 of their counter affidavit and not denied by the applicant that the dispute has been referred to the Arbitrator for decision on the points referred by the District Judge and therefore there was no need of appointment of an Arbitrator.

16. In paragraph 3 of the counter affidavit it has also been stated that the earlier Arbitrator Shri R.D. Maheshwari is

still alive and it has wrongly been mentioned that he has expired.

17. In the entire body of the application nowhere it has been stated that Shri R.D. Maheshwari has expired and that therefore it was necessary to appoint a new Arbitrator. It is only in the chronology list of dates and events that it has been stated that Shri R.D. Maheshwari had expired in the meantime. However, since this fact has not been categorically stated in the application under Section 11(6) of the Act, 1996 and does not appear to be correct in view of the categorical denial of his death in paragraph 3 of the counter affidavit and undenied by the applicant, I do not find any illegality or infirmity if the dispute has been remanded to Shri R.D. Maheshwari to consider afresh in the light of the observations made by the District Judge.

18. In this view of the matter, the application under section 11(6) of the Act, 1996 is absolutely misconceived in law, devoid of merit and not maintainable and is accordingly rejected.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.10.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Transfer Application No. 64 of 2008

Rakesh Srivastava "Nyayik" ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Srivastava, Sri S.I. Siddiqui, S.M.A Kazmi
Sri Saiful Islam Siddiqui, Tahira Kazmi, Sri Syed Safdar Ali Kazmi

Counsel for the Respondents:
A.G.A., Sri Manish Tewari, Sri Ankur Tandon, Sri Ashwani Kumar Awasthi

Cr.P.C. Section 407- Transfer of Session Trail Case from Varanasi to another adjoining district-on ground the applicant being social worker and author of book subject to life of prisoners- explosure of mafia, bureaucrats and politicians-safety of applicant in danger as per report confirmed by SSP-held-mere apprehension not enough-unless supported by same material-can not be grated on a fancied notion of litigant-transfer not be allowed-but considering entire fact and with consent of both parties counsel-application allowed with observation of expedition conclusion of Tail within 6 month-necessary followup directions to jailor, SSP given.

Held: Para-15 & 17

15. Mere allegations like substantial prejudice, non-availability of congenial atmosphere for a free trial cannot be held the sole ground of transfer. Mere apprehension is not enough unless it is supported with some material. A party, either complainant or the accused should not ordinarily be allowed to have the Forum of his/her own choice. A transfer applicant cannot be allowed to make unfounded charges. A transfer should not be granted on a fancied notion of a litigant. Where the ground for transfer is not substantiated and as such does not exist, the application for transfer should not be allowed. It should not be allowed to help a litigant to choose a Bench of his own choice.

17. Looking to the entire facts of the case and also with consent of learned counsel appearing for parties, for transfer of trial at Allahabad, in my view, it would be appropriate if the aforesaid Sessions Trial is transferred to Allahabad with appropriate direction for its expeditious adjudication and conclusion.

Case Law discussed:
1999 (9) SCC 67

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri S.M.A.Kazmi, learned Senior Advocate, assisted by Sri Saiful Islam Siddiqui, learned counsel for the applicant, Sri Ankur Tandon, Advocate, holding brief of Sri Manish Tewari, learned counsel for opposite party no.2, learned A.G.A and perused the record.

2. This is an application under Section 407 Cr.P.C. filed by applicant seeking transfer of Session Trial No.201 of 2007 (State Vs. Rakesh Srivastava Nyayik), pending in the Court of Special Judge, SC/ST Act, Varanasi to some other district on the ground that opposite party no.2, complainant, is influential person in Varanasi and therefore, applicant has several apprehension, which have been detailed in the application.

3. In fact further proceeding of trial was stayed by this Court in 2008 and for the last six years and more, nothing has proceeded in the matter.

4. Facts in brief as disclosed in the affidavit accompanying transfer application are, that, the applicant is a social worker. He is also author of the book on the subject of Life of prisoners in U.P., titled as "Jail Apradh". A number of other facts have been stated in respect of various other litigations in which the applicant is involved, which, according to him were for reform of social system, exposure of mafia, bureaucrats and politicians' nexus etc, which in my view is not necessary to be detailed so far as this transfer application is concerned. Suffice it to mention that the applicant is a retired Custom Officer. FIR was lodged on 27.05.1990 by the applicant's father against one Rajendra Kumar Gaur who is alleged to be closest man of Awadhesh Rai, brother of respondent no.2. In the aforesaid matter, chargesheet was filed and Sessions Trial No. 155 of 1991 under Sections 452/307/504 IPC commenced in the Ciourt of 8th Additional Sessions Judge, Varanasi. It is said that the aforesaid report caused reason of enmity between applicant and his family vis a vis the family of Awadhesh Rai, elder brother of respondent no.2 Ajay Rai.

5. Respondent no.2 lodged a report against applicant, being Case Crime No. 229 of 1991, under Sections 147/148/149/302 IPC, at P.S. Chetganj on 3.8.1991 reporting an incident of firing in which Awadhesh Rai, brother of respondent no.2 died. The applicant was named as one of the accused therein along with Mukhtar Ansari, Kamlesh Singh, Bheem Singh and Abdul Kalam.

6. Police submitted chargesheet no.101 of 1991 dated 02.10.1991 whereupon the Court took cognizance and trial proceeded against applicant and others. The applicant is being tried in Sessions Trial No. 201 of 2007 under Sections 147/148/149/302 IPC.

7. It is said that respondent no.2 used to threat the applicant in Court premises to eliminate him. The applicant brought this fact to the notice of Court vide application dated 23.11.2007 and 26.11.2007, whereupon trial court sought report from Senior Superintendent of Police, Varanasi (hereinafter referred to as "S.S.P.") vide order dated 07.12.2007. The report was submitted on 10.12.2007 in which threat to safety of applicant was confirmed by S.S.P. and he clearly said that trial involves a notorious criminal

mafia and may go to the extent of eliminating, even by taking recourse to help of unsocial elements. He recommended that trial may be held at Central Jail Varanasi, instead of Court premises. It is in these circumstances, this application has been filed seeking transfer of Sessions Trial No. 201 of 2007 to some other district from Varanasi.

8. At the initial stage, when this matter was taken up by on 29.01.2008, notice was issued to respondent no.2 and learned A.G.A. was also permitted to file counter affidavit. The Court in the meantime, stayed further proceedings in the aforesaid Sessions Trial until further orders. That is how trial has not proceeded at all for the last more than six years.

9. A Parcha has been filed by Sri Ashwini Kumar Awasthi and Manish Tiwary Advocates on behalf of opposite party but no counter affidavit has been filed at all.

10. On behalf of the State respondent no.1, a counter affidavit through Additional Government Advocate has been filed stating that the present application has been filed only to linger trial and therefore, it should be rejected. It is said that the applicant even otherwise has no grievance and he can always approach S.S.P. for redressal of his grievance.

11. When this matter was taken up for hearing, learned counsel appearing for respective parties did not seriously dispute transfer of trial. Report of SSP which has been filed as Annexure 18 to the application is self speaking and paragraphs no. 3 and 4 thereof may be reproduced as under:

^^3- mDr eqdnesa dh lquokbZ ,d dq[;kr ekfQ;k ds fo:) py jgh gSA og vius fo:) lk{; dks lekIr djus ds fy;s fdlh Hkh vlekftd rRo dk lgkjk ysdj ?k`f.kr dk;Z djk ldrk gSA

*4- mDr fjiksVZ }kjk mijksDr eqdnesa dh lquokbZ U;k;ky; ds ctk; lsUVªy tsy] okjk.klh esa djk;s tkus dk vuqjks/k fd;k x;k gSA***

"3. Hearing of the aforesaid case is going on against a notorious Mafia. In order to eliminate evidence against him, he can take resort to any vicious act with the help of unsocial elements.

*4. Through the aforesaid report, a prayer for conducting hearing of the aforesaid case at Central Ja*il, Varanasi instead of Court, has been made."(English translation by Court)

12. The aforesaid report, facts and recommendation contained in paras 3 and 4 of the report of S.S.P., as noted above, show seriousness of the matter and degree of threat perception in the case in hand. This fact by itself is sufficient for this Court to pass appropriate order so that trial must conclude expeditiously and within reasonable time but without possibility of any untoward incident. In case like the present one, final adjudication of the matter at the earliest is of utmost importance. In the garb of transfer application, trial in the matter of a heinous crime can/should not be allowed to remain suspended for a long time.

13. Power under Section 407 Cr.P.C. can be exercised by this Court where it is made to appear:

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice.

14. The Court, therefore, can act suo moto or when such an request comes from Court below or on an application made by a party concerned. The conditions, on which the power can be exercised under Section 407 Cr.P.C., are:

(i) fair and impartial inquiry or trial cannot be had;

(ii) some question of law of unusual difficulty is likely to arise;

(iii)an order under Section 407 Cr.P.C. is required by any provision of Code of Criminal Procedure, i.e., Cr.P.C.;

(iv) it will tend to the general convenience of the parties or witnesses;

(v) it is expedient for the ends of justice.

15. Mere allegations like substantial prejudice, non-availability of congenial atmosphere for a free trial cannot be held the sole ground of transfer. Mere apprehension is not enough unless it is supported with some material. A party, either complainant or the accused should not ordinarily be allowed to have the Forum of his/her own choice. A transfer applicant cannot be allowed to make unfounded charges. A transfer should not be granted on a fancied notion of a litigant. Where the ground for transfer is not substantiated and as such does not exist, the application for transfer should not be allowed. It should not be allowed to help a litigant to choose a Bench of his own choice.

16 In Vijay Pal and others Vs. State of Haryana and another 1999 (9) SCC 67, the Court said that in absence of any justified reason, it is not proper and legal to exercise power under Section 407 Cr.P.C.

17. Looking to the entire facts of the case and also with consent of learned counsel appearing for parties, for transfer of trial at Allahabad, in my view, it would be appropriate if the aforesaid Sessions Trial is transferred to Allahabad with appropriate direction for its expeditious adjudication and conclusion.

18. The application is accordingly disposed of. I direct that Sessions Trial No. 201 of 2007 (State Vs. Rakesh Srivastava Nyayik), pending in the Court of Special Judge, SC/ST Act, Varanasi shall stand transferred to a competent Sessions Court at Allahabad. The trial court at Varanasi shall forthwith transmit record of the aforesaid trial to Allahabad and the District and Sessions Judge, Allahabad, after receiving record, shall either hear the case himself or nominate any other Court of competent jurisdiction for trial, expeditiously. The Court at Allahabad shall make endeavour to conclude trial within six months. In case the Presiding Officer of Trial Court at Allahabad finds difficulty in completion of trial within six months, a progress report, justifying extension of time shall be submitted to this Court, before expiry of the period of six months, for

appropriate order. If any such report or application is submitted by Trial Court, the Registry shall place the same before Court for appropriate order.

19. Before parting, this Court would like to place on record another aspect, which has seriously disturbed it. It is evident from the record that earlier Sessions Trial No. 201 of 2007 was proceeding against the applicant and other co-accused. However, the Trial Court used to adjourn, noticing the message conveyed to it by a co-accused or the complainant's witness that they shall not remain present in Court on that date and, therefore, the matter should be adjourned. Similarly on another date, again trial was adjourned because the accused detained in jail could not be produced by jail authorities. Two orders of Trial Court dated 19.12.2007 and 08.01.2008 are on record as Annexure 22 to the affidavit filed in support of transfer application. It would be appropriate to reproduce orders dated 19.12.2007 and 08.01.2008, passed by Trial Court, to see the manner, in which, Trial Court was adjourning the case, as if it was working under the command of the accused or complainant. In fact the tone and tenor of the order is sufficient to show otherwise influence enjoyed by such persons. The orders dated 19.12.2007 and 08.01.2008 read as under:

^^19-12-07

46&[k] 47&[k] 48&[k] 49&[k] 50&[k

vkt eqdnek izLrqr gqvkA vkt vfHk;qDr eq[rkj vgen is'kh ij vfHkj{kk esa xkthiqj tsy ls ugha vk;saxs D;ksafd bl ckcr xkthiqj tsy v/kh{kd dk i= Hkstk x;k gS tks i=koyh esa 50[k layXu gSa ! vfHk;qDrx.k jkds'k dqekj JhokLro] deys'k dh gktjh ekQh dh nj[okLrA is'k gksdj vkns'k gqvk fd vkt ds fy, Lohd'rA vkt vt; jk; xokg ds rjQ ls muds vf/koDrk us izkFkZuk i= fn;k fd os xSj ftyk x;s gSaA vkt mifLFkr ugha jgsaxs] vr% vYi frfFk gsrq izkFkZuk Lohd'rA eqdnek fnukad 08-01-2008 okLrs 'ks"k ftjg is'k gSA**

^^08-01-08

51&[k] 52&[k] 53&[k]

^vkt eqdnek izzLrqr gqvkA vfHk;qDr jkds'k dqekj U;kf;d dh gktjh vkt muds vf/koDrk }kjk ekQ dh x;hA eqyfteku Hkhe flag o deys'k ftyk dkjkxkj xkthiqj ls ryc gksdj U;k;ky; esa is'k ugha fd;s x;sA vfHk;qDr eq[rkj vgen ds ckjs esa ftyk dkjkxkj v/kh{kd xkthiqj ls i= ds lkFk Nk;k izfr esfMdy Hksth x;h gS fd mudks is'kh ij Hkstuk laHko ugha gS D;ksafd chekj gSaA vkt vfHk;qDrx.k ds vf/koDrk mifLFkr gSaA vkt oknh vt; jk; ds vf/koDrk }kjk izkFkZuk i= izLrqr fd;k x;k fd os xSj ftyk ls okil ugha vk;s gSa vr% vYi frfFk okLrs - - - fu;r fd;k tk;A nj[kkLr ,Mhthlh dksVZ }kjk lefiZr fd;k x;kA vr% Lohd'r fd;k x;kA i=koyh fnukad 22-01-2008 okLrs 'ks"k ftjg ihMCyw0 1 is'k gksA**

"19-12-07

46 Kha, 47-Kha,48-Kha,49-Kha, 50 Kha

Case was presented today. Today accused Mukhtar Ahmad in custody shall not appear before the Court from Ghazipur Jail because in this regard a letter of Ghazipur Jail Superintendent has been received which is enclosed to file as Paper no. 50 Kha. Application of accused Rakesh Kumar Srivastava and Kamlesh for exemption from personal appearance, presented and ordered-Allowed for today. On behalf of witness Ajay Rai, his counsel has given application that he has gone outside the District and will not remain present, therefore the adjournment application for a short period, is allowed. The case be placed on 08.01.2008 for remaining cross examination.

"08.01.2008
51 Kha, 52-Kha,53 Kha

Case was presented today. Personal appearance of accused Rakesh Kumar exempted through counsel. Accused Bheem Singh and Kamlesh were not produced in Court from District Jail Ghazipur. With respect to accused Mukhtar Ahmad, medical certificate along with a letter has been sent by the Superintendent, District Jail, Ghazipur, stating that it is not possible to present him in Court because he is ill. Counsel for accused persons is present today. An application has been moved by counsel for complainant Ajay Rai, praying that he has not come back from outside the district, hence the case may be fixed after short period..... Application moved in Court by ADG (ADGC). Hence, allowed. File be put up on 22.01.2008 for remaining cross examination of PW-1."

20. This attitude of Presiding Officer of Trial Court, proceeding on the dictates of either accused or complainant, or on mere inaction on the part of jail authorities in producing accused before it in their own discretion and command, deserves to be condemned and deprecated seriously. It appears as if the Trial Court proceeded snail pace for convenience of the accused and others and under their command. The two orders placed on record do not show that it was the Presiding Officer of Trial Court who was commanding proceedings of his Court. Once trial starts, it is duty of Trial Court to proceed with trial on day to day basis and complete it without any unnecessary delay. If jail authorities, including Jail Superintendent and concerned police authorities are acting with laxity, causing non-production of accused, detained in jail, on the date fixed before Trial Court, enough powers are conferred upon Trial Court to take appropriate action against such erring officials but instead thereof, it has chosen to simply adjourn the matter as if it is solely helpless. This Court could not understand as to why appropriate action against erring officials of jail authorities was not recommended by Trial Court to higher authorities, besides taking judicial deterrent action available under various statutes, by itself.

21. It is in these circumstances, taking cognizance of the manner, in which trials in certain criminal cases, where accused etc. are quite influential, resourceful and powerful personalities, do not proceed with due expedience, some directions are required be issued. I order accordingly and as under:

(I)It shall be personal as well as official responsibility of jail authorities including Jail Superintendent/ Jailer as also local police authorities to ensure that all the accused are presented, without fail, in concerned Court(s) on the date fixed for trial.

(II)In case any accused is not able to go to Court on account of medical reason(s), a proper certificate issued by Government Medical Officer. Jail Doctor, duly countersigned by Chief Medical Officer concerned must be produced before the Court concerned. In appropriate cases wherever Trial Court finds any reason for doubt or suspicion, it shall take appropriate steps for verification of such ground of non-production of accused in Court.

(III)In case there is any laxity or failure on the part of authorities concerned, Courts concerned shall take immediate deterrent action against erring officer/officials. It will also be open to

them to make reference for contempt to this Court under Contempt of Courts Act 1971.

(IV)I also direct the Chief Secretary, Government of U.P., Lucknow, Principal Secretary, Home, Government of U.P. Lucknow, Director General of Police,

(V)Similarly, if any other witness or complainant is causing delay in trial, appropriate action must be taken against him/them also, in the same manner.

22. Registrar General is directed to serve a copy of this order to the Chief Secretary, Government of U.P. Lucknow, Principal Secretary, Home, Government of U.P., Lucknow, Director General of Police, U.P., Lucknow, Additional Director General (Prison) Government of U.P., Lucknow for communication forthwith. They shall also submit compliance report after three months i.e., 20th January 2015.

23. Let a copy of this order be circulated to all the Judicial Officers in the State of U.P. through concerned District Judges for communication and compliance.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE SHRI NARAYAN SHUKLA, J.

First Appeal from Order No. 83 of 2008

The United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Meera Devi & Ors. ..Claimants

Counsel for the Appellant:
Sri Saral Srivastava

U.P., Lucknow and Additional Director General (Prison), U.P., Lucknow to take appropriate steps in this regard and issue necessary directions to all the jail authorities to ensure presence of all under-trials before the Court(s) concerned on the date fixed for trial.

Counsel for the Claimants:
Sri S.C. Kesarwani

Motor Vehicle Act, 1988 Section-2 (9) and 166- Owner of vehicle-driving Tata Sumo-died in accident-Tribunal-considering difination of 'Driver' as given under Section 2(9)-held owner being behind stearing is driver-awarded compensation-appeal by Isnsurance company as no separate premium paid for owner-insurance company not liable-held-once the comprehensive insurance policy of vehicle there-Rs. 15/ extra paid to cover the driver-keeping in view of defination of Driver the owner-driving the vehicle being behind the stearing-coveres the personal insurance of owner also-appeal dismissed.

Held: Para-14 & 15

14. Section 2(9) of the Act defines driver, which in our view encompasses the owner also to be the person who is behind the steering wheel and driving the vehicle. The cover note of the insurance policy in the instant case includes the insured and any other person, who is entitled to drive. The words used in the insurance policy are as under:

"Persons or classes of persons entitled to drive
Any person including insured:"

15. The premium of Rs.15/- was paid for driver. Nothing has been indicated in the appeal nor has anything been addressed by the learned counsel for the appellant to the effect that personal insurance of the owner of the vehicle under the comprehensive policy could invite a different premium other than that

premium paid for the driver. In the absence of any such pleading, we are of the opinion, that the comprehensive policy in the instance case also covered the personal insurance of the owner of the vehicle.

Case Law discussed:
2008 (2) T.A.C. 752 (S.C.); 2006 (9) SCC 174; 2004 (5) SCC 385; 2000 (3) TAC 585.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The owner Sri Pravendra Singh was driving his vehicle "Tata Sumo" and collided with a tractor, on account of which, he suffered injuries and subsequently died. The dependants of the deceased, Pravendra Singh, filed a claim application claiming compensation of Rs.22,36,768/-. The Tribunal gave an award allowing the claim application awarding Rs.6,60,000/- along with interest @ 6.5% per annum as compensation to the claimants. The Insurance Company of the vehicle TATA SUMO, being aggrieved by the said award, has filed the present appeal under Section 173 of the Motor Vehicles Act (hereinafter referred to as the "Act").

2. Heard Sri Saral Srivastava, the learned counsel for the appellant and Sri S.C.Kesarwani, the learned counsel for the claimants.

3. The learned counsel for the appellant has attacked the award on three grounds, namely:-

1.That the deceased was the owner and driving the vehicle and was not personally insured under the policy and, therefore, his dependants were not entitled for any compensation. In support of his submission, the learned counsel placed reliance on a decision of the Supreme Court in Oriental Insurance Company Ltd. vs. Rajni Devi and others, 2008 (2)T.A.C. 752(S.C.) as well as the decision of the Supreme Court in New India Assurance Company Ltd.vs. Meera Bai and others, 2006(9)SCC 174.

2.The claim application was filed under Section 163-A of the Act showing an income of the deceased at Rs.1,21,094/- which was more than Rs.40,000/- per annum and, therefore, the claim application was not maintainable in view of the decision of the Supreme Court in Deepal Girishbhai Soni and others vs. United India Insurance Co. Ltd., 2004 (5) SCC 385.

3.The compensation has been awarded without any proof of income of the deceased being filed by the claimants and, accordingly, notional income of Rs.15,000/- per annum could have been awarded.

4. On the other hand, the learned counsel for the claimant contended that a comprehensive policy was taken of the vehicle in question, in which the deceased was also insured and, consequently, the Insurance Company was liable to pay the compensation. In support of his contention the learned counsel placed reliance upon a decision in Chimaji Rao Shirke and another vs. Oriental Fire and General Insurance Company Ltd., 2000 (3) TAC 585 wherein the Supreme Court held, that the Insurance Company was liable to pay compensation to the heirs on the death of the owner who was driving the vehicle.

5. The learned counsel further submitted that necessary proof of the income of the deceased was filed before the Tribunal by way of filing the Income Tax return of the deceased, which was duly considered and accepted by the Tribunal and, therefore, the

contention of the appellant that no proof of income of the deceased was filed, was patently erroneous. It was also contended that initially the claim application was filed under Section 163-A of the Act, but, subsequently, an amendment application was filed, which was allowed by the Tribunal by an order dated 6.8.2007 and thereafter the appeal was converted as having been filed under Section 166 of the Act. The learned counsel contended that the contention of the appellant that the claim application was not maintainable, was wholly erroneous and against the record.

6. Having heard the learned counsel for the parties, we find that the claim application was maintainable, inasmuch as, the claim application was converted from Section 163-A to Section 166 of the Act. Further, proof of income of the deceased was filed by filing the Income Tax return of the deceased, which was duly accepted. The contention of the appellant on these two issues is patently misconceived and is rejected.

7. Admittedly, the owner was driving his own vehicle, when it met with an accident. The question is, whether the insurance policy covered the personal insurance of the owner or not. In this regard the cover note and the insurance policy has been filed before the Tribunal as well as before this Court.

8. Upon its perusal, the Court finds that the policy was given in the name of the insured Sri Pravendra Singh Yadav, who was the owner of the "Tata Sumo" and who died in the accident. The insurance policy indicates that any person including the insured was entitled to drive the vehicle. Under the heading "Liability" we find that a premium of Rs.15/- was paid towards "legal liability to paid driver as per Endt. IMT 19".

9. The question is, whether the word "driver" would include owner of the vehicle or not.

10. Section 2(9) of the Motor Vehicles Act defines "driver" as under:

"2(9). "driver" includes, in relation to a motor vehicle which is drawn by another motor vehicle, the person who acts as a steersman of the drawn vehicle;"

11. A perusal of the aforesaid provision indicates that any person, who is behind the steering wheel is a driver and, consequently, we are of the opinion, that the owner of the vehicle who is behind the steering wheel of the vehicle would also be a driver.

12. The learned counsel for the appellant has relied upon the decision of Rajni Devi (supra). We are of the opinion, that the said decision has no application as in that case a claim was made by the claimants of the deceased/owner, on the ground, that the policy covered the personal insurance. The Supreme Court held, that the premium paid under the heading "own damage" was to cover the damage occurred to a vehicle and not for injury to a person or the owner. The Supreme Court held, that the owner of the vehicle can only claim compensation provided the personal accident insurance had been taken out, which in the said case had not been done.

13. The Supreme Court, in Meera Bai's case(supra) held, that the insurance policy does not cover the risk to the driver of the vehicle in view of the insurance policy, which indicated liability to paid driver and/or conductor and, in that scenario, the Supreme Court held, that the

owner, who was driving the vehicle, was not covered under the policy. The said case in our humble view is distinguishable for the following reasons.

14. Section 2(9) of the Act defines driver, which in our view encompasses the owner also to be the person who is behind the steering wheel and driving the vehicle. The cover note of the insurance policy in the instant case includes the insured and any other person, who is entitled to drive. The words used in the insurance policy are as under:

"Persons or classes of persons entitled to drive
Any person including insured:"

15. The premium of Rs.15/- was paid for driver. Nothing has been indicated in the appeal nor has anything been addressed by the learned counsel for the appellant to the effect that personal insurance of the owner of the vehicle under the comprehensive policy could invite a different premium other than that premium paid for the driver. In the absence of any such pleading, we are of the opinion, that the comprehensive policy in the instance case also covered the personal insurance of the owner of the vehicle.

16. Consequently, we do not find any error in the order of the Tribunal. The appeal fails and is dismissed.

17. In the circumstances of the case parties shall bear their own cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2014

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Misc. Application No. 306325 of 2013

In
Second Appeal No. 344 of 2009

Smt. Ganga Devi ...Appellant
Versus
Sri Bhagwan Dass & Ors. ...Respondents

Counsel for the Appellant:
Sri Sankatha Rai, Sri Vinod Kumar Rai, Sri Vijay Kumar Rai, Sri Ashok Kumar Singh

Counsel for the Respondents:
Sri Madhav Jain, Sri M. Jain, Sri Mukesh Kumar, Sri Nirvikar Gupta, Sri Prakash Chandra

C.P.C.- Order XXXXI Rule-27-Additional Evidence-Second Appeal-document sought to filed-already rejected by lower Appellate Court-under challenge in Second Appeal-unless the contingencies of Rule 27 there-addition evidence can not be allowed to fill up lacuna of case-rejected.

Held: Para-18

Order 41 Rule 27 CPC is clearly not intend to allow a litigant who had been unsuccessful in the lower court to patch up the weak parts of his case and to fill up the omission in appeal. Additional evidence can be admitted only where the Appellate court requires it, i.e. finds it needful, to enable it to pronounce judgment, or for any other substantial cause. In either case it must be the court that requires it. The legitimate occasion for the exercise of this discretion is when on an examination of the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court, of fresh evidence, and an application is made to import it. It may well be that the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands (See. Arjan Vs. Kartar, 1951 SCR 258, Parsotim Thakur and others Vs. Lal Mohan and others, AIR 1931 P.C. 143).

Case Law discussed:
A 1974 SC 2069; AIR 1995 ALL 70; 1951 SCR 258; AIR 1931 P.C. 143.

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

1. Heard Sri Ashok Kumar Singh, learned counsel for the appellant, Shri order to bring the following additional evidence on record :-

"The appellant application no.22C/1 to 22 C/3 under order 41 rule 27 C.P.C. Purported to file additional evidence annexing with the documents was rejected by the learned VII Additional District Judge vide order dated 2.2.2009 in first appeal no.110 of 1994 on the ground that the document seeking to produce in additional evidence are the photo copies.

The present supplementary affidavit and its annexure is being filed by deponent to avoid the delay. The Hon'ble Court may be pleased to the allow the same in exercise the inherent power of the court in the interest of justice."

3. On the said application, an order has been passed on 26.09.2013. The relevant portion of the same is quoted herein below :-

"The question whether the appellate court was justified in rejecting the application of appellant under Order 41 Rule 27 CPC shall be considered at the time of hearing of the appeal. The application is rejected."

4. While pressing the application in question, learned counsel for the appellant submits that the original appellant/Smt. Ganga devi (now deceased) who was illiterate lady and ignorant of the complicated questions of law and fact, therefore, same Madhav Jain, learned counsel for the respondents and perused the record.

2. The present application has been moved by the appellant under Order 41 Rule 27 read with Section 151 C.P.C. in

documents/admissions of the respondents could not be filed on record. When it came to her knowledge that Rsmesh Chand has filed Writ Petition No.1087 of 1987 (Ramesh Chandra vs. Additional District Magistrate, Agra and others) before this Court, the appellant sent letter to the clerk of his counsel Shri R. N. Bhalla, Advocate to obtain the copy of aforesaid writ petition.

5. Thereafter, the photostat copy of the said writ petition was obtained and from perusal of paragraph no.2 of the said writ petition, it came to knowledge that Ramesh Chandra himself has admitted that he and Smt. Ganga Devi (now deceased) were owner and londlord of the house in dispute in an application filed under Section 16 of U.P. Act 13 of 1972 against Munna Lal for release of the House No.24/106, Kazi Para, Agra. So, keeping in view the said facts, the appellant filed an application under Order 41 Rule 27 (1) C.P.C. Supported by an affidavit (registered as paper Nos.22-C and 23-C) before the appellate court.

6. By means of order dated 2.2.2009, the same has been rejected on the ground that the document sought to be brought on record, is a photostat copy, not admissible under evidence. Further the appellate court while rejecting the said application has also given a finding that matter is to be decided expeditiously as per the order passed by this Court dated 18.4.1988 expeditiously.

7. During the pendency of the present appeal, on behalf of the appellant, an application (C.M.A.No. 102352 of 2009) has been moved under Order 41 Rule 27 (1) C.P.C. to bring the document on record in respect to which an order dated 2.2.2009 has been passed by the appellate court on an application moved under Order 41 Rule 27 C.P.C.. After hearing learned counsel for the parties on 25.7.2014 the following order has been passed :-

(C.M. Application No. 102352 of 2009)

Heard Sri Ashok Kumar Singh, learned counsel for the appellant, Sri Prakash Chandra, learned counsel for the respondents and perused the record.

In the present case , present application under Order 41 Rule 27 CPC has been moved by defendant/ appellant in which this Court on 29.9.2013 has passed the following orders:-

"Heard learned counsel for the parties on civil misc. application no. 102352 of 2009 under Order 41, Rule 27 CPC.

Learned counsel for the appellant moved this application to bring certain documents on record under Order 41 Rule 27 CPC.

The main contention of the appellant is that he also filed the same documents in the Appellate Court in First Appeal, which was rejected by the Appellate Court.

The documents which the appellant wish to file here in this Appeal are also on record in First Appeal. Now the only question is whether trial court was justified in rejecting his application under Order 41 Rule 27.

The question whether the appellate court was justified in rejecting the application of appellant under Order 41 Rule 27 CPC shall be considered at the time of hearing of the appeal. The application is rejected.

Since no application is pending, list this appeal for hearing of the appeal in the week commencing 21.10.2013."

After arguing at some length, learned counsel for the appellant prays that he does not want to press this application.

Learned Standing Counsel has no objection to the above said prayer.

For the forgoing reasons, the application is rejected."

8. In view of the above said factual background, the present application (C.M.A.No.306325 of 2013) moved by him under Order 41 Rule 27 C.P.C. has come up for consideration and the same has been pressed on behalf of the appellant as per the facts stated herein above and mentioned in the affidavit filed along with the application in question and on the basis of the same, it is submitted that the same may be allowed.

9. After hearing learned counsel for parties in order to decide the controversy in question, it would be appropriate to go through the provisions of Order 41 Rule 27(1) C.P.C. which reads as under:-

"Rule 27- Production of additional evidence in Appellate Court-- (1) The parties to an appeal shall not been titled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if--

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

10. Under Sub-Rule (1) (a) an appellate court can direct additional evidence to be recoded if the trial court had improperly rejected to record evidence which a party was prepared to produce. (See Offl Liquidator vs. Raghava, A 1974 SC 2069). However, if the document was not tendered at the trial, Rule 27 (1) (a) does not apply coupled with the fact that when no explanation is given why those documents were not produced before the trial court, they cannot be received as additional evidence (See Raj Kishore Mishra v. Meena Mishra, AIR 1995 ALL 70). Moreover, the permission to produce additional evidence cannot be given unless it is established that such evidence was not within the knowledge or could not be produced after due diligence at the time of passing of decree.

11. Further on plain reading of Sub-rule (1)(aa) of Order 41 rule 27, the position which emerges out is that when application is made at a late stage to put in evidence res moviter ad notitiant preventa, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter/evidence was not discovered before, so he was not able to file the same before the court below and if a appellant falls to satisfy the said condition his application to produce the same at a belated stage is liable to be rejected.

12. The party seeking to produce additional evidence, whether oral or documentary additional evidence, is to establish that notwithstanding to exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed and in order to bring the additional evidence on record, the appellant should establish that he made application to get the certified copies prior to the disposal of the suit, and they were not available and adjournment was refused by the Court. Where it is not stated that the trial court refused to admit the documents or that the documents were not available at the time of trial, they cannot be admitted in the appellate court to fill up the gaps in the evidence or to better the case of the appellant.

13. Before a party is allowed to produce additional evidence he has to establish that the evidence was not in existence, was not within his knowledge or could not after the exercise of due diligence be produced by him at the time

when the decree appealed against was passed.

14. Sub-Rule (1)(b) of Order 41 Rule 27 CPC has two important ingredients, namely, (a) 'requires' (b) for any substantial justice' in order to invoke the said provision.

15. As per the said provision "the requirement" must be of the court and not of any party to the suit. When the court is of opinion that without fresh evidence it cannot pronounce judgment and perform its functions, then and then only will it be allowed because requires means needs or finds needful or that it is necessary for doing real justice (substantial justice) and for just decision of an appeal, the appellate Court has discretion to take such documents on record.

16. Accordingly, , the true test is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. The mere discovery of fresh evidence subsequent to the decision of the lower court is not a ground for its admission in appeal unless the appellate court requires that evidence to enable it to pronounce judgment. So, additional evidence should not be permitted at the appellate stage to enable a party to remove certain lacunae and to fill in gaps. It should be proved that the evidence sought to be let in was not available at the trial. The rule does not authorise admission of additional evidence for the purpose of removal of lacunae and filling in gaps in evidence.

17. Further, "any other substantial cause" need not be ejusdem generis with the cause stated in the earlier part of the rule and the words "or for any other substantial cause" must be read with the word "requires" which is set out at the commencement of the provision, so that it is only where for any other substantial cause, the appellate court requires additional evidence.

18. Order 41 Rule 27 CPC is clearly not intend to allow a litigant who had been unsuccessful in the lower court to patch up the weak parts of his case and to fill up the omission in appeal. Additional evidence can be admitted only where the Appellate court requires it, i.e. finds it needful, to enable it to pronounce judgment, or for any other substantial cause. In either case it must be the court that requires it. The legitimate occasion for the exercise of this discretion is when on an examination of the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court, of fresh evidence, and an application is made to import it. It may well be that the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands (See. Arjan Vs. Kartar, 1951 SCR 258, Parsotim Thakur and others Vs. Lal Mohan and others, AIR 1931 P.C. 143).

19. In view of the above said discussions and the facts as taken by the appellant in order to bring the additional evidence as per the provisions of Order 41 Rule 27 (1) C.P.C. , I do not find that on the said facts, the application in question can be allowed as per the discussions made herein above and in regard to applicability of the Order 41 Rule 27 (1) C.P.C., so the same is rejected.

20. List the matter before appropriate Bench after three weeks.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: 31.10.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Sri Gulab Chandra

Counsel for the Respondents:
A.G.A.

Cr.P.C. Section-372-Leave to appeal-against acquittal-on ground the deceased made dying declaration before his death-assigning role of accused-under Section 27 of evidence Act-valid u/s 32 of Evidence Act-held that dying declaration recorded by constable on dictation of I.O.-No declaration in eye of law-blood sustained clothes neither sent for forensic test not produced before Trail Court-material contradiction in prosecution witnesses-no independent witness-examined-Trail Court not committed any illegality or infirmity-requires no interference by High Court-Appeal dismissed.

Held: Para-16
The Apex Court in the case of Murlidhar alias Gidda and others versus State of Karnataka, 2014 (2) SCC (Crl.) 690 has held that if a dying declaration of the injured was recorded by a Constable on the dictation of I.O. it will not be a dying declaration in the eye of law. Hence, in the facts of this case it is established from the statements of P.W.2 and P.W.4 that injured was not in a position to give his statement. The trial Court has therefore, rightly disbelieved the dying declaration of the deceased recorded by the I.O. It is also significant to note that the blood stained clothes of the deceased were neither sent for forensic test nor the same were produced before the trial Court.

Crl. Misc. Application (Leave to Appeal)
No. 400 of 2014

Neeraj Kumar Kanaujia ...Complainant
Versus
State of U.P. & Ors. ..Opp. Parties.

Counsel for the Complainant:

Case Law discussed:
(2014) 5 SCC-509; SCC-2011 (7) page-295; SCC-2011 (2) page 490; Cr. L.J. 2006 page 2618; AIR 1995 SC-2472; AIR 2004 SC 1920; 1999 (2) SCC-126; 2014 (2) SCC (Crl.) 690.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard Sri Gulab Chandra, learned counsel for the appellant, learned AGA for the accused-respondents and perused the record.

2. In view of the judgment rendered in the case of Lekhraj versus State of U.P. and others (Criminal Misc. Application under Section 372 Cr.P.C. (Leave to Appeal) No. 6 of 2014 decided on 10th October, 2014, no leave to appeal is required for the victim to prefer an appeal on the grounds mentioned in proviso to Section 372 Cr.P.C. as he has an indefeasible statutory right to file the appeal.

3. Criminal Appeal No. 400 of 2014 under Section 372 Cr.P.C. has been preferred challenging the impugned judgment and order dated 20.9.2014 passed by the Addl. Sessions Judge, Court No. 10, Allahabad in S.T. No. 757 of 2011 (State Vs. Sunil Kumar Kaushik and another along with connected S.T.No. 758 of 2011, State versus Sunil Kumar Kaushik) acquitting the accused-respondents of the charges framed against them under Sections 302 read with

Section 34 IPC and Section 3/25 of the Arms Act.

4. The facts of the case as are culled out from record are that on 23.11.2010 at about 9.15 P.M. when complainant Neeraj Kumar Kannauji was returning on his motorcycle along with his father Ramesh Chandra Kannaujia after attending the marriage of daughter of his uncle at Transport Nagar, all of a sudden two persons came on a motorcycle and the fire was made by the pillion rider. After firing they fled away towards Karbala. On hearing the sound of firearm shots the people began to run away due to fear. The complainant brought his injured father to Colvin Hospital from where he along with his uncle and other persons was brought to Jeevan Jyoti Hospital for treatment. Dying declaration of Ramesh Chandra Kannaujia was recorded by the Police Officer at that hospital. The appellant-complainant then lodged an FIR of the incident at P.S. Khuldabad, Allahabad on the same day.

5. Pursuant to the report, case crime nos. 758 of 2011 and 77 of 2011 under Section 302 and Section 3/25 of the Arms Act were registered on 24.11.2010 at 00.10 A.M. at P.S.Khuldabad against unknown persons. During the investigation, the names of the accused persons came to light. Accused Sunil Kumar Kaushik while on police remand pointed a recovery of 315 bore tamancha and one blank cartridge used in the murder of Ramesh Chandra Kannaujia. After investigation, the I.O. submitted charge sheet against the accused persons under Sections 302 IPC and 3/25 of the Arms Act.

6. The case on being committed to the Court of Session, the charge under Section 302 read with Section 34 IPC was framed against accused-respondents Sunil Kumar Kaushik and Tinku Kaushik and a separate charge under Section 3/25 of the Arms Act was framed against accused Sunil Kumar Kaushik, who denied the charges and claimed trial.

7. In order to prove its case the prosecution examined eleven witnesses, namely, Neeraj Kumar Kannaujia (PW-1) Arjun Lal (PW-2), Dr. Santosh Kumar, Orthopedic Surgeon, T.B. Sapru Hospital, Allahabad (PW-3), S.O. Anjani Kumar Mishra (PW-4), Hajari Lal (PW-5), S.I. Ram Asre Mishra (PW-6) S.O. Rajesh Kumar (PW-7), Retired Dy. S.P. Jitendra Nath Pandey (PW-8), Head Constable Shyam Lal (PW-9), Surendra Singh, Inspector Food & Civil Supplies, Varanasi (PW-10) and Dr. S.K. Dubey (PW-11) whereas the accused persons in their statements under Section 313 Cr.P.C. denied the entire circumstances appearing in story against them stating that they have been falsely implicated in this case. The accused-respondents also produced five defence witnesses, namely, Raj Kumari Devi (DW-1), Pradeep Chaudhari (DW-2), Suresh Mahajan (DW-3), Sri Apoorva Vrat Pathak, Dy. Jailer, Central Jail, Naini, Allahabad (DW-4) and Devendra Kumar Pandey (DW-5) in support of their case.

8. The impugned judgment is assailed on the ground that from the evidence of Neeraj Kannaujia (PW-1) and Arjun Kannaujia (PW-2) it is established that the accused-respondents were inimical with Ramesh Chandra Kannaujia (since deceased) on account of encroachment over the land of Dhobi

Ghat which was motive for commission of crime; that accused Sunil Kumar Kaushik on remand had himself pointed out recovery of tamancha of .315 bore along with a blank cartridge used in the murder of Ramesh Chandra Kannaujia; that recovery memo has also been proved by the concerned Police officer and witnesses in the trial Court which itself was sufficient to convict the accused-respondents in view of Section 27 of the Evidence Act; that deceased made his statement soon prior to his death in hospital before the Police Officer assigning the role of committing the murder to accused Sunil Kumar Kaushik on account of enmity arising out of encroachment over the land of Dhobi Ghat, which is valid under Section 32 of the Evidence Act but the trial Court has not considered these facts and evidence on record while acquitting the accused-respondents. Learned counsel has placed reliance upon the judgment rendered in Dharam Deo Yadav versus State of Uttar Pradesh, (2014) 5 SCC-509 in support of these contentions.

9. It is also submitted that Neeraj Kannaujia (PW-1) who was with his father Ramesh Chandra Kannaujia on 23.11.2010 when murder was committed had identified accused Sunil Kumar Kaushik before the Court. He also stated the manner and involvement of the accused in murder. It is stated that there is a clear, cogent and credit worthy evidence on record explaining the injuries sustained by the deceased which were illegally discarded by the trial Court on ground of contradictions in the statement of witnesses and medical evidence, though minor contradictions cannot be a ground of acquittal as has been held in the cases of Waman and others versus State of Maharasthra, SCC-2011 (7) page-295, Ravindra Kumar Pal versus Republic of India, SCC-2011 (2) page-490 and that as per the decision rendered in the case of Kishore Sindhi versus State of Maharshtra, Cr.L.J. 2006 page 2618, Karnail Singh versus State of M.P., AIR 1995 SC-2472, Dhanraj alias Shera and others versus State of Punjab, AIR 2004 SC 1920, Paras Yadav and others versus State of Bihar, 1999 (2) SCC-126.

10. On the basis of aforesaid judgments Counsel has argued that any irregularity in the investigation cannot be a ground for acquittal but the trial Court has passed the impugned judgment of acquittal taking into account the irregularities and omissions in the investigation. In so far as the dying declaration is concerned, it is submitted that it was not signed by the deceased or the doctor; that it is well established law that the FIR is not a encyclopedia where facts to be mentioned but the trial Court has discarded the prosecution story merely because of non-mentioning of the name of accused-respondents in the FIR and that Ramesh Chandra Kannaujia (since deceased) was in a serious condition, hence could not have given any declaration in that state. Therefore, the entire facts and evidence available on record clearly go to show that there is a strong prosecution story with credit worthy evidence proving the prosecution case, hence the impugned judgment and order of the trial Court based on illegal and perverse finding is liable to be set aside.

11. After considering the evidence, material on record and hearing counsel for the parties, the trial Court acquitted the accused-respondents vide impugned

judgment and order dated 20.9.2014 holding that the prosecution has failed to prove its case beyond all reasonable doubts.

12. On perusal of the impugned judgment of the trial Court, evidence as well as the record it appears that the incident is said to have taken place on 23.11.2010 at about 9.15 P.M. at Chauphatka bridge whereas the report was lodged at P.S. Khuldabad on 24.11.2010 at 00.10 A.M. against two unknown persons. Complainant Neeraj Kumar Kannaujia (PW-1) in his evidence has stated that he had seen the assailants for the first time at Dhobi Ghat where he used to go off and on along with his father; that neither he nor his father were having any land in their name at Dhobi Ghat and that there was a dispute with the accused persons, who wanted to grab the land of Ghobi Ghat on which accused Sunil Kumar Kaushik had made encroachment and had started running a shop dealing in footwear. Ramesh Chandra Kannaujia (since deceased) had opposed this whereupon the accused persons had threatened him with dire consequences.

13. PW-1 has further stated in his oral evidence that when his father sustained bullet injuries he was in a conscious state and speaking but had not told the names of the assailants to him or any other members of his family. He also stated that he knew the names of the assailants from before. There is no reason given by him as to why he did not mention the names of the accused persons in the FIR if he knew them from before.

14. Similar is the statement of Arjun Lal (PW-2) who is brother of the deceased- Ramesh Chandra Kannaujia. He has stated in his evidence that when deceased was got admitted in Colvin hospital he was speaking but neither he nor any persons present there, had enquired from the deceased as to who had attacked and caused bullet injuries. It may be pointed out here that if injured is in a conscious state and is aware of the assailants surrounded by his family members or well wishers as per prosecution story then he will certainly tell them the names of the assailants. Therefore, his statement of the witness appears to be very unnatural

15. The dying declaration of deceased-Ramesh Chandra Kannaujia is said to have been recorded by I.O. Sri Anjani Kumar Mishra on 24.11.2010 at 12.00 in the night. From the statement of Dr. S.K. Dubey, (PW-11) it appears that he was kept on ventilator. He has stated that the patient who is kept on ventilator, will not be in a position to speak. Doctor treating the injured at Jeevan Jyoti Hopsital has not given any certificate that he was in a conscious state to give statement. The Doctor could have also recorded the dying declaration of the injured but he has not done so. From paper nos. (Ex.Ka-21 and Ex.Ka-22) issued by Dr. Ashok Kumar Srivastava of Jeevan Jyoti Hospital it appears that the injured was not in a position to speak due to tubes in his throat and mask of ventilator covering his face but was also not examined by the prosecution to prove that the injured was in a position to speak. Arjun Lal (PW-2) has stated that the dying declaration of his brother was recorded by the I.O. Sri Anjani Kumar Mishra (PW-4) in his evidence has stated that on 24.11.2010 at 12.30 when he reached Jeevan Jyoti Hospital in the night

he had to take permission from the Doctor for going in the ICU room. He has also stated that the dying declaration of injured was recorded by Munshi Purshottam Pandey on his dictation in the hospital but he was not examined by the prosecution. In this situation, the I.O. could have got his dying declaration recorded by a Magistrate but it has not been done in the instant case.

established from the statements of P.W.2 and P.W.4 that injured was not in a position to give his statement. The trial Court has therefore, rightly disbelieved the dying declaration of the deceased recorded by the I.O. It is also significant to note that the blood stained clothes of the deceased were neither sent for forensic test nor the same were produced before the trial Court.

17. Raj Kumari (DW-1) has stated in her evidence that accused Sunil Kumar Kaushik is the father-in-law of her daughter. He along with his family members had come to attend the Tilak ceremony of Ramu on 23.11.2010 at 7.00 P.M. at Ashok Nagar. Dinner at Tilak ceremony took place till 12.00 in the night and that she saw accused Sunil Kumar Kaushik had not gone any where else during this period i.e. he had stayed there during the whole of the ceremony till 12.00 midnight. Pradeep Chaudhari (DW-2) and Suresh Mahajan (DW-3) in their statements have stated that on 23.11.2010 in the Tilak ceremony of Ramu Gautam son of Banshi Lal at Ashok Nagar the accused persons were present and accused Sunil Kumar Kaushik had stayed there during the whole night. There is nothing in their statements which may indicate that the accused persons were not present in the Tilak ceremony, the night of 23.11.2010 at between 8.00 to 9.30 P.M.

16. The Apex Court in the case of Murlidhar alias Gidda and others versus State of Karnataka, 2014 (2) SCC (Crl.) 690 has held that if a dying declaration of the injured was recorded by a Constable on the dictation of I.O. it will not be a dying declaration in the eye of law. Hence, in the facts of this case it is

when the murder of Ramesh Chandra Kannaujia was committed.

18. In so far as the recovery of country made pistol from the possession of accused Sunil Kumar Kaushik is concerned, it has come in the evidence of constable Kalp Nath Singh (PW-7) that the colour of the country made pistol was white steel whereas S.I. Ram Asre Mishra (PW6) in his evidence has stated that the colour of country made pistol was iron and not in steel colour. The rulings cited by the learned counsel for the appellant are not applicable to the facts and circumstances of the present case and are clearly distinguishable.

19. From the above discussions, we find that there are material contradictions in the statements of prosecution witnesses and the medical evidence. No independent witness has been examined by the prosecution.

20. In our considered opinion, the trial Court has not committed any illegality or infirmity in acquitting the accused persons through the impugned judgment and order dated 20.9.2014, hence requires no interference by this Court.

21. For the reasons stated above, the Criminal Appeal lacks merit and is dismissed at the admission stage itself.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ASHOK PAL SINGH, J.

Special Appeal No. 445 of 2011

Bhuneshwar Rai ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava, Sri Swarn Kumar Srivastava

Counsel for the Respondents:
C.S.C.

U.P. Civil Services Regulation-370- Pensionary benefit-deniel in garb of Regulation 370-identical provision of Punjab State government-quashed-affirmed by Hon'ble Supreme Court-further Hon'ble Supreme Court clarified-Regulation 370 to be read in the line of judgment of Apex Court-held-work charge employee working for more than 10 years continuously-entitled for pension benefit.

Held: Para-13
For all these reasons the dispute in the present special appeal is no longer res-integra. The appellant has put in more than 10 years regular service as work charge employees w.e.f. 26.3.76 to 30.4.2006, hence he is entitled to the benefit of pension etc. in view of the law stated above.

Case Law discussed:
2010-Laws (SC)-2-40; (2010 (1) ADJ-329 (All) (LB); (2006 (1) ESC 611 (All)(DB); (2006 (6) ADJ-384 (DB).

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the parties and perused the record.

2. The appellant has filed this intra court appeal challenging the validity and correctness of the judgment and order dated 3.3.2011 passed by the Writ Court in Civil Misc. Writ Petition No. 43822 of 2008, Bhuneshar Rai versus the State of U.P. and others, whereby the aforesaid writ petition had been dismissed.

3. Brief facts giving rise to the instant appeal are that the appellant was working in work charge establishment as Chaukidar/helper since 26.6.1976 and continued to work as such till 30.4.2006. The proceedings for regularization was initiated by the respondents in April, 2006. The Executive Engineer issued letter dated 18.4.2006 directing the appellant to produce the certificates of educational qualification etc. for considering his case for regularization on 25.4.2006 so that formality could be completed. He retired on attaining age of superannuation on 30.4.2006.

4. It is contended that appellant ought to have been regularized in April, 2006 and that his entire services from 26.6.1976 be counted for his pension and other retiral benefits.

5. In support of his aforesaid contention, learned counsel for the appellant has relied upon the judgment rendered by the Apex Court in the case of Punjab State Electricity Board and another versus Narata Singh, 2010-Laws (SC)-2-40, which has been relied upon by the learned Single Judge of this Court in the case of Mohd. Mustafa versus State of

U.P., (2010 (1) ADJ-329 (All)(LB). holding that where the petitioner has put in 23 years of service including 113 months and 11 days i.e. 9 years 5 months & 11 days of regular service then denial of pension for not having completed 10 years of regular service, was not proper. In that case, the Court directed the respondents to grant pensionary benefit to the petitioner considering him to have completed 10 years of regular service and pay him regularly every month from the date of retirement. The State of U.P. preferred an appeal against the aforesaid judgment in re: Mohd. Mustafa versus State of U.P.(Special Appeal Defective No. 254 of 2013), State of U.P. and others versus Prem Chandra and others wherein the Court relying upon the judgment of the Apex Court in Punjab Electricity Board (supra) vide its judgment dated 13.5.2013 held that the provisions of regulation 370 of the U.P. Civil Service Regulation have to be read down in line with the judgment of the Apex Court. Aggrieved , the State of U.P. preferred SLP (Civil) No. CC 22271 of 2013, State of U.P. and others versus Prem Chandra and others before the Apex Court, which was dismissed vide judgment and order dated 7.1.2014.

6. We may also refer to the judgments rendered in the cases of Board of Revenue and others versus Prasidh Narain Upadhyaya, (2006 (1) ESC-611 (All) (DB) and Bansh Gopal versus State of U.P., (2006(6) ADJ-384 (DB).

7. Learned Standing counsel does not dispute this legal position but contends that the appellant's case is not covered by the Government Order dated 1.7.89 which required that pension shall be payable also to temporary employee who have rendered at least 10 years of regular service; that the appellant cannot be said to have rendered 10 years regular service since he was taken into regular service from work-charge establishment only by order dated 12.10.1999 and he retired on 21.5.2005.

8. Before considering the case laws we may reproduce the G.O. dated 1.7.1989.

"vLFkk;h lsodksa gsrq isa'kujh ykHk

mRrj izns'k ljdkj

la0 lk& 3&1152@nl&915@89

foRr ¼lkekU;½ vuqHkkx&3 y[kuÅ fnukad% 1 tqykbZ 1989

dk;kZyd&Kki

fo"k;& vLFkk;h ljdkjh lsodksa dh lsok fuo'Rr@eqR;q ij isa'kujh ykHkksa dh vuqeU;rkA

mi;qZDr fo"k; ij v/kksgLrk{kjh dks ;g dgus dk funsZ'k gqvk gS fd flfoy lfoZl jsxqys'ku ds vuqPNsn 368 dh O;oLFkk ds vuqlkj jkT; ljdkj ds vUrxZr dh x;h lsok isa'ku gsrq rc rd vgZ ugh ekuh tkrh gS tc rd fd ljdkjh lsod fdlh in ij LFkk;h u gks x;k gksA ljdkjh lsodksa ds ;Fkk le; LFkk;hdj.k fd;s tkus gsrq 'kklu ds fo|eku vkns'kksa ds ckotwn dqN ekeyksa esa izfdz;k lEcU/kh vis{kk;s iwjh u gks ikus ds dkj.k lEcfU/kr deZpkjh LFkk;h gq, fcuk gh vf/ko"kZrk ij lsokfuo'Rr gks tkrs gS ftlls mUgs isa'kuh; ykHk vuqeU; ugh gSA

2& mijksDrkuqlkj vLFkk;h jgrs gq, lsokfuo'Rr gks tkus ds dkj.k ljdkjh lsodks dks gksus okyh dfBukb;ksa dks nwj fd;s tkus dk iz'u dkQh le; ls 'kklu ds fopkjk/khu jgk gS vkSj lE;d~ fopkjksijkUr jkT;iky egksn; us lg"kZ ;g vkns'k iznku fd;s gS fd ,sls ljdkjh lsodks dh ftUgksusa de ls de 10 o"kZ

dh fu;fer lsok iw.kZ dj yh gks] vf/ko"kZrk ij lsok fuo‘Rr gksus vFkok l{ke fpfdRlk izkf/kdkjh }kjk vkxs lsok djus gsrq iw.kZr;k v{ke ?kksf"kr dj fn;s tkus ij vf/ko"kZrk@v’kDrrk isa’ku lsok fuo‘fRr xzsP;qVh rFkk ikfjokfjd isa’ku mlh izdkj ,oa mUgh njksa ij ns; gksxh tSlk fd LFkk;h deZpkfj;ksa dks mUgh ifjfLFkfr;ksa esa laxr fu;eksa ds vUrxZr vuqeU; gksrh gSA

3& ;g O;oLFkk mu ekeyksa esa Hkh ykxw gksxh tgkW vLFkk;h jgrs gq, 20 o"kZ dh lsok iw.kZ djus vFkok 45 o"kZ dh vk;q iw.kZ djus] tks Hkh igys gks] ds mijkUr ewy fu;e 56 ds vUrxZr LosPN;k lsok fuo‘Rr gksus dh vuqefr iznku dh x;h gksA

4& ;g vkns’k 1&6&89 ls ykxw ekus tk;saxsA mDr fnukad ls iwoZ vLFkk;h jgrs gq, vf/ko"kZrk@v’kDdrrk ij vFkok LosPN;k lsokfuo‘Rr gks pqds ,sls deZpkfj;ksa ds ekeyksa es tks mDr fnukad dks thfor gks] laxr O;oLFkkvksa ds vUrxZr fey pqdh xzsP;qVh] ;fn dksbZ gks] dk dksbZ iqujh{k.k ugh gksxhA ,sls ljdkjh lsodksa dks tks vLFkk;h jgrs gq, fnukad 1&6&89 ds iwoZ lsokfuo‘Rr gks pqds Fks vkSj ftUgs mlds dkj.k dksbZ isa’ku vuqeU; ugh gqbZ Fkh] fnukad 1&6&89 ls lsokfuo‘Rr ds iwoZ lsokfuo‘fRr deZpkfj;ksa ds ekeyksa es vkSlr ifjyfC/k;ksa dk vk’k; ml osru ls gS tks mUgsa ewy osru 9 ¼21½ ds vUrxZr fey jgk Fkk rFkk 1&1&86 vFkok mlds mijkUr ds ekeyksa esa ifjyfC/k;ksa dk vk’k; ml osru ls gs tks ewy fu;e 9 ¼21½ ¼1½ esa ifjHkkf"kr gS fd 50 izfr’kr dh nj ls ml n’kk esa isa’ku vuqeU; gksxh tc lsokfuo‘fRr ds iwoZ mUgksus 33 o"kZ dh vgZdkjh lsok iw.kZ dj yh gksA ;fn vgZdkjh lsok 33 o"kZ ls de jgh gks rks isa’ku mlh vuqikr es de gks tk;sxhA bl izdkj vkxf.kr ,sls deZpkfj;ksa dh isa’kuks dh tks fnukad 1&1&86 ds iwoZ lsokfuo‘Rr gks pqds Fks foRr foHkkx }kjk fuxZr ’kklukns’k la[;k lk&4&1120@nl&37&301@1987 fnukad 28&7&87 ds jsMh&jsdulZ Hkkx&1 ,oa Hkkx&2 tSlh fLFkfr gks ds vuqlkj 608 ewY; lwpdkad ds cjkcj eagxkbZ jkgr dk ykHk nsrs gq, iqujhf{kr dj fn;k tk;sxk vkSj fnukad 1&6&89 ls iqujhf{kr /kujkf’k dk ykHk fn;k tk;xkA

5& bl dk;kZy; Kki ds vUrxZr isa’ku dk fdlh ,sls deZpkjh dks jkf’kdj.k vuqcU/k ugh gksxk tks fnukad 31&5&1974 vFkok mlds iwoZ lsokfuo‘Rr gqvk gksA ;fn bl dk;kZy; Kki ds vUrxZr fdlh ,sls deZpkjh dks isa’ku nh tk; tks 31&5&1974 ds mijkUr lsokfuo‘Rr gqvk gks rks mls 1&6&89 ds mijkUr vxyh tUe frfFk ds le; mldh vk;q ds le:i nj ij ewy isa’ku dh /kujkf’k ij jkf’kdj.k vuqeU; gksxk vkSj mldh isa’ku ls de dh x;h /kujkf’k mldks okLrfod lsokfuo‘Rr fnukad ls 15 o"kZ ckn fjLVksj dj nh tk;sxhA

6& fnukad 1&8&1989 vFkok mlds ckn lsokfuo‘fRr@eqR;q ls ftu ekeyksa es mi;qZDr O;oLFkk dk ykHk fn;k tk;xk] muesa dkfeZd vuqHkkx&1 ds ’kklukns’k la[;k 19&8&1980 dkfeZd&1&fnukad 29&4&89 ds vUrxZr vkuqrksf"kd dk ykHk ns; ugh gksxkA

Hkonh;]

fot; d‘".k lDlsuk] ¼izeq[klfpo½"

9. We may now proceed to consider the ratio laid in the judgments cited by the learned counsel for the appellant which has not been disputed by the learned Standing counsel.

10. In the case of Board of Revenue (supra) the respondent was appointed on the post of Collection Peon in 1962 on temporary basis and he was continued in

service till the date of his retirement in 1999. In that case, it has been held by the Court that even in cases where an employee may not have worked as a permanent employee but had worked regular for more than 10 years, he is entitled for pension and other retiral benefits in view of Fundamental Rules 56 and Paras 361, 465 and 465-A of Regulations. Mere fact that he was neither confirmed nor regularized in service would not take away his right to get pension which flows from law and also from period of more than 10 years of continuous service which cannot be ignored.

11. Similarly in the case of Bansh Gopal (supra) the appellant therein had put in only six years of regular service and had not rendered 10 years of service regularly. Previously, the appellant was engaged as Muster Roll employee in the establishment and thereafter he was taken under work-charge establishment. In the present case, the appellant was given regular appointment as class IV employee. After his superannuation it was contended by the respondent that he had *appellant cannot be said to have rendered 10 years regular service since he was taken into regular service from work-charge establishment only by order dated 12.10.1999 and he retired on 31.5.2005.*

20. An unreported judgment of Hon'ble Single Judge delivered on 22.2.2005 in Civil Misc. Writ Petition No. 53568 of 1999 (Shri Gangoo vs. Executive Engineer) is relied upon by the appellant also. No doubt there his Lordship allowed pension to the writ petitioner on the basis of temporary service and the reading of the judgment shows that his Lordship drew no distinction between temporary service and work-charge service. To this extent, we are in respectful disagreement with the opinion given by the Hon'ble Single Judge.

21. The writ petitioner-appellant cannot in any manner be granted pension on the basis of only six years of regular service.

22. The appeal is dismissed."

in fact put in six years of regular service and not 10 years of regular service as required in G.O. dated 1.7.1989, hence he was not granted pension.

12. Repelling this contention on consideration of the case laws and various provisions dismissing the writ petition the Court has held that in paragraph nos. 18 to 21 of the judgment thus:-

" 18. The relevant rules for payment of pension are contained in Civil Services Regulation. There is nothing inconsistent between Fundamental Rule 56 and Regulation 370 so as to not follow Regulation 370. According to Regulation 370, the services rendered by appellant in work charge establishment does not qualify for purposes of pension.

19. The appellant's case is also not covered by the Government Order dated 1.7.89. The Government Order required that pension shall be payable also to temporary employe who have rendered at least 10 years of regular service. The

13. For all these reasons the dispute in the present special appeal is no longer res-integra. The appellant has put in more than 10 years regular service as work charge employees w.e.f. 26.3.76 to 30.4.2006, hence he is entitled to the benefit of pension etc. in view of the law stated above.

14. Accordingly, the appeal is allowed and the impugned judgment and order dated 3.3.2011 is quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE OM PRAKASH-VII, J.

First Appeal No. 447 of 2014
Smt. Rekha Mishra & Anr. ...Appellants
Versus
Shiv Prasad Srivastava & Ors. Respondents

Counsel for the Appellants:
Sri Sandeep Kumar Srivastava, Sri Pranab Kr. Ganguly

Counsel for the Respondents:
Sri Anil Kr. Srivastava

C.P.C. Order VII Rule-11-read with Specific Relief Act-34-Rejection of Plaint-suit for declaration without possession-held-not maintainable-held Trail Court not committed any error-Appeal dismissed.

Held: Para-10
We do not find any error in the impugned order. The relief sought in the plaint has been referred hereinabove. The admitted fact is that the appellants were not in possession of one of the shop on the ground floor and the other on the first floor of the house in dispute, while the decree of declaration was being sought to declare the appellants as the sole and exclusive owners of the house no. 117/193/I, block, Navin Nagar, Kanpur Nagar, without seeking the relief of possession of those portions of the house which were not in the possession of the appellants.

Case Law discussed:
AIR 1993 SC 957; (2002) 7 SCC 559; (2003) 1 SCC 557; (2005) 7 SCC 510; (1993) Suppl. 3 SC 129; (2007) 14 SCC 535; (2013) 3 AWC (SC) 2213; AIR 1996 SC 642; (2005) 5 SCC 390: 2005 (2) SCCD 838:2005(2) AWC 1599 (SC)

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

1. Heard Sri P.K. Ganguly, learned counsel for the appellants and Sri M.D. Singh Shekhar, learned Senior Advocate, appearing on behalf of the respondents.

2. This is an Appeal against the order of the Civil Judge (Senior Division), Kanpur Nagar, dated 2nd August, 2014 by which the Suit no. 107/14, filed by the appellants, under Order VII, Rule 11 of the Code of Civil Procedure (In short 'CPC'), has been rejected on the ground that the suit for declaration without seeking the relief of possession is not maintainable.

3. The appellants filed the Suit No. 107 of 2014, seeking following reliefs:

"A) A decree for Declaration that the plaintiffs are the sole and exclusive owners of the premises No. 117/193, I-block, Navin Nagar, Kanpur Nagar, fully detailed and bounded below.

B) A decree for Permanent Injunction restraining the defendants, their agents servants and assigns from causing any interference in the free ingress and egress by the plaintiffs and from forcefully dispossessing the plaintiffs from the suit accommodation viz ground floor portion, excluding one room on the front side of premises no. 117/193, I-block, Navin Nagar, Kakadeo, Kanpur, both fully detained at the foot of the plaint, and from taking its illegal possession till disposal of the suit.

C) Cost of the suit be passed in favour of the plaintiffs and against the defendant.

D)Any other relief which this learned court deems fit and proper in the

circumstances of the case may also be passed in favour of the plaintiffs against the defendant."

4. It appears that the appellants also moved an application, under Order 39, Rule 1 of the CPC, seeking the interim relief. The court below, after hearing both the parties, granted interim injunction on 15th April, 2014. It further appears that the respondent-defendants filed an application, under Order VII, Rule 11 of the CPC, with the prayer to reject the plaint as the suit is barred by the provisions of Section 34 of the Specific Relief Act. The respondent-defendants also filed FAFO No. 1512 of 2014 before this Court against the order dated 15th April, 2014, passed by the Trial court, granting interim injunction. This Court, by the order dated 20th May, 2014, has directed the Trial court to dispose of the application, under Order VII, Rule 11 of the CPC pursuant to which present impugned order has been passed by the Trial court.

5. Learned counsel for the appellants submitted that in the house in dispute, the respondent-defendants are in possession of one room on the ground floor and one room on the first floor. Rest portion of the house in dispute is in the possession of the appellants.

6. There is no dispute about this fact. The Trial court has rejected the suit on the ground that in the suit, relief of declaration, declaring the plaintiffs as the sole and exclusive owners of premises no. 117/193, I-block, Navin Nagar, Kanpur Nagar, has been sought, though the defendants are in possession of one of the room on the ground floor and one of the room on the first floor, but no relief has been sought seeking possession of the said room on the ground floor and the other room on the first floor. Therefore, the suit is barred by Section 34 of the Specific Relief Act. Reliance has been placed by the Trial court on the decisions of the Apex Court in the case of Vinay Krishna v. Keshav Chandra, reported in AIR 1993 SC 957 and the case reported in AIR 2002 SC 1499.

7. Learned counsel for the appellants submitted that no opportunity has been given to the appellants to amend the plaint. If the opportunity would have been afforded to them, they would have would have amended the plaint. The reliance is being placed on the decision of the Apex Court in the case of Sampath Kumar v. Ayya Kannu and another, reported in (2002) 7 SCC 559. He further submitted that under Order VII, Rule 11 of the CPC, the application, under Order VII, Rule 1 is to be decided on the basis of the averments made in the plaint and not on the basis of the plea taken in the written statement. To strengthen his submission, learned counsel placed reliance on the decision of the Apex Court in the case of Saleem Bhai and others v. State of Maharashtra and others, reported in (2003) 1 SCC 557. The submission is that Order VII, Rule 11(d) applies only in a situation where the statement, as made in the plaint, without any doubt or dispute, shows that the suit is barred by any law in force. It does not apply in a case where disputed questions are involved. Reliance is being placed on a decision of the Apex Court in the case of Popat and Kotecha Property v. State Bank of India Staff Association, reported in (2005) 7 SCC 510.

8. Learned counsel for the respondents submitted that it is apparent from the plaint that a decree for

declaration to declare the appellants as the sole and exclusive owners of house no. 117/193, I-block, Navin Nagar, Kanpur Nagar, has been sought. Admittedly, one of the shop on the ground floor and on the first floor are in possession of the respondents. Therefore, without seeking the relief for possession of those portions, which are not in the possession of the appellants, suit for declaration is barred by Section 34 of the Specific Relief Act and proviso to Section 42. To buttress the submission, Reliance is being placed on the decision of the Apex Court in the case of Vinay Krishna v. Keshav Chandra, reported in (1993) Suppl. 3 SC 129. He submitted that ample time was available to the appellants to move the amendment application to amend the relief, if they so desired, but no such amendment application has been moved. Therefore, the court below proceeded to decide the suit on the basis of the admitted facts and the averments made in the plaint. It is submitted by Sri Shekhar that the appellants are not remedy-less, even after dismissal of the present suit, it is open to them to file a fresh suit as provided under Order 7, Rule 13 of the CPC.

9. We have considered rival submission and perused the record.

10. We do not find any error in the impugned order. The relief sought in the plaint has been referred hereinabove. The admitted fact is that the appellants were not in possession of one of the shop on the ground floor and the other on the first floor of the house in dispute, while the decree of declaration was being sought to declare the appellants as the sole and exclusive owners of the house no. 117/193/I, block, Navin Nagar, Kanpur Nagar, without seeking the relief of possession of those portions of the house which were not in the possession of the appellants.

11. Section 34 of the Specific Relief Act reads as follows:

34. Discretion of court as to declaration of status or right.-Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.--A trustee of property is a "person interested to deny" a little adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

12. Section 34 is pari materia to Section 42 of the Specific Relief Act, 1877 before the amendment.

13. In the case of Vinay Krishna v. Keshav Chandra (Supra), the Apex Court categorically held that if the plaintiff had been in possession, then a suit of mere declaration would be maintainable. The Apex Court in paragraph 14 of the said judgment held as follows:

"14- From the reading of the plaint it is clear that the specific case of the plaintiff Jamuna Kunwar was that she was in exclusive possession of property bearing No.

52 as well. She thought that it was not necessary to seek the additional relief of possession. However, in view of the written statement of both the first and the second defendant raising the plea of bar under Section 42, the plaintiff ought to have amended and prayed for the relief of possession also. Inasmuch as the plaintiff did not choose to do so she took a risk. It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There was also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration."

14. In the case of Mehar Chandra Das v. Lal Babu Siddiqui, reported in (2007) 14 SCC 535, the apex Court held as follows:

"11. The appellant defendant, therefore, had been in possession of the suit property. In that view of the matter the respondent-plaintiffs could seek for further relief other than for a decree of mere declaration of title.

In Muni Lal v. Oriental Fire and General Insurance Co. Ltd. And another, AIR 1996 SC 642, this Court dealt with declaratory decree, and observed that "mere declaration without consequential relief dos not provide the needed relief in the suit; it would be for the plaintiff to seek both reliefs. The omission thereof mandates the Court to refuse the grant of declaratory relief."

In Shakuntla Devi v. Kamla and others, (2005) 5 SCC 390 : 2005 (2) SCCD 838 : 2005 (2) AWC 1599 (SC), this Court while dealing with the issue held:

12. The High Court, in our opinion, committed a manifest error in not relying the decision of this Court in Vinay Krishna. The said decision categorically lays down the law that if the plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable."

15. In a recent case, reported in (2013) 3 AWC (SC) 2213, Venkata Raja and others v. Vidyane Doureradjaperumal (D) through Lrs and others, the Apex Court held as follows:

"17. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide : Prakash Chand Khurana etc. v. Harnam Singh and others, AIR 1973 SC 2065 and State of M.P. v. Mangilal Sharma, AIR 1998 SC 743).

".....a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree."

18. In view of the above, it is evident that the suit filed by the appellants/plaintiffs was not maintainable, as they did not claim consequential relief. The respondent nos. 3 and 10 being admittedly in possession of the

suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property . Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/plaintiffs was not in the nature of a relief. A worshiper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought therein was for the benefit of the appellants/plaintiffs themselves.

As a consequence, the appeals lack merit and, are accordingly dismissed. There is no order as to costs."

16. In view of the law laid down by the Apex Court, we are of the view that the Trial court has not committed any error in rejecting the suit as barred by Section 34 of the Specific Relief Act.

17. The decisions cited by the learned counsel for the appellants, referred hereinabove, are not applicable to the present case and are of no help to the appellants. The appellants are not remedy-less. It is open to them to file a fresh suit, as provided under Order VII, Rule 11 of the CPC.

18. In view of what has been discussed above, in the result, the Appeal, being devoid of merits, fails and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ASHOK PAL SINGH, J.

Special Appeal No. 497 of 2013

Seema Srivastava ...Appellant
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C. Sri P.D. Tripathi

Constitution of India, Art.-226-Cancellation of appointment-part time teacher (Art & Music)-honorarium payable subject to verification of educational testimonials-admittedly appellant/petitioner-not possess TET certificate-contention that no requirement of TET-under Basic Educations (teacher) Service Rules 1981-held-in absence of requisite qualification-once participated in pursuance of advertisement-joined with open eye-can not be allowed to question the validity of such requirement of advertisement-Single Judge rightly refused to interfere-appeal dismissed.

Held: Para-12

We have considered the rival contentions of learned counsel for the parties and in our opinion, the appellant-petitioner on one hand, cannot take advantage of advertisement for appointment and on the other hand, challenge the advertisement. After verification of her educational testimonials she has been found to be unqualified for the post. Hence, she cannot now turn around now and challenge the advertisement as well as the order of termination passed on the ground that she was ineligible for appointment for the post in question. It is always open to the college to invite applications from the candidates who are eligible and having better qualifications than the minimum qualifications prescribed in the statute itself. The petitioner was found ineligible for appointment on the post in question, hence her appointment has rightly been cancelled by the authority.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard learned counsel for the parties and perused the record.

2. This intra court appeal has been preferred by the appellant challenging the validity and correctness of the judgment and order dated 12.9.2012 passed by the Writ Court in Civil Misc. Writ Petition No. 46336 of 2012, Seema Srivastava versus State of U.P. and others, whereby the aforesaid writ petition had been dismissed.

3. Relevant facts giving rise to the instant appeal are that the appellant herein applied for consideration of her candidature for appointment as part time teacher (Art and Music). In terms of the advertisement, the incumbent was required to be trained graduate. After selection proceedings, the District Basic Education Officer with concurrence of the District Magistrate issued letter of appointment to the petitioner-appellant. As per terms and conditions of appointment letter, her appointment was temporary and in case her work and conduct was not found satisfactory, her services were liable to be terminated without any notice. It was also provided that honorarium was payable to her only after verification of her educational testimonials.

4. It appears that on verification of the testimonials, it was found that the petitioner-appellant was not at all a trained graduate, hence a show cause notice was given to her. She preferred to challenge the same in Civil Misc. Writ Petition No. 22487 of 2012, which was disposed of directing the authority concerned to take a decision in the matter. Subsequently, her appointment was thereafter cancelled by order dated 7.6.2012. The aforesaid writ petition no. 46366 of 2012 was preferred by her challenging the order dated 7.6.2012, which was dismissed by the Writ Court vide its impugned judgment and order dated 12.9.2012.

5. For ready reference the relevant extract of the impugned judgment and order dated 12.9.2012 reads thus:-

"Petitioner has rushed to this Court with request to quash the order dated 07.06.2012, wherein District Basic Education Officer, Kaushambi has proceeded to pass order mentioning therein that the petitioner had been selected as part time teacher (Art and Music) and when verification proceedings have been undertaken, then it has been reflected that the petitioner was not at all eligible to be selected, as minimum eligibility criteria is not being fulfilled by her.

On show cause notice being issued on 04.04.2012, petitioner filed writ petition No.22487 of 2012, wherein this Court asked the authority concerned to take decision in the matter. Thereafter decision has been taken cancelling her candidature.

Sri Ranjeet Asthana, learned counsel for the petitioner, contended with vehemence that in the present case appointment in question had been made with the concurrence of the District Magistrate, as such the District Basic Education Officer has no authority to cancel the appointment so made, and coupled with this petitioner fulfills the eligibility criteria, as such action taken is bad.

Countering the said submissions, learned standing counsel as well as Sri Jayram Pandey, Advocate, on the other hand, contended that the petitioner lacks minimum eligibility criteria, as such the District Basic Education Officer has rightly cancelled her candidature.

After respective arguments have been advanced, factual situation which has so emerged in the present case, is that the petitioner had applied for consideration of her candidature for appointment as part time teacher (Art & Music). As per advertisement, the incumbent was required to be trained graduate. Selection proceedings were finalized, whereupon with due concurrence of the District Magistrate, the District Basic Education Officer proceeded to issue appointment letter to the petitioner. As per terms and conditions of the appointment letter, the appointment in question was temporary and in case work and conduct of the incumbent was not found satisfactory, same was liable to be terminated without any notice, and honourarium was to be ensured only verification of educational testimonials. On verification being conducted, it was found that the petitioner was not at all trained graduate, and in view of this show cause notice was given to her and thereafter her candidature has been cancelled.

The argument, that the District Basic Education Officer has no authority to cancel the appointment,is misconceived, for the simple reason that once the District Basic Education Officer had proceeded to issue appointment letter in favour of the petitioner, then the District Basic Education Officer has every authority to vary, rescind or modify the aforesaid appointment letter, specially when honourarium has to be ensured to the incumbent only after verification of the educational testimonials. In verification proceeding the record of the petitioner has been examined and it has been found that the petitioner has got no training qualification to her credit.

Petitioner is contending before this Court that apart from her graduate degree, she has got to her credit certificate in Drawing Grade Examination issued by Directorate of Art & Chairman, Art Examination Committee, Maharashtra State Mumbai. Said certificate, by no stretch of imagination, can be equated with training qualification.

Once such is the factual situation that the petitioner lacks minimum eligibility criteria, then the decision taken cannot be faulted. In view of the above facts, writ petition is dismissed."

6. The impugned judgment and order dated 12.9.2012 passed by the Writ Court is challenged on the ground that the fact escaped from the notice of the Court that under the U.P. Basic Education (Teachers) Service Rules, 1981 the subject of Art has not been specified, hence qualification of teacher (Art and Music) has to be the qualification as provided under the regulation framed under the U.P. Intermediate Education Act, 1921; that the Writ Court returned no finding regarding information which was sought by the appellant from the U.P. Secondary Education Service Selection Board for qualification of Assistant Teacher in the subject of Art and Music; that the Writ Court has failed to take into consideration the generality of acquisition of trained graduate as a qualification sine-qua-non for the purpose of recruitment of Assistant Teacher (Art & Music) as mentioned in the

advertisement for the purpose of recruitment to be an essential qualification and that said qualification was not either in consonance with the provisions of U.P. Basic Education (Teachers) Service Rules, 1981 or the regulations framed under the U.P. Intermediate Education Act, 1921.

7. Learned counsel for the appellant submits that the Writ Court has failed to take into consideration that as the petitioner had passed Intermediate Grade Drawing Examination (I.G.D.), there was no requirement of an incumbent to be a trained teacher for the purpose of appointment as Assistant Teacher in the Art and Music which is recognized only at High School level for appointment as Assistant Teacher where Basic Education in subject of Art or any other subject is not recognized. It is stated that this very important aspect of the matter has been overlooked by the Writ Court while passing the impugned order dated 12.8.2012.

8. Lastly, it is submitted that in any view of the matter the impugned order dated 12.9.2012 of the Writ Court affirming the order dated 7.6.2012 passed by the District Basic Education Officer is unsustainable, unrealistic and unreasoned in the eye of law and as such is liable to be quashed.

9. Sri P.D. Tripathi, learned counsel for the private respondents and the learned Standing counsel for respondent nos. 1 to 4 have supported the findings recorded by the Writ Court in the impugned judgment and submits that no illegality or infirmity in the order impugned has been shown by the petitioner, hence no interference is required by this Court.

10. After hearing learned counsel for the parties and on perusal of the record it appears that the appointment of the appellant was made pursuant to an advertisement as part time teacher in the college in question. In the writ petition she had prayed for the following reliefs.

I. "Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 7.6.2012 issued by the respondent no.5, which is contained as Annexure-7 to this writ petition ;

II. Issue a writ, order or direction in the nature of certiorari to quash the column 3 of the above said impugned advertisement dated 02.11.2011 published in daily newspaper Dainik Jagran which is contained as Annexure-1 to this writ petition in which the educational qualification mentioned Trained Graduate against the column 2 with respect to petitioner only '

III. Issue a writ, order or direction in the nature of mandamus directing the respondent authorities to permit the petitioner function on the post of part time Art Teacher in Kastoorba Gandhi Balika Vidyalya, Nevada, Kaushambi, during the pendency of the writ petition ;

IV. Issue a writ, order or direction in the nature of mandamus directing the respondent authorities to release the arrears of the salary and salary of the petitioner time to time which falls due continuously ;

V. Issue any other suitable order or direction which this Court may deem fit and proper in the circumstances of the case;

VI. To award the cost of writ petition in favour of the petitioner."

11. It appears that on verification of educational testimonials of the appellant it

was found that she was not having requisite qualification for the post in question as advertised. However, she accepted the appointment with open eyes without even a murmur and rushed to this Court and challenged the advertisement as well as the order dated 7.6.2012 by which her services were terminated, praying that the respondents may be directed to permit her to function as a part time teacher in Kastoorba Gandhi Balika Vidyalya, Nevada, Kaushambi and make payment of her salary.

12. We have considered the rival contentions of learned counsel for the parties and in our opinion, the appellant-petitioner on one hand, cannot take advantage of advertisement for appointment and on the other hand, challenge the advertisement. After verification of her educational testimonials she has been found to be unqualified for the post. Hence, she cannot now turn around now and challenge the advertisement as well as the order of termination passed on the ground that she was ineligible for appointment for the post in question. It is always open to the college to invite applications from the candidates who are eligible and having better qualifications than the minimum qualifications prescribed in the statute itself. The petitioner was found ineligible for appointment on the post in question, hence her appointment has rightly been cancelled by the authority.

13. We, therefore, do not find any illegality or infirmity in the impugned judgment and order dated 12.9.2012 of the Writ Court dismissing the writ petition preferred by the appellant-petitioner and affirming the order dated 7.6.2012 passed by the District Basic Education Officer, Kaushambi.

14. For all the reasons stated above, the appeal is dismissed. Parties to bear their own costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2014

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Revision No. 602 of 2010

Sri Vikas Gupta ...Revisionist
Versus
M/s Shri Ram Mahadev Prasad & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ramendra Asthana, Sri Vijay Kumar Ojha, Sri M.L. Maurya

Counsel for the Opp. Parties:
Sri M.K. Gupta, Sri Arun Kumar Shukla, Sri Abhinav Shukla

C.P.C. Order XX Rule 4 & 5-Framing of issues-proceeding before judge small causes court, being summery in nature with limited pecuniary jurisdiction-sole purpose of expeditions disposal-framing issues-held-not necessary like regular civil suits.

Held: Para-12 & 13

12. The distinction between sub rule (1) and (2) of Rule 4 of Order XX of the CPC by itself is sufficient to indicate that the Small Causes Court is a summary proceedings and detailed reasons are not required to be given in judgements. The point for determination does not need for framing an issue and there is no need for the procedure applicable for the regular civil suits. In case the detail procedure of regular suit is also followed in the matter of the Small Causes Court, the very object of the Act No. 9 of 1887 shall be frustrated. Therefore, the submission of the learned Counsel for the revisionist does not stand to reasons.

13. After careful consideration of the matter, I am of the view that framing of the issue in the suits under the Act No. 9 of 1887 is not mandatory. It is a discretion of the court to formulate some points for determination, if it needs it is necessary to meet the ends of justice, but framing of the issue like a regular suit, as stated above, would be against the object of the Act to dispose of small matters expeditiously.

Case Law discussed:
1982 (1) ARC 356; 2013 (2) ARC 376.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. This is a defendant's Civil Revision under Section 25 of the Provincial Small Cause Courts Act, 1887 (Act No. 9 of 1887) against the order dated 30.10.2010 passed by the learned Additional District Judge/ Judge, Small Cause Court, Kanpur Nagar, whereby his application (49-Ga) for framing the issues has been rejected.

2. The essential facts are; the applicant / revisionist is a tenant of the premises bearing Municipal No. 361, Harrisganj, Cantt., Kanpur Nagar. The landlord-opposite party gave a notice under Section 106 of the Transfer of Property Act, 1882 (Act No. 4 of 1882) to the tenant-revisionist for eviction and arrear of rent. The landlord instituted SCC Suit No. 79 of 2007 in the court of Judge, Small Cause Court for recovery of arrears of rent and eviction. The applicant-defendant contested the suit by filing his written statement on 23 December 2009.

3. On 17 July 2010 the tenant-revisionist moved an application 49-Ga for framing the issues. The said application has been rejected by the Court of Small Causes vide impugned order dated 31.10.2010. Feeling aggrieved the tenant/ revisionist has filed the present revision.

4. Learned Counsel for the revisionist submits that a conjoint reading of the provisions of law contained in Section 15 of the Act No. 9 of 1887 and Order XIV Rules 4 & 5 of the Code of Civil Procedure, 1908 (for short, "the CPC") makes it clear that in the proceedings before the Judge, Small Cause Court, the issue should be framed before proceeding to decide the suit. He further urged that point for determination referred to in Rule 4(1) of the Order XX of CPC enjoins the Small Cause Court to frame the issue as the words "points for determination" have been used in the said Rule.

5. I have heard Sri Vijay Kumar Ojha, learned Counsel for the revisionist and Sri Arun Kumar Shukla, learned Counsel for the opposite parties.

6. The only issue, which falls for determination in the present revision, is whether in a suit filed under the provisions of the Provincial Small Cause Courts Act, 1887, is it imperative upon the Judge, Small Cause Court to frame the issues.

7. The Chapter III of the Act No. 9 of 1887 deals with the jurisdiction of the Courts of Small Causes. Section 15 enjoins that all suits of civil nature, of which the value does not exceed Rs. 500/- shall be cognizable by the court of small causes. (vide Uttar Pradesh Act 17 of 1991 in Section 15, for sub sections (2) and (3), has been inserted. The Section

15, as applicable in the State of U.P., reads thus;

"15. Cognizance of suits by Courts of Small Causes.---(1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the 1[State Government] may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order.2

State Amendment

3Uttar Pradesh.---In section 15, for sub-sections (2) and (3), substitute the following:-

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five thousand rupees shall be cognizable by a Court of Small Causes.

Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease, or for recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use and occupation thereof after the determination of the lease, the reference in this sub-section to five thousand rupees shall be construed as a reference to twenty-five thousand rupees.

Explanation.-- For the purposes of this sub-section, the expression 'building' has the same meaning as in Art. (4) in the Second Schedule."

8. From a perusal of the said Section it is manifest that the Small Cause Court has limited pecuniary jurisdiction. The intent of the legislature is manifest that the suits of small causes should be decided expeditiously. With the said view of the matter the detail procedure of the regular suit is not applicable.

9. This Court in the case of Dau Dayal Tandon v. Addl. District Judge, Naini Tal and others, 1982 (1) ARC 356 has held that Section 15 of the Act No. 9 of 1887 provides that the proceedings shall be summary in nature. Recently the said view has been reiterated by this Court in the case of Yasin and another v. Murari Lal, 2013 (2) ARC 376. Relevant paragraph in the case of Yasin (supra) reads as under;

"4. The suit in question is one under Section 15 of the Act and is of a summary nature. It is well settled that in a suit of such a nature it is not mandatory to frame issues. The provisions of Order XIV C.P.C. relating to settlement of issues are not applicable to proceedings before Small Cause Court in view of Order L Rule 1(a) C.P.C. as has been held in Dau Dayal Tandon Vs. Additional District Judge, Naini Tal and others 1982 ARC 356 and a series of decision thereafter. The only thing required is that the court below on consideration of the plaint case and the defence may indicate the points which arise for consideration."

10. As regards the submission of Sri Asthana that the Order XX Rule 4 and 5 of CPC makes it clear that the Judge, Small Cause Courts should frame the issue for determination hardly merit acceptance. The Order XX Rule 4 and 5 of CPC reads as under;

"44. Judgments of Small Cause Courts.---(1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

(2) Judgments of other Courts.--- Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. Court to state its decision on each issue.---In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit."

11. A simple reading of aforesaid Rules 4 and 5 make it clear that the judgment of a Court of Small Causes need not contain more than the points for of the Act to dispose of small matters expeditiously.

14. Resultantly, the order of the court below does not suffer any error hence Civil Revision is liable to be dismissed. Accordingly, it is dismissed.

15. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.09.2014

BEFORE

determination and the decision thereon, whereas judgements of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

12. The distinction between sub rule (1) and (2) of Rule 4 of Order XX of the CPC by itself is sufficient to indicate that the Small Causes Court is a summary proceedings and detailed reasons are not required to be given in judgements. The point for determination does not need for framing an issue and there is no need for the procedure applicable for the regular civil suits. In case the detail procedure of regular suit is also followed in the matter of the Small Causes Court, the very object of the Act No. 9 of 1887 shall be frustrated. Therefore, the submission of the learned Counsel for the revisionist does not stand to reasons.

13. After careful consideration of the matter, I am of the view that framing of the issue in the suits under the Act No. 9 of 1887 is not mandatory. It is discretion of the court to formulate some points for determination, if it needs it is necessary to meet the ends of justice, but framing of the issue like a regular suit, as stated above, would be against the object

THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.

Special Appeal No. 625 of 2008
Connected with Special Appeal (D) No. 186 of 2009, 662 of 2008, 669 of 2008 and Special Appeal No. 631 of 2008

Ravindra Nath Pandey (S/S 6985/2005) ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajan Roy, Sri Rahul Srivastava

Ranjana Agnihotri, Sudha Sharma

Counsel for the Respondent:
C.S.C., Sri Gyanendra Kumar Srivastava
Sri Y.K. Mishra

U.P. Revenue Consolidation Service Rules 1992-Rule 8(8) read with U.P. Government Servants Seniority Rules 1991-Rule-8(3)- Seniority-Assistant Consolidation Officer-appointed under promotion quota on 16.12.97-where as direct recruitment August 97-learned Single Judge held-promotee be placed above than direct recruitee-held-recruitment year according to Rule 2 of 1991 material-when Rota Rule available in Rule-preparation of seniority-it should be followed-to this extent order passed by Single Judge is modified.
Held: Para-31 & 37
31. So far as the mandate contained in Rule 2 of 1991 Seniority Rules to the effect where appointments are made both by promotion and direct recruitment on the result of one selection, seniority of promotee and direct recruits will be determined by a cyclic order, is concerned, since admittedly and ordinarily, in one selection, appointment and direct recruitment may not be done, then while construing the provisions harmoniously, the provision contained in Sub Rule (3) may be interpreted relating it to the year of recruitment as defined by Sub Rule (m) of Rule 3 of 1992 Rules. It means all persons who have been appointed by direct recruitment or by promotion in a recruitment year shall be entitled to be considered for seniority in pursuance to 1991 Seniority Rules. The seniority list shall contain the names of officers in order of their recruitment against substantive vacancy relating back to the recruitment year. The appointment should have been done in accordance with rules.

37. In (2000)7 SCC 561 Suraj Parkash Gupta and others versus State of J & K and others, Hon'ble Supreme Court held that even if on account of delay and lethargic attitude of the State Government, promotion and appointment is delayed, it does not lead to an inference that the quota rule has broken down and where there is no explicit provision with regard to rota rule, then rota rule may not be applied. Employees cannot claim rota merely on the basis of post and perks.

Case Law discussed:
(2001) 2 SCC 441; (2002) 8 SCC 409; (2002) 4 SCC 297; (2002) 4 SCC 105; UOI (2004) 1 SCC 256; A.P.SRTC (2004) 6 SCC 729; (2004) 11 SCC 625; (2004) 5 SCC 385; (2005) 3 SCC 551; (2007) 6 SCC 81; (2007) 10 SCC 528; (2007) 7 SCC 394; 2010 (9) SCC 280; 2010 (7) SCC 129; 1992 Supp. 1 SCC 272; (2007) 1 SCC 683; (2005) 8 SCC 454 D; (1996) 11 SCC 361.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. These special appeals under the Rules of the Court (Chapter VIII Rule 5) have been preferred, being aggrieved with the judgment and order dated 29.9.2008, passed by learned Single Judge in writ petition No.6015(S/S) of 2005 and other connected petitions deciding an issue relating to inter se dispute between the direct recruits and promotees in the cadre of Assistant Consolidation Officer.

2. We have heard Mr. R.K. Tiwari, learned Senior counsel, Mr. Shobhit Mohan Shukla and other counsels on behalf of the appellants as well as Mr. S.K. Kalia, learned Senior Counsel and others representing the respondents.

3. Controversy relates to inter se seniority of the cadre of Assistant Consolidation Officers between direct recruits and promotees in pursuance to U.P. Government Servants Seniority Rules, 1991 (in short, 1991 Seniority Rules).

4. It has been admitted at bar that the direct recruits were appointed on 18.8.1997 whereas the promotees were

promoted on the post of Assistant Consolidation Officer on 16.12.1997 within their quota (67%) in pursuance to U.P. Revenue Consolidation Service Rules, 1992 (In short, 1992 Rules). Promotions were done within the quota on the post of Assistant Consolidation Officer from the persons who were working on the post of Consolidators.

5. Under these admitted facts on record, it has been argued by the appellants' counsel that the direct recruits are entitled to be placed over and above the promotees since they were appointed earlier than the promotees, i.e. in the month of August, 1997.

It has been further argued by the appellants' counsel that the learned Single Judge while allowing the writ petitions directed that all the promotees who were promoted and appointed in the year 1997 should be placed over and above the direct recruits ignoring the roster. Learned Single Judge while allowing the writ petition has not only directed to place the promotees over and above direct recruits but also directed for en-block placement of all the promotees promoted in the year 1997 over and above direct recruits.

6. On the other hand, Mr. S.K. Kalia, learned Senior Counsel submits that since the direct recruits as well as the promotees were appointed in the same recruitment year in accordance with rules, the promotees were entitled to be placed over and above the direct recruits in accordance with rules.

7. 1991 Seniority Rules framed under the proviso to Art. 309 of the Constitution of India have overriding effect (Rule 3) and deals with the matter with regard to determination of seniority. According to Sub Rule (h) of Rule 4, substantive appointment has been defined as appointment, not being an ad hoc appointment, on a post in the cadre of the Service, made after selection in accordance with the service rules of the respective services.

8. Rule 5 deals with determination of seniority where appointment is done by direct recruitment only and Rule 6 deals with the situation where seniority is liable to be determined in a situation where appointment is done only by promotion from a single feeding cadre. Rule 7 deals with a situation where appointment by promotion is done from several feeding cadres. However, Rule 8 deals with a situation where appointments are done by promotion and direct recruitment. Rule 8 is relevant for the purpose of determination of present controversy. For convenience, Rule 8 is reproduced as under :

8. Seniority where appointments by promotion and direct recruitment.--(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub- rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order :

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other

cases, it will mean the date of issuance of the order:

Provided further that a candidate recruited directly may lose his seniority if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing authority as to the validity of reasons, shall be final.

(2) The seniority inter se of persons appointed on the result of any one selection,--

(a) through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule 7, as the case may be, according as the promotion are to be made from a single feeding cadre or several feeding cadres.

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotees vis-`-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations.--(1) Where the quota of promotees and direct recruits is in the proportion of 1 : 1 the seniority shall be in the following order :

First .. .. .. Promotee
Second .. .. .. Direct Recruits
and so on

(2) Where the said quota is in the proportion of 1 : 3 the seniority shall be in the following order :

First .. .. .. Promotee
Second to fourth .. .. Direct Recruits
Fifth .. .. .. Promotee
Sixth of eight .. .. Direct recruits
and so on

Provided that :

(i) where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

(ii) where appointment from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments are made, so however, that their names shall be placed at the top followed by the names, in the cyclic order of the other appointees;

(iii) where, in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other source and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota."

9. Thus, under Sub Rule (1) of Rule 8, seniority is to be determined from the date of the order of substantive appointment. The proviso of Sub Rule (1) provides that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment but in other cases

it will mean the date of issuance of the order. In the event of direct recruitment, the direct recruit shall lose seniority if he fails to join without valid reasons, when vacancy is offered to him. Under Sub Rule (2) of Rule 8, inter se seniority of persons appointed on the result of any one selection shall be the same as shown in the merit list prepared by the Commission.

10. However, under Sub Rule (3), where appointments are made both by promotion and direct recruitment on the result of any one selection, the seniority of promotees vis-a-vis direct recruits should be determined in a cyclic order (the first being a promotee) in accordance with the quota prescribed for the two sources. Where the quota of promotees and direct recruits is in the proportion of 1:1, the first shall be promotee and second shall be direct recruit but where the quota is in the proportion of 1:3, the seniority list shall give first place to promotee, second to fourth to direct recruits, fifth to promotee and sixth of eight to direct recruits. However, this shall be subject to certain conditions provided under the proviso to Rule 8 (supra).

11. Much emphasis has been given by the learned counsel for the appellant to the words, used in Sub Rule (3), "where appointments are made both by promotion and direct recruitment on the result of any one selection".

It is agreed at bar that ordinarily, it is not possible to make selection through direct recruitment and promote persons in a single selection process.

12. In District Mining officer vs. Tata Iron and Steel co. (2001) 7 SCC 358, Hon'ble Supreme court has held that function of the court is only to expound the law and not to legislate. A statute has to be construed according to the intent of them and make it the duty of the court to act upon true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose the interpretation which represents the true intention of the legislature.

13. In Krishna vs. state of Maharashtra (2001)2 SCC 441: Hon'ble Supreme court has held that, in absence of clear words indicating legislature intent, it is open to the court ,when interpreting any provision , to read with other provision of the same statute.

14. In Essen Deinki vs. Rajiv Kumar (2002)8 SCC 409, it has been observed that it is the duty of the court to give broad interpretation keeping in view the purpose of such legislation of preventing arbitrary action .however statutory requirement can not be ignored.

15. In Grasim industries ltd. vs. Collector of Custom (2002) 4 SCC297, it has been held that while interpreting any word of a statute every word and provision should be looked at generally and in the context in which it is used and not in isolation.

16. In Bhatia international vs. Bulk trading S.A. (2002)4 SCC 105, it has been held that where statutory provision can be interpreted in more than one way , court must identify the interpretation which represents the true intention of legislature. While deciding which is the true meaning and intention of the legislature, court must consider the consequences that would result from the various alternative constructions. Court must reject the

construction which leads to hardship, serious inconvenience, injustice, anomaly or uncertainty and friction in the very system that the statute concerned is suppose to regulate.

17. In S.Samuel M.D. Harresons Malayalam vs. UOI (2004)1 SCC 256, it has been held that when a word is not defined in the statute a common parallence meaning out of several meanings provided in the dictionaries can be selected having regard to the context in which the appeared in the statute.

18. In M. Subba Reddy vs. A.P. SRTC (2004) 6 SCC 729, it has been held that although hardships can not be a ground for striking down the legislation, but where ever possible statute to be interpreted to avoid hardships.

19. In Delhi Financial Corpn. Vs. Rajiv Anand (2004)11 SCC 625, it has been held that legislature is presumed to have made no mistake and that it intended to say what it said. Assuming there is a defect or an omission in the words used by the legislature , the court can not correct or make up the deficiency , especially where a literal reading there of produces an intelligible result .the court is not authorized to alter words or provide a casus omissus.

20. In Deepal Girish bhai soni vs. United India insurance ltd. (2004) 5 SCC 385, it has been held that statute to be read in entirety and purport and object of Act to be given its full effect by applying principle of purposive construction.

21. In Pratap Singh vs. State of Jharkhand (2005) 3 SCC 551, it has been held that interpretation of a statute depends upon the text and context there of and object with which the same was made. It must be construed having regard to its scheme and the ordinary state of affairs and consequences flowing there from - must be construed in such a manner so as to effective and operative on the principle of "ut res magis valeat quam pereat". When there is to meaning of a word and one making the statute absolutely vague, and meaningless and other leading to certainty and a meaningful interpretation are given, in such an event the later should be followed.

22. In Bharat petroleum corpn.ltd. vs. Maddula Ratnavali (2007) 6 SCC 81, it has been observed that Court should construe a statute justly. An unjust law is no law at all. Maxim "Lex in justa non est."

23. Deevan Singh vs. Rajendra Pd. Ardevi (2007)10 SCC528, it has been held that while interpreting a statute the entire statute must be first read as a whole then section by section , clause by clause , phrase by phrase and word by word .the relevant provision of statute must thus read harmoniously.

24. In Japani sahoo vs. Chandra shekhar mohanty (2007) 7 SCC 394, it has been held that a court would so interpret a provision as would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconditional by adopting rule of literal legis.

25. In 2010 (9) SCC 280, Zakiya Begum Vs. Shanaz Ali, it has been held that an Explanation to a section should normally

be read to harmonise with and clear up any ambiguity in the main section and normally not to widen its ambit.

26. In 2010 (7) SCC 129, Bondu Ramaswamy Vs. Bangalore Development Authority, it has been observed that an interpretation that would avoid absurd results should be adopted - When the object or policy of a statute can be ascertained, imprecision in its language not to be allowed in the way of adopting a reasonable construction which avoids absurdities and incongruities and carries out the object or policy.

27. In view of above, sub Rule (3) of Rule 8 of 1991 Seniority Rules should be construed in such a manner which may not make the rule inoperative. Further external aid from 1992 Service Rules may be taken while interpreting 1991 Seniority Rules for removal of ambiguity and doubt, if any.

28. Accordingly, the provisions contained in Sub Rule (3) of Rule 8 should be construed harmoniously to make it effective after taking into account the other rules as well as the purpose and object of the rule.

29. 1992 Rules deals with the service conditions of Asstt. Consolidation Officer and Consolidation Officer. Rule 22 of 1992 Rules provides that the seniority of persons substantively appointed in any category of posts shall be determined in accordance with 1991 Rules (supra). Sub Rule (m) of Rule 3 defines the year of recruitment as under :

""year of recruitment" means a period of twelve months commencing from the first day of July of calendar year."

Rule 19 deals with appointment on the respective posts. For convenience, Rule 19 is reproduced as under :

"19. appointments :- (1) Subject to the provisions of sub-rule (2) the appointing authority shall make appointment by taking the names of candidates in order in which they stand in the list prepared under Rule 15, 16 or 17, as the case may be.

(2) Where in any year of recruitment, appointments are to be made both by direct recruitment and by promotion, regular appointments shall not be made unless selections are made from both the sources and a combined list is prepared in accordance with Rule 18.

(3) If more than one orders of appointments are issued in respect of any one selection, a combined order shall also be issued, mentioning the names of the persons in order of seniority as determined in the selection or, as the case may be, as it stood in the cadre from which they are promoted. If the appointments are made both by direct recruitment and by promotion, names shall be arranged in accordance with the cyclic order referred to in Rule 18."

Under Sub Rule (2) of Rule 19, it has been provided that in every recruitment year, appointment shall be made both by direct recruitment and by promotion, i.e. from both sources.

30. Under Sub Rule (3) of Rule 19, it has been provided that if the appointments are made both by direct recruitment and by promotion, names shall be arranged in accordance with the cyclic order referred to in Rule 18. It means a roster shall be provided in terms

of rule 18 in the cadre of Assistant consolidation Officer containing direct recruits and promotees. Since 1991 Seniority Rules have got overriding effect, so far as seniority is concerned, roster shall be in accordance with Sub Rule (3) of Rule 8(supra). In case the number of candidates are not available to apply roster for each and every person selected through direct recruitment and promotion, then remaining may be placed in block at appropriate place in the seniority list.

31. So far as the mandate contained in Rule 2 of 1991 Seniority Rules to the effect where appointments are made both by promotion and direct recruitment on the result of one selection, seniority of promotee and direct recruits will be determined by a cyclic order, is concerned, since admittedly and ordinarily, in one selection, appointment and direct recruitment may not be done, then while construing the provisions harmoniously, the provision contained in Sub Rule (3) may be interpreted relating it to the year of recruitment as defined by Sub Rule (m) of Rule 3 of 1992 Rules. It means all persons who have been appointed by direct recruitment or by promotion in a recruitment year shall be entitled to be considered for seniority in pursuance to 1991 Seniority Rules. The seniority list shall contain the names of officers in order of their recruitment against substantive vacancy relating back to the recruitment year. The appointment should have been done in accordance with rules.

32. So far as the order passed by learned Single Judge for enblock placement of promotees is concerned, it seem to be contrary to Rules (supra) which provides roster for the placement of promotees and direct recruits in a cyclic manner. To that extent, the impugned order passed by learned Single Judge required to be modified. It shall be appropriate to consider some of the cases, relied upon by learned counsels.

33. In the case of Uttaranchal forest Rangers versus State of U.P and others JT2006(12)SC513, their Lordships of Hon'ble Supreme court held that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime. Supreme Court relied upon earlier judgment reported in 1992 Supp. 1 SCC 272 Keshav Chandra Joshi and others versus Union of India and others. It means seniority may be given to direct recruits only from the date they were appointed or joined service and not earlier to it. While interpreting Rule 8(1) of Seniority Rules, 1991, the conferment of seniority to an employee from a previous date provided that the date of such conferment along with substantive appointment is mentioned in the order of substantive appointment which seems to exist in the case of Uttaranchal but such provision does not seem to exist in the Service Rules in question.

While interpreting Rule 8(3) of the Service Rules(supra), Hon'ble Supreme court observed as under :

"Rule 8(3) of the Rules is not applicable in this case because the appointments were not made by both the direct and promoted sources of recruitment as a result of one selection. Moreover, definite quota is not prescribed for the two sources of appointment ? As

per Rule 8 of the Seniority Rules, there is a provision that if the appointment order specifies a particular back date with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and in other cases, it will mean the date of issuance of the order. This implies that there is a provision of vacancies of being carried over. Moreover, it is also in the interest of natural justice that employees are promoted from the date they become eligible and the vacancy exits. Otherwise, it would result in denying promotion to them for no fault of theirs and only because of not holding selection procedure on time for which they cannot be held responsible. As far as Rule 8(3) is concerned, it applies to one selection made both for promotion and direct recruitment, which is not the case under consideration."

34. In views of above, since selection and promotion has not been done in a single process, seniority may be considered as observed hereinabove keeping in view the year of recruitment.

35. Their Lordships further proceeded to hold that no seniority can be granted from the date when an employee was even not borne in the cadre. To quote relevant portion :

"We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime, as decided by this court in the case of K.C. Joshi & others vs. Union of India, 1992 Suppl (1) SCC 272 held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous."

36. In the State of Uttaranchal and another versus Dinesh Kumar Sharma (2007)1 SCC 683, Hon. Supreme Court ruled that the seniority should be reckoned from the date of substantive appointment and not from the date of occurrence of vacancy. The provisions contained in the Rules cannot be ignored. While dealing with the matter with regard to Service Rules of U.P. Agriculture Group B, their Lordships further held that there can be no automatic appointment /promotion on mere recommendation of PSC unless Government sanctions such appointment/promotion.

37. In (2000)7 SCC 561 Suraj Parkash Gupta and others versus State of J & K and others, Hon'ble Supreme Court held that even if on account of delay and lethargic attitude of the State Government, promotion and appointment is delayed, it does not lead to an inference that the quota rule has broken down and where there is no explicit provision with regard to rota rule, then rota rule may not be applied. Employees cannot claim rota merely on the basis of post and perks.

However, in the present case, rota rule has been provided under both the Service Rules (supra), hence that should be applied while preparing the seniority list.

38. In Special Appeal No.1304 of 2003 Arun Kumar Saxena versus State of Uttar Pradesh and others, this Court has observed that under proviso 3 of Rule 8(3) (supra), a promotee shall be entitled for seniority from the date of promotion subject to fulfillment of other conditions.

While considering Clause (3) of Rule 8, this Court held as under :

"Clause (3) or Rule 8 of 1991 Rules provides for the inter se seniority of direct recruits and promotees to be appointed on the basis of one selection and illustrations 1 and 2 thereto provide for the manner in which the direct recruits and the pro9motees are to be adjusted. Thereafter there are three provisions (i) to (iii) to the sub rule 3 of rule 8. However, it must be remembered that the provisos are to be read in a manner to suggest that something is being carved out from the main clause. As already noticed above, Rule 8(3) itself contemplates determination of seniority between the pro9motees and direct recruits as a result of any one selection, meaning thereby that the aforesaid rule will have application only where appointments both by direct recruitments and promotions are being made as a result of one selection. If selections are made in different years, Rule 8(3) will have no application, as a result whereof the proviso to the aforesaid Rule would also not apply."

39. However, the 1992 Rules as well as applicability of rota rule seems to have not been considered. Attention of this Court has not been invited to any finding with regard to applicability of rota rule under Rule 8(8) read with the provisions contained in 1992 Rules (supra) by Hon'ble Supreme Court.

40. In (2005)8 SCC 454 D. Ganesh Rao Patnaik and others versus State of Jharkhand and others, their Lordships interpreted the definition of cadre and considered the right of the employees appointed within and beyond the quota.

41. In (1996) 11 SCC 361 M.S.L. Patil, Asstt. Conservator of Forests, Solarpur (Maharashtra) and others versus State of Maharashtra and others, the question before the Supreme Court relates to binding nature of judgment and interpretation of Civil Services Regulations of Seniority Rules which does not seem to be applicable in the facts of the present case. However, their Lordships of Supreme Court have reiterated the principle emerging from the case of Keshav Chandra Joshi (supra).

42. In view of above, the impugned order passed by learned Single Judge does not seem to suffer from any impropriety or illegality subject to modification that keeping in view the Service Rules in question (supra), rota should be applied by the authorities of direct recruits and promotees appointed in one recruitment year. Accordingly, the order passed by Hon'ble Single Judge is modified to the extent that the State shall apply rota system to direct recruits and promotees appointed in one recruitment year.

The appeal is allowed in part accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2014

BEFORE
THE HON'BLE DR. DHANANJAY YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal Defective No. 840 of 2014

Additional Director General of P.H.Q. & Ors. Appellants

Versus

Radhey Shyam Sharma ...Respondent

Counsel for the Appellants:
S.C.

Counsel for the Respondents:
Shiv Krishna Bahadur

Civil Services Regulation-Regulation 351 AA -Withholding pension gratuity-respondent/petitioner working as S.I.-convicted for offence under Section 302 read with 149/364 IPC-Appeal admitted-realization of fine stayed-Single Judge allowed the petition as no peeunary loss caused to the government-held-Learned Single Judge totally over sighted provisions of Regulation 351-AA read with Regulation 919-A (3) held-government reserves its right to with hold pension under Regulation 351-AA-direction of Single Judge not sustainable-Appeal allowed.

Held: Para-11

However, it has been urged on behalf of the respondent that full pensionary benefits have been released to some of the other accused, who were tried along with the respondent. In view of the clear mandate of the provisions contained in Regulation 351-AA read with Regulation 919-A, we are of the view that such a direction cannot be issued by this Court supposedly on the basis of parity. In the present case, the respondent has been convicted of a serious crime within the meaning of Regulation 351. Under Regulation 351 the Government reserves to itself the right to withhold a pension if the pensioner is convicted of a serious crime. In view of the provisions of Regulation 351-AA, the State Government was acting within its statutory powers in withholding regular pension and as provided under Regulation 919-A(1) provisional pension has been released to the respondent.

Case Law discussed:

Special Appeal Defective No. 1278 of 2013 decided on 17 Dec. 2013.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The special appeal arises from a judgment and order of the learned Single Judge dated 29 November 2013 directing the appellants to release all the retiral benefits of the respondent with interest at the rate of 12% per annum including full pensionary benefits.

2. The respondent was appointed as a Sub Inspector in the State Police. The respondent was committed to trial and by a judgment of the Sessions Judge, Etah dated 20 November 1998, he was convicted of the offences inter alia under Section 302 read with Section 149 and under Section 364 of the Indian Penal Code and was sentenced to undergo imprisonment for life. The respondent has filed a criminal appeal, which has been admitted by this Court on 24 November 1998 and he has been released on bail. Realisation of the fine imposed by the Sessions Judge has been stayed during the pendency of the appeal.

3. The respondent attained the age of superannuation on 31 May 1999. A provisional pension has been released to him but full pensionary benefits, gratuity and other retiral dues were withheld on the ground that an appeal against the order of conviction inter alia under Sections 302 and 364 of the Indian Penal Code is pending before this Court. The respondent filed a writ petition1, which came up for hearing before the learned Single Judge. The learned Single Judge was of the view that in the present case no pecuniary loss was caused to the department or to the Government and even after the criminal proceeding is finalized, no recovery would be made from the respondent. For this reason, the petition was allowed with a direction for payment of full

pensionary benefits together with all other retiral dues with interest at the rate of 12% per annum.

4. The submission, which has been urged by the learned Standing Counsel, is that the view which has been taken by the learned Single Judge is directly contrary to the provisions of Regulation 351-AA of the Civil Service Regulations2 read with Regulation 919-A(3). These provisions, it was urged, have been construed in a judgment of a Division Bench of this Court in State of U.P. and others v. Jai Prakash3.

5. On the other hand, it has been submitted on behalf of the respondent that the pensionary dues have been allowed to the other accused who were tried and convicted with the respondent and who, like the respondent, were engaged in the Police Service of the State of Uttar Pradesh. Hence, it was urged that on a parity of reasoning, the respondent should be granted the same benefit.

6. Regulation 351-AA of the Regulations provides as follows:

"351-AA. In the case of a Government Servant who retires on attaining the age of superannuation or otherwise and against whom any departmental or Judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement a provisional pension as provided in Regulation 919-A may be sanctioned."

7. Regulation 919-A of the Regulations is in the following terms:

"919-A. (1) In case referred to in Regulation 351-AA the Head of Department may authorise the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the Government servant or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension.

(2) The provisional pension shall be authorised for the period commencing from the date of retirement upto and including the date on which after conclusion of departmental or judicial proceeding or the enquiry by the administrative Tribunal; as the case may be, final orders are passed by the competent authority.

(3) No death-cum-retirement gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings or the enquiry by the Administrative Tribunal and issue of final orders thereon.

(4) Payment of provisional pension made under clause (1) above shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of the proceedings or enquiry referred to in clause (3) but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or withheld either permanently or for special period."

8. Besides these two regulations, Regulation 351 stipulates that the State Government reserves to itself the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

9. These regulations have been construed in the judgment of the Division of this Court in State of U.P. and others v.

Jai Prakash (supra), rendered on 17 December 2013, where it has been held as follows:

"Government has the power to withhold or withdraw the pension and a power to recover any pecuniary loss suffered. Regulation 351-A postulates that there has to be a determination in departmental or judicial proceedings. Regulation 351-AA deals with a situation where a departmental or judicial proceeding or any enquiry by the Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement in which case a provisional pension under regulation 919-A may be sanctioned. Where a departmental or judicial proceeding is pending on the date of retirement, regulation 351-AA stipulates that a provisional pension would be admissible and the modalities for the payment of a provisional pension are prescribed under regulation 919-A. Regulation 919-A (1) makes a reference to the situation which is referred in regulation 351-AA and authorises the payment of a provisional pension by the Head of Department. The provisional pension is to be authorised for the period commencing from the date of retirement upto and including the date of conclusion of departmental or judicial proceedings or, as the case may be, the enquiry by the Administrative Tribunal.

10. In view of the law as laid down in the aforesaid decision, the judgment of the learned Single Judge would, in our view, be unsustainable. The clear mandate of Regulation 351-AA is that in case of a Government servant who retires on attaining the age of superannuation or otherwise and against whom judicial proceedings are pending on the date of retirement or are instituted thereafter, a provisional pension may be sanctioned. Regulation 919-A(3) contains a specific prohibition on the payment of death-cum-retirement gratuity Regulation 919-A (3) contains an expression prohibition on the payment of death-cum-retirement gratuity to a government servant until the conclusion of the departmental proceeding, judicial proceeding or as the case may be, an enquiry by the Administrative Tribunal. Regulation 41 provides that except when the term 'Pension' is used in contradistinction to gratuity, 'Pension' would include gratuity. Consequently, regulation 919 (3) which contains a bar on the payment of gratuity till the conclusion of a departmental or judicial proceeding would allow the payment of a provisional pension stipulated in clause (1) of regulation 919-A.

8. The learned Single Judge, in the present case, has proceeded on the basis that neither in regulation 351 nor in regulation 351-A is a withholding of gratuity contemplated during the pendency of a judicial proceeding. The learned Single Judge, with respect, has overlooked the provisions of regulation 351-AA and a specific bar which is contained in regulation 919-A (3). In view of the specific prohibition which is contained in regulation 919-A (3), no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression 'judicial proceeding' would necessarily include the pendency of a criminal case."
until the conclusion of judicial proceedings. In terms of Regulation 919-A a provisional pension has been made admissible to the respondent.

11. However, it has been urged on behalf of the respondent that full pensionary benefits have been released to some of the other accused, who were tried along with the respondent. In view of the clear mandate of the provisions contained in Regulation 351-AA read with Regulation 919-A, we are of the view that such a direction cannot be

issued by this Court supposedly on the basis of parity. In the present case, the respondent has been convicted of a serious crime within the meaning of Regulation 351. Under Regulation 351 the Government reserves to itself the right to withhold a pension if the pensioner is convicted of a serious crime. In view of the provisions of Regulation 351-AA, the State Government was acting within its statutory powers in withholding regular pension and as provided under Regulation 919-A(1) provisional pension has been released to the respondent.

12. In this view of the matter, the judgment and order of the learned Single Judge is, with respect, erroneous. The learned Single Judge was in error in holding that merely because no pecuniary loss was caused to the department or to the Government, no recovery would be required to be made and hence, the entire pensionary dues should be released. Regulation 351-A of the Regulations, which has been noticed in the decision in State of U.P. and others v. Jai Prakash (supra), deals with a situation where inter alia a pensioner is found to have caused a pecuniary loss to the State by his misconduct or negligence during service. Regulation 351 and Regulation 351-AA of the Regulations do not confine the power of the Government to withhold the pensionary dues until a loss is shown to be caused to the State.

13. For these reasons, we allow the special appeal and set aside the impugned judgment and order of the learned Single Judge dated 29 November 2013. However, we clarify that upon the disposal of the criminal appeal by this Court, necessary consequences under the law shall follow based on the outcome of the case.

14. The special appeal, is accordingly, allowed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2014

BEFORE
THE HON'BLE DR. DHANANJAY YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal Defective No. 850 of 2014

Birjesh Kumar ...Petitioner
Versus
State of U.P. & Ors. .Respondents

Counsel for the Petitioner:
Sri B.K. Srivastava, Sri Dhiraj Srivastava
Counsel for the Respondents
C.S.C.

Constitution of India Art. 226-Service Law-termination on conviction in criminal case-without inquiry-without considering the conduct of employee-in utter violation of guide lines of Apex Court in Tulsiram Patel case-held-disciplinary authority as well as Single Judge proceeded on wrongful premises-mere conviction would not result termination automatically-appeal allowed.

Held: Para-6
In the counter affidavit, which was filed on behalf of the State before the learned Single Judge, it was specifically admitted in paragraph-8 that the appellant was dismissed from service "on the basis of the conviction". Hence, it is clear that the order of dismissal has been passed on the erroneous basis that the conviction in the criminal case would ipso facto result in an order of termination. In this view of the matter, we are of the view that it would be appropriate and in the interest of justice to set aside the impugned order of the learned Single Judge and to remit the

proceedings back to the disciplinary authority.

Case Law discussed:
AIR 1985 SC 1416

(Deliverd by Hon'ble Dr. Dhananjay Yeshwant Chandrachud, C.J.)

1. The appellant was appointed in a Group 'D' post in the Trade Tax Tribunal on 08 September 1989. The appellant was convicted by the VIIth Additional Sessions Judge, Meerut in Session Trial No. 146 of 1986 of offences under Sections 147, 325 read with Section 149, 324 read with Section 149, and 452 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment respectively for a period of six months, two years, three years and three years. Based on the order of conviction, the services of the appellant were terminated by the Chairperson of the Trade Tax Tribunal on 11 July 1990. The appellant filed a writ petition, being Civil Misc. Writ Petition No. 17805 of 1990 (Biresh Kumar v. State of U.P. and others), before the learned Single Judge questioning the legality of the termination. The writ petition has been dismissed by the impugned judgment and order dated 02 December 2011 on the ground that Article 311 (2) of the Constitution provides that without any enquiry, an order of punishment can be passed if a civil servant has been convicted in a criminal case after considering his conduct which led to the conviction.

2. The submission, which has been urged on behalf of the appellant, is that in view of the decision of the Constitution Bench of the Supreme Court in Union of India and another v. Tulsiram Patel1, the disciplinary authority is required to consider whether the conduct of the Government servant was such as to require his dismissal or removal from service or reduction in rank following his conviction in a criminal case. In the present case, it was submitted that the disciplinary authority proceeded on a wrongful premise that a mere conviction would result in an order of termination.

3. Article 311 of the Constitution, insofar as is material, provides as follows:

"311. Dismissal, removal or reduction in rank of person employed in civil capacities under the Union or a State.--(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply--

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce

him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry."

4. The provisions of Clause (a) of the second proviso to Clause (2) of Article 311 of the Constitution have been construed in the judgment of the Constitution Bench of the Supreme Court in Union of India and another v. Tulsiram Patel (supra), where it has been held as follows:

"**127.** ..... To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case (AIR 1975 SC 2216). This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant."

5. In the present case, the order of termination does not indicate that the disciplinary authority had applied its mind to the nature of conviction or to the question as to whether the conduct of the Government servant was such as to require his dismissal or removal from service. The decision in Union of India and another v. Tulsiram Patel (supra) specifically requires the disciplinary authority to bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank.

6. In the counter affidavit, which was filed on behalf of the State before the learned Single Judge, it was specifically admitted in paragraph-8 that the appellant was dismissed from service "on the basis of the conviction". Hence, it is clear that the order of dismissal has been passed on the erroneous basis that the conviction in the criminal case would ipso facto result in an order of termination. In this view of the matter, we are of the view that it would be appropriate and in the interest of justice to set aside the impugned order of the learned Single Judge and to remit the proceedings back to the disciplinary authority.

7. For the aforesaid reasons, the special appeal is allowed by setting aside the impugned order of the learned Single Judge dated 02 December 2011. The order passed by the disciplinary authority on 11 July 1990 is set aside. The disciplinary authority shall have due regard to the law laid down by the Supreme Court in Union of India and another v. Tulsiram Patel, AIR 1985 SC

1416, and then determine as to whether the conduct of the appellant is such as to warrant his dismissal, removal or reduction in rank within the meaning of proviso (a) to Clause (2) of Article 311 of the Constitution.

8. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2014

BEFORE
THE HON'BLE DR. DHANANJAY YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal Defective No. 861 of 2014
State of U.P. & Ors. Appellants
Versus
Mahipal Singh & Anr. Respondents

Counsel for the Appellants:
S.C., Sri A.K. Mishra

Counsel for the Respondents
Sri Jitendra Singh, Sri Veer Singh

Constitution of India, Art.-226- claim for Regularization and payment of salary-respondent/petitioner working on daily wages basis since 1986-on post of part time sweeper-claim of Regularization not accepted by learned Single Judge-however till consideration of request for creation of regular post-direction to give minimum basic pay-admissible to regular employee along with arrears from the date of initial engagement-not sustainable modification with current payment of wages as per direction of learned Single Judge maintainable.

Held: Para-14-
In several judgements of the Supreme Court, it has been held that the principle of 'equal pay for equal work' cannot be attracted merely on the nature of the work, irrespective of the educational qualifications attached to a post or irrespective of the source of recruitment and other relevant considerations. Hence, it is now a well settled principle of law that the doctrine of 'equal pay for equal work' is not a matter of abstract application or a mathematical formula that can be applied to a case.

Case Law discussed:
(2006) 4 SCC 1; (2003) 6 SCC 123; (1996) 11 SCC 77; (2009) 9 SCC 514; (2003) 5 SCC 188; (2004) 1 SCC 347; (2006) 9 SCC 321; (2009) 8 SCC 556.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. This special appeal arises from a judgement of the learned Single Judge dated 16 April 2014 by which the State Government has been directed to take a decision in regard to the creation of a post of sweeper for the office of the Sub-Divisional Officer1, Dhampur, Bijnor within two months, on a letter which was addressed by the Board of Revenue on 8 February 1994. The learned Single Judge has also directed that from 8 February 1994 till the creation of the post, the first respondent shall be allowed salary equivalent to the salary at the lowest grade of an employee on the post of sweeper in the State, in the office of the Collector. Arrears have been directed to be worked out within a period of three months and to be paid over to the first respondent. The first respondent has also been granted continuity of service.

2. The first respondent was engaged as a sweeper by the SDO when a new office was established in 1986. By a letter dated 8 February 1990, the SDO requested the District Magistrate to grant him permission

to appoint the sweeper. On 2 March 1990, the District Magistrate issued directions for the appointment of the first respondent on a part-time basis as a sweeper on a consolidated salary of Rs. 76/- per month. The consolidated payment has since been revised from time to time. On 24 January 1992, the District Magistrate addressed a communication to the Board of Revenue for the creation of a permanent post of sweeper in the office of the SDO at Dhampur. Correspondence ensued between the Board of Revenue and the District Magistrate. By a letter dated 8 February 1994, the Secretary, Board of Revenue forwarded the papers to the State Government for the creation of a permanent post of sweeper in the office of the SDO at Dhampur.

3. The first respondent had moved the State Public Services Tribunal at Lucknow by filing a claim petition2. The claim petition was dismissed by an order dated 13 February 1996 with the following observations:

"At the time of admission stage, from the record it is clear that he is part time employee and he has worked as such. He cannot show any rule under which a part time employee can be converted into a full time employee. It is also clear from record that no post has been created in which he might be considered as full time employee. It is also clear that the recommendation has been made by the lower authority of the Govt. to create the post so that the petitioner may be considered for appointment as full time employee on that post. No post has been created so far, the petitioner cannot be given a legal right to get a declaration as full time employee.

Thus for the above reasons the claim petition is not maintainable and is liable to be dismissed at the admission stage."

4. Eventually, a writ petition3 was filed by the first respondent. In the said writ petition, the reliefs that were claimed were for a direction in the nature of mandamus directing the appellants to regularize the services of the first respondent as a class-IV employee in the post of sweeper; for the payment of arrears of salary since 1990 as payable to a regular class-IV employee; and restraining the appellants from interfering with the discharge of duties by the first respondent.

5. The learned Single Judge has, after noticing the decision of the Supreme Court in Secretary, State of Karnataka and others v. Uma Devi (3) and others4, held that the first respondent was continuously working as a part-time employee since his appointment on 2 March 1990 and had completed ten years of continuous service, the Board of Revenue had also recommended to the State Government for creation of a permanent post, since there is a permanent establishment of the SDO at Dhampur but the State had delayed in taking a decision thereon. In the meantime, the petition which was filed in March 1996 remained pending. On these facts, the learned Single Judge issued the following directions while allowing the aforesaid petition:

"9...State of U.P. is directed to take decision relating to creation of post of 'sweeper' for the office of Sub-Divisional Officer, Dhampur, Bijnor within a period of two months, on the letter of Board of Revenue U.P. at Lucknow dated 08.02.1994. From 08.02.1994 till creation

of the post, the petitioner be given salary equal to the salary at the lowest grade of employees of the post of sweeper in State of U.P., in the office of Collector. The arrears be worked out within three months and paid to the petitioner. The petitioner shall be entitled for other benefits of continuity in service."

6. Learned Standing Counsel appearing on behalf of the appellants has questioned both the direction to the State to consider the request of the Board of Revenue as well as the direction to allow salary to the first respondent from 8 February 1994 on the lowest grade of an employee in the post of sweeper in the State. It is urged that no direction can be issued for the payment of salary on the minimum of the pay scale in the case of a person who is admittedly a daily wager. It is further urged that the principle of 'equal pay for equal work' has no application where an employee is not borne on the permanent establishment, and in this regard reliance is placed on a decision of the Supreme Court in State of Haryana and another Vs Tilak Raj and others5.

7. On the other hand, learned Senior Advocate appearing on behalf of the first respondent relied upon the observations contained in Para-55 of the decision in Uma Devi (supra), to the following effect:

"55...We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them..."

8. In the first part of the direction which has been issued by the learned Single Judge, the State Government has been directed to take a decision on the request which was made by the Board of Revenue in regard to the creation of a permanent post of sweeper on the establishment of the SDO, Dhampur, Bijnor. On this aspect, the direction of the learned Single Judge, it must be noted, is not a direction either to create the post or to regularize the first respondent. Whether a post should be created or sanctioned, is a matter entirely for the State Government to decide.

9. In the present case, the office of the SDO was established in 1986 and since a sweeper had to be appointed, the respondent workman was engaged on a part-time basis, which arrangement has been continuing since then. The Board of Revenue had written to the State Government as far back as on 8 February 1994 recommending the creation of a permanent post. The State Government had not taken its decision. The direction of the learned Single Judge to the State Government to take a decision, therefore, cannot be faulted since the learned Single Judge has neither directed the creation of the post nor issued a mandamus for regularization of the first respondent. A direction for taking a decision, in fact, is a direction to take a decision in accordance with law and hence that part of the order is unexceptionable.

10. The real bone of contention in the special appeal is in regard to the direction of the learned Single Judge to pay to the first respondent the salary at the lowest grade or, in other words, in the minimum of the salary payable to a regular employee of the State holding the post of sweeper and to pay arrears w.e.f. 8 February 1994. On this direction of the learned Single Judge for payment of arrears, the learned Senior Advocate appearing on behalf of the first respondent fairly stated before the Court that this part of the order for payment of arrears from 8 February 1994 cannot be sustained but it was sought to be submitted that in consistent with the direction contained in Para-55 of the decision in Uma Devi's case (supra), a direction for the payment of salary on the minimum of the pay scale would be justified and in accordance with law. Learned Senior Advocate submitted that the direction of the Supreme Court in Para-55 of the decision in Uma Devi's case can be divided in two parts, the first in regard to the grant of minimum of the scale of pay and the second in regard to the grant of relaxation in the matter of permanent engagement Hence, it was urged that only the latter part constitutes a direction under Article 142 of the Constitution.

11. Before we deal with the submissions, we must, at this stage, take due note of the position which was laid down in a judgement of the Supreme Court in State of Haryana Vs Tilak Raj (supra), which has been followed since in several decisions of the Supreme Court. The Supreme Court held that a scale of pay is attached to a definite post, whereas a daily wager does not hold a post. Moreover, it was held that the doctrine of 'equal pay for equal work' applies as between equivalents and would have no application where a parity is sought by a daily wager with permanent employees. In that context, the following principles were laid down:

"11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

12. "Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated in a mathematical formula."

12. The same principle, it must be noted, was laid down in an earlier decision in State of Haryana Vs Jasmer Singh6.

13. The decision of the Supreme Court in Uma Devi's case, more specifically Para-55, has been considered in State of Punjab Vs Surjit Singh7 by the Supreme Court. The Supreme Court has

considered the entirety of the observations contained in Para-55, as extracted therein, as constituting directions which are referable to the exercise of jurisdiction under Article 142 of the Constitution. This is clear from the following extracts contained in Paragraphs 29 & 30 of the decision:

"29. It is in the aforementioned factual backdrop, this Court in exercise of its jurisdiction under Article 142 of the Constitution of India, directed: (Umadevi case8, SCC p. 43, para 55)

"55.....Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect of the work, irrespective of the educational qualifications attached to a post or irrespective of the source of recruitment and other relevant considerations. Hence, it is now a well settled principle of law that the doctrine of 'equal pay for equal work' is not a matter of abstract application or a mathematical formula that can be applied to a case.

as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.

30. We, therefore, do not see that any law has been laid down in para 55 of the judgement in Umadevi (3) case9. Directions were issued in view of the limited controversy. As indicated, the State's grievances were limited."

14. In several judgements of the Supreme Court, it has been held that the principle of 'equal pay for equal work' cannot be attracted merely on the nature

15. In this regard we may only refer, at this stage, to the decisions of the Supreme Court in Orissa University of Agriculture & Technology and another Vs Manoj K. Mohanty10, Government of W.B. Vs Tarun K. Roy and others11, and State of Haryana and others Vs Charanjit Singh and others12.

16. We may also note that where State legislation, such as the Maharashtra

Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 provides for a catalogue of unfair labour practices, such as engaging employees on daily wage, casual or temporary basis, the remedy under the industrial law would, in such cases, be available, as held by the Supreme Court in Maharashtra Road Transport Corporation Vs Casteribe Rajya P. Karmchari Sanghatana13. However, a general direction of the nature which was issued by the learned Single Judge in the present case cannot be issued in exercise of the writ jurisdiction under Article 226 of the Constitution.

17. For these reasons, we are of the view that the impugned judgement and order of the learned Single Judge would have to be set aside and is set aside to the extent it directs the State to grant to the first respondent salary equivalent to the salary payable to the lowest grade of an employee holding the post of sweeper in the State and for the payment of arrears w.e.f. 8 February 1994. We, however, direct that from the date of the decision of the learned Single Judge, namely 16 April 2014, the first respondent would be entitled to the payment of minimum wages as applicable in the State under the relevant notification, or as the case may be, Government Order holding the field.

18. The special appeal is, accordingly, disposed of in the aforesaid terms.

19. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2014

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 17459 of 2012

Ram Rekha Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Kumar Nigam, Sri Manoj Kumar

Counsel for the Respondents:
C.S.C., Sri Ravi Prakash Srivastava, Sri V.P. Mathur

U.P. Government Servant (Discipline & Appeal) Rules 1999-Rule-7-Termination with recovery of Rs. 26,17,408/- towards alleged loss-petitioner working as Block Development Officer-placed under suspension-quashed on ground of undue-delay-after receiving reply to show cause notice-impugned termination order passed-without following procedure prescribed under Rule in utter violation Natural Justice-termination order quashed with reinstatement in service-enquiry to be concluded from stage of serving charge sheet-to conclude disciplinary proceeding within 4 months.

Held: Para-22 & 24

22. Noteworthy it is that even in the punishment order, as regards practically all the charges against the petitioner, the disciplinary authority has merely observed that the delinquent had not adduced any evidence to refute the charges and hence, the same stood proved. The basic requirement of the primary evidence on the part of the department to substantiate the charges appears to have been ignored as if with the assumption that levelling of charges was sufficient and no evidence was requisite to substantiate the same. This approach cannot be countenanced.

24. In view of what has been discussed hereinabove, the impugned order of punishment and also the inquiry report are required to be quashed. However, in the facts and circumstances of the case, it appears just and proper to allow the respondents to hold the disciplinary proceedings afresh from the stage of serving of the charge sheet.

Case Law discussed:
(2010) 2 SCC 772; 2012 (1) AWC 354; 2008 (1) ADJ 284; W.P. No. 369763 of 2010.

(Delivered by Hon'ble Dinesh Maheshwari, J.)

1. By way of this writ petition, the petitioner, who had been serving as Block Development Officer, has questioned the order dated 01.02.2012 as passed by the State Government in conclusion of the disciplinary proceedings that his services shall stand terminated and an amount of Rs.26,17,408/- shall be recovered from him towards the alleged loss to the Government. The order so passed against him has been questioned by the petitioner essentially on the grounds that the entire disciplinary proceedings had been in violation of the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999('the Rules of 1999' hereafter) as also the basic principles of natural justice.

2. The issue involved in the present matter being related to the validity of the disciplinary proceedings, only a brief reference to the background aspects of the matter would suffice. The petitioner, working as Block Development Officer, Nagra/ Rasra, District Ballia, was placed under suspension in contemplation of an inquiry by the order dated 11.10.2007(Annexure No.2). In this order of suspension, seven distinct allegations were made against the petitioner, essentially of the nature that he indulged in misappropriation of the government money by various acts of improper and illegal payments towards different works. By another order dated 11.10.2007(Annexure No.3), the Collector, Basti was appointed as the Inquiry Officer but then, by yet another order dated 05.12.2007, the Collector, Ballia was appointed as the Inquiry Officer. The petitioner was, thereafter, served with a charge sheet by the Collector, Ballia on 15.05.2008; though this charge sheet was dated 11.10.2007. In this charge sheet, as many as fifteen different charges were levelled against the petitioner. It is the case of the petitioner that he had already submitted an explanation/ representation dated 15.12.2007 in relation to the seven charges which were mentioned in the suspension order dated 11.10.2007; and that regarding eight new charges in the charge sheet, documents were required, which he demanded under his letter dated 15.05.2008(Annexure No.6) but the same were not supplied to him.

3. The petitioner has averred that after service of the charge sheet on 15.05.2008, he was not given any notice regarding any further action taken by the Inquiry Officer in relation to the inquiry proceedings. On the other hand, by an order dated 17.06.2008(Annexure No.7), he was reinstated in service, revoking the order of suspension on the ground that there was delay in receiving the report from the Inquiry Officer. However, later on, the petitioner was served with the notice dated 30.07.2008 (Annexure No.8), enclosing therewith a copy of the inquiry report, said to have been drawn by the Inquiry Officer on 02.06.2008.

4. The opening remarks in the inquiry report dated 02.06.2008, indicating the background in which, and the basis on which, the inquiry report was drawn deserve to be noticed for their relevance and the same are reproduced as under :-

"Jh jkejs[kk flag ;kno] [k.M fodkl vf/kdkjh] uxjk@jlM+k] tuin cfy;k dks dfri; vkjksiksa esa izeq[k lfpo] mRrj izns'k 'kklu] xzkE; fodkl vuqHkkx&1 ds dk;kZy; Kki la[;k 4603@38&1&2007&94f'k0@06 fnukad 11 vDVwcj 2007 }kjk fuyfEcr djds muds fo:) foHkkxh; dk;Zokgh izkjEHk dh x;h vkSj bl foHkkxh; dk;Zokgh esa ftykf/kdkjh] cLrh dks tkWp vf/kdkjh ukfer fd;k x;kA iqu% mRrj izns'k 'kklu] xzkE; fodkl vuqHkkx&1 ds dk;kZy; Kki la'kks/ku la[;k 5325@38&1&2007&94f'kdk0@06 y[kuÅ fnukad 05 fnlEcj 2007 }kjk v/kksgLrk{kjh dks tkWp vf/kdkjh ukfer fd;k x;k gSA

Jh jkejs[kk flag ;kno] fuyfEcr vf/kdkjh ds fo:) yxk;s x;s vkjksiksa ds laca/k esa vkjksi i= xfBr dj jkT;iky] mRrj izns'k 'kklu dh vksj ls vuqeksfnr vkjksi i= la[;k 5026@38&1&07&97f'k0@06 y[kuÅ fnukad 11 vDVwcj 2007 Jh jkejs[kk flag ;kno] mijksDr dks miyC/k djkus gsrq iwokZf/kdkjh@tkap vf/kdkjh ds gLrk{kj ls fuxZr fd;k x;k ijUrq ;g vkjksi i= vkjksih vf/kdkjh Jh jkejs[kk flag ¼fuyfEcr½ [k.M fodkl vf/kdkjh ij fof/k lEer :i ls rkehy u gksus ds QyLo:i mUgs mDr vkjksi i= ,oa izLrkfor lk{; lfgr fnukad 15-05-2008 dks O;fDrxr :i ls miyC/k djk;k x;k rFkk mUgksus fnukad 15-05-08 dks gh fyf[kr :i ls vkosnu i= fn;k fd og 03 fnu ds vUnj ¼vFkkZr 18-05-08½ rd viuk Li"Vhdj.k izLrqr dj nsxsa ijUrq muds }kjk mDr vkjksi i= dk izR;qRrj vFkok Li"Vhdj.k vHkh rd izLrqr ugh fd;k x;k gSA

mDr vkjksi i= ds lkis{k Li"Vhdj.k nsus ds LFkku ij Jh jke js[kk flag ;kno ¼fuyfEcr½ vfrpkjh deZpkjh }kjk fuEu vkosnu i= v/kksgLrk{kjh ds dk;kZy; esa izLrqr fd, x;s gS%

¼d½ izeq[k lfpo] m0iz0 'kklu] xzkE; fodkl dks ftykf/kdkjh@tkap vf/kdkjh ds ek/;e ls lEcksf/kr vkosnu i= fnukad 11-03-2008 tks fd fuyEcu vkns'k fnukad 11-10-2007 ds dze esa tkap ,oa Li"Vhdj.k gsrq izLrqr fd;k x;k ¼izfr layXu½ gSA mDr i= esa ;g dgk x;k gS fd vipkjh vf/kdkjh dks vkjksi i= ds lk{; izkIr ugh gS rFkk vkjksi i= ds dqN foUnqvksa ij viuk Li"Vhdj.k nsrs gq, 'ks"k dk;Z dks iwjk djus ds fy, Jh lqcsnkj flag] voj vfHk;Urk ,oa 'ks"k Hkqxrku djus ds fy, jkejs[kk flag [k.M fodkl vf/kdkjh ds uxjk ,oa jlM+k dk dk;ZHkkj nsus dk vuqjks/k fd;k gSA

¼k½ vkjksi i= fnukad 15-05-2008 dks izLrkfor leLr lk{; izkIr djus ds mijkUr vfrpkjh vf/kdjh us fnukad 15-05-08] ftls dk;kZy; esa fnukad 17-05-08 dks miyC/k djk;k x;k gS] es rFkkdfFkr mRrj fnukad 15-12-2007 ,oa ekax i= fnukad 05-05-2008 dh ckr dgh xbZ gS] bl dk;kZy; esa izkIr ugh gSA

vr,o vkjksih Jh jkejs[kk flag ;kno] ¼fuyfEcr½ vf/kdkjh ds fo:) yxk;s x;s dqy 15 vkjksiksa ds lUnHkZ esa i=koyh ij miyC/k vfHkys[kksa ,oa muds }kjk fn, x, lanfHkZr vkosnu i=ksa ds ijh{k.kksijkUr vkjksiokj foopsuk ds dze esa tkWp vk[;k fuEuor gS%"

5. After the aforesaid remarks, the Inquiry Officer proceeded essentially with

the observations that the relevant record was with the delinquent himself who had failed to state any explanation/ justification in relation to the charges; and found charge no.1 partially proved and charges no.2 to 15 fully proved against him.

6. The petitioner submitted a reply to the notice dated 30.07.2008 on 13.02.2009(Annexure No.9), denying all the charges and the findings; and asserted that the record was available with other officers. Thereafter, the Government proceeded to pass the order dated 01.02.2012, awarding punishment, as noticed at the outset.

7. Questioning the order so passed against him, the petitioner has urged that the entire proceedings against him had been in violation of the Rules of 1999 as also the principles of natural justice. The petitioner has referred to Rule 7 of the Rules of 1999 and has submitted that after denial of imputations, the Inquiry Officer was bound to call the witnesses to prove the charges and to record the oral evidence in the presence of petitioner, who was required to be given an opportunity to cross examine the witnesses; and thereafter, the petitioner was to be afforded the opportunity to lead evidence in defence. It is also submitted that even non-submission of explanation by the delinquent is not decisive of the matter nor could be considered ipso facto admission of the guilt; and the charges of misappropriation/ embezzlement are required to be proved by cogent evidence and finding of guilt could be recorded only on the basis of such evidence. According to the petitioner, after serving of the charge sheet on 15.05.2008, the Inquiry Officer neither fixed any date, time and place for holding the inquiry, nor examined any witness, nor afforded any opportunity to him to produce the evidence. It is submitted that the documents requested by the petitioner for giving effective reply to the charge sheet were not supplied to him.

8. It may be observed that the petitioner has also taken detailed averments in relation to the merits of the charges levelled against him and has attempted to show that the charges were either misplaced or were not substantiated. However, looking to the scope of this petition and the order proposed to be passed, we would prefer not to dilate upon the merits of the charges in this order and such aspects are left at that only.

9. The respondents have filed the counter affidavit seeking to contest the submissions made by the petitioner. It is submitted by the respondents that the petitioner has been involved in embezzlement of huge amount of government money and as such, under a detailed charge sheet along with the material documents the inquiry was conducted through duly appointed Inquiry Officer. The respondents have alleged that the petitioner tried to avoid the charge sheet and ultimately, he received the same only after advertisement was made in the newspaper on 06.03.2008. The respondents have further alleged that the petitioner did receive all the material documents annexed with the charge sheet but chose not to file any reply to the charge sheet and hence, the Inquiry Officer was left with no option but to proceed with the inquiry along with the material documents available with the department; and after due proceedings,

which the petitioner avoided, the Inquiry Officer submitted a detailed inquiry report in pursuance whereof a show cause notice along with inquiry report was served upon the petitioner; and after due consideration of the petitioner's reply, final punishment order was passed by the competent authority. According to the respondents the inquiry proceedings cannot be said to be vitiated on any count or at any stage. Respondents have also refuted the submissions of the petitioner about non supplying of the documents with reference to the letter of the petitioner dated 15.05.2008(Annexure - C.A.2) that therein the petitioner himself admitted having received all the documents/ evidence relied upon in the charge sheet and gave an undertaking for submission of reply within three days, but he did not file any reply even until finalization of the inquiry. The respondents have also contested the submission of the petitioner that no time, date and place was fixed by the Inquiry Officer and have referred to the communication of the Inquiry Officer dated 05.05.2008 (Annexure-C.A.3) whereby, the petitioner was informed that 15.05.2008 was the date fixed for the purpose of inquiry. The respondents have also denied the averments of the petitioner about the submission of the representation dated 15.05.2008 with the assertion that no such letter was received in the office of the respondents authorities, nor the same was available with the Inquiry Officer.

10. Thus, according to the respondents there were no shortcomings in the inquiry proceedings and in the case of serious financial irregularities/ embezzlement where the petitioner retained and withheld the documents himself, the punishment order has rightly been passed after due inquiry in which the petitioner was given proper and ample opportunities to defend.

11. The respondents have also attempted to join the issue on the merits of the charges but, as observed hereinbefore, we do not propose to enter into the merits of the charges in this order and hence, those aspects are not being dilated upon.

12. The petitioner has filed a rejoinder affidavit, refuting the allegation that he attempted to avoid the service of charge sheet; and has submitted that charge sheet was served upon him on 15.05.2008 and no date in the inquiry was fixed by the Inquiry Officer thereafter, nor any evidence was recorded by the Inquiry Officer, nor any opportunity was given to him to lead evidence, and, Inquiry Officer straightway submitted the inquiry report within a short period of 18 days in utter disregard to the provisions of the Rules of 1999 and principles of natural justice.

13. The learned counsel for the parties have made the submissions in conformity with the averments taken and the grounds urged in the pleadings as noticed hereinabove. The learned counsel for the petitioner has referred to and relied upon the decision of Hon'ble Supreme Court in the case of State of U.P. Vs. Saroj Kumar Sinha, (2010) 2 SCC 772, and of this Court in the case of Mahesh Narain Gupta Vs. State of U.P. and others, 2012 (1) AWC 354, Mohd. Javed Khan Vs. State of U.P. and others, 2008 (1) ADJ 284, and Vijay Kumar Sinha Vs. State of U.P. and others, Civil Misc. Writ Petition No.36973 of 2010 decided on 19.04.2011.

14. Having given anxious consideration to the rival submissions and having examined the record with

reference to the law applicable, we are unable to to approve the process of the disciplinary proceedings, as adopted by the respondents in this case; and we are clearly of the view that the punishment order consequent to these invalid proceedings deserve to be annulled while leaving it open for the respondents to take up the proceedings in accordance with law.

15. It remains trite that in departmental inquiry proceedings, the requirement of rules in particular and the principles of natural justice in general are required to be followed; and the proceedings held in violation thereof cannot be sustained. In the case of Saroj Kumar Sinha(supra) the Hon'ble Supreme Court, inter alia, said,

29. Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/ removal from service.

16. It is also not a matter of much debate that even if the delinquent does not submit his reply to the charge sheet the Inquiry Officer cannot conclude that the charges stood automatically proved. Recording of necessary evidence with participation of the delinquent in such a process is also the basic requirement of fair opportunity of hearing in such matters of disciplinary proceedings. In the case of Mahesh Narain Gupta (supra), while referring to several of the decided cases, this Court, inter alia, said,

16. As it is a case of non recording of any evidence either oral or documentary in the enquiry proceedings and submission of the enquiry report justifying all the charges only on the ground of non-filing of the reply/ evidence from the petitioner's side, we are of the view that going into merit of the charges and to record own finding may be neither proper nor justified as that will be again exercise in ex parte manner behind the back of the petitioner, i.e., without opportunity to him.

17. At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice of charged employee. Even if the department is to rely its own record/ document which are already available, then also the Enquiry Officer by looking into them and by assigning his own reason after analysis will have to record a

finding that those documents are sufficient enough to prove the charges.

18. In no case, approach of the Enquiry Officer that as no reply has been submitted, the charges will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the Enquiry Officer of automatic prove of charges on account of non-filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, Enquiry Officer has to be cautioned in this respect.

17. We need not to multiply the reference to the authorities in the present case, because herein, it is explicit and apparent that the petitioner has been denied a fair opportunity of hearing and in fact, the proceedings have been conducted in a rather casual and perfunctory manner.

18. It is clear from the own showing of the respondents that after the advertisement in the newspaper on 06.03.2008, a notice was served upon the petitioner for the purpose of the inquiry proceedings on 15.05.2008 at 3:00 p.m. in the office of the Collector, Ballia(vide Annexure - C.A.-3). The petitioner is said to have appeared before the Inquiry Officer on 15.5.2008(Annexure - C.A.-2) and submitted that he would file the reply within three days. The petitioner has stated in this writ petition that he made a representation dated 15.05.2008 with the submissions that he had already stated his explanation as regards seven charges contained in the order of suspension and regarding eight new charges in the charge sheet, documents were required, which had already been asked for and the same may be supplied. The document in support of these submissions has been filled as Annexure - 6 to the petition. This document Annexure - 6 bears the seal and signatures from the office of the Collector, Ballia dated 17.05.2008. It is difficult to accept the suggestions made by the respondents in their reply that the said representation was not received in their office or was not available with the Inquiry Officer.

19. In the given fact situation, even if it be assumed that there had been any miscommunication, it is further difficult to accept the submissions of the respondents that the petitioner was not at all interested in participating in the inquiry proceedings.

20. Moreover, and even if all the submissions of the respondents are taken on their face value, it remains seriously questionable yet as to on what basis and evidence had the Inquiry Officer drawn his report dated 02.06.2008 ? The entire of the report nowhere mentions about even a single witness having been examined in support of the charges levelled against the petitioner. It has also not been shown that after 15.05.2008, the Inquiry Officer ever fixed any other date for proceedings ahead with the inquiry.

21. In a comprehension of record, the conclusion is irresistible that the inquiry proceedings had been conducted in a casual manner and with a closed mind. For no witnesses having been examined and no opportunity having been extended to the petitioner, we are clearly

of the view that the proceedings cannot be sustained. The order passed consequent to such proceedings by the respondents is liable to be set aside.

22. Noteworthy it is that even in the punishment order, as regards practically all the charges against the petitioner, the disciplinary authority has merely observed that the delinquent had not adduced any evidence to refute the charges and hence, the same stood proved. The basic requirement of the primary evidence on the part of the department to substantiate the charges appears to have been ignored as if with the assumption that levelling of charges was sufficient and no evidence was requisite to substantiate the same. This approach cannot be countenanced.

23. We may also observe that it has repeatedly been sought to be asserted by the Inquiry Officer as also by the disciplinary authority that the relevant record was retained by the delinquent himself. Significantly, even the primary evidence in this regard had also not been adduced to establish that the referred record was in the possession of the delinquent-petitioner.

24. In view of what has been discussed hereinabove, the impugned order of punishment and also the inquiry report are required to be quashed. However, in the facts and circumstances of the case, it appears just and proper to allow the respondents to hold the disciplinary proceedings afresh from the stage of serving of the charge sheet.

25. Accordingly and in view of above, this writ petition succeeds and is allowed to that extent and in the manner indicated. The impugned order of punishment dated 01.02.2012 and so also the inquiry report dated 02.06.2008 are quashed and set aside. The petitioner shall be reinstated in service forthwith. The respondents shall hold the disciplinary proceedings afresh from the stage of serving of charge sheet and for that purpose, it shall be open for the respondents to appoint any other Inquiry Officer, if so chosen. The Inquiry Officer shall fix a date for proceeding with the inquiry with due notice to the petitioner and shall attempt to conclude the proceedings at the earliest, preferably within a period of four months from the first date of appearance of the petitioner. The payment of arrears and salary etc., for the period during which the petitioner had remained out of service, shall be subject to the final decision taken by the respondents while concluding the proceedings afresh.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 23783 of 2010

Neetu Devi... Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nisheeth Yadav, Sri C.B. Yadav

Counsel for the Respondents:
C.S.C., Sri Rajesh Tripathi

Indian Electricity Rules, 1956-Rule 29, 30(4), 51(1) and 77 (3)-Duty of electricity department to maintain proper supply-petitioner's husband about 26 years loss of his life due to electrocution-

claim of immediate compensation-denied shifting responsibility upon Principal I.T.I-apart from compensation of Rs. 75 lac-held-apart from forum of Civil Suit-Rs. 12 Lac shall be solace to her-accordingly direction issued to deposit 12 Lacs within two months-in case of default -D.M. to recover as arrears of Land revenue.

Held: Para-19
Accordingly, in view of above, since in the present case, the petitioner's husband suffered because of negligence on the part of the respondents No.2, 5 and 6, and while staying with his own friend petitioner's husband died on account of electrocution at the young age of 26 years leaving the petitioner widow, this Court may grant compensation which shall be in addition to the petitioner's right in accordance with law before the appropriate court or forum.

Case Law discussed:
2012 (9) SCC 791; (2005) 6 Supreme Court Cases 344.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1 Heard learned counsel representing the parties. The petitioner has preferred the instant writ petition under Article 226 of the constitution of India to issue a writ in the nature of mandamus directing the U.P. Power Corporation Limited to pay compensation.

2 According to the petitioner's counsel, petitioner's husband on 8.7.2009, at about 6:30 a.m., Arimardan Singh came in contact with the insulated open cable installed by U.P. Power Corporation Limited. On being touched with the insulated cable, he was electrocuted and succumbed to injuries. Post mortem was conducted and the post mortem report revealed that he died because of electrocution. A copy of post mortem report of petitioner's husband, has been annexed as Annexure No.3 to the writ petition. After the death of petitioner's husband, the petitioner requested the Executive Engineer of U.P. Power Corporation Limited for payment of compensation. A copy of representation submitted to the competent authority, has been filed as Anenxure No.4 to the writ petition.

3 It has also been submitted by the petitioner's counsel that the incident occurred because of lapse on the part of U.P. Power Corporation Limited and its Maintenance Engineer. On account of negligence of the U.P. Power Corporation Limited to maintain its electricity line, the electrocution took place.

A legal notice was also sent by the petitioner for payment of compensation to the tune of Rs.75,00,000/-. In spite of repeated requests made, the compensation was not paid.

4 Submission of the petitioner's counsel is that in pursuance of provisions contained in Rule 29, 30 (4), 50 (1) and 77 (3) of Indian Electricity Rules, 1956, the petitioner is entitled for compensation. It is also submitted that immediate compensation of Rs.1,00,000/- should also be paid to the petitioner under relevant Rules. A specific pleading has been made in the writ petition that the respondent U.P. Power Corporation Limited has not maintained its electricity line with sufficient care to prevent such mis-happening. Accordingly, the dependant of the deceased person who suffered on account of ill-maintenance of electricity line, shall be entitled for payment of compensation. The aforesaid

Rules relied upon by the petitioner's counsel, are reproduced as under:-

29. Construction, installation, protection, operation and maintenance of electric supply lines and apparatus-- (1) All electric supply lines and apparatus shall be of sufficient ratings for power, insulation and estimated fault current and of sufficient mechanical strength, for the duty which they may be required to perform under the environmental conditions of installation, and shall be constructed, installed, protected, worked and maintained in such a manner as to ensure safety of [human beings, animals and property.

(2) Save as otherwise provided in these rules, the relevant code of practice of the 3[Bureau of Indian Standards] 4[including National Electrical Code] if any may be followed to carry out the purposes of this rule and in the event of any inconsistency, the provision of these rules shall prevail.

(3) The material and apparatus used shall conform to the relevant specifications of the [Bureau of Indian Standards] where such specifications have already been laid down.

30. Service lines and apparatus on consumer's premises-- (1) The supplier shall ensure that all electric supply lines, wires, fittings and apparatus belonging to him or under his control, which are on a consumer's premises, are in a safe condition and in all respects fit for supplying energy and the supplier shall take due precautions to avoid danger arising on such premises from such supply lines, wires, fittings and apparatus.

(2) Service-lines placed by the supplier on the premises of a consumer which are underground or which are accessible shall be so insulated and protected by the supplier as to be secured under all ordinary conditions against electrical, mechanical, chemical or other injury to the insulation.

(3) The consumer shall, as far as circumstances permit, take precautions for the safe custody of the equipment on his premises belonging to the supplier.

(4) The consumer shall also ensure that the installation under his control is maintained in a safe condition.

50. Supply and use of energy-- (1) The energy shall not be supplied, transformed, converted or used or continued to be supplied, transformed, converted or used unless provisions as set out below are observed:-

(a) The following controls of requisite capacity to carry and break the current 2[are placed] after the point of commencement of supply as defined in rule 58 so as to be readily accessible and capable of being easily operated to completely isolate the supply to the installation such equipment being in addition to any equipment installed for controlling individual circuits or apparatus: -

(i) a linked switch with fuse(s) or a circuit breaker by low and medium voltage consumers.

(ii) a linked switch with fuse(s) or a circuit breaker by HV consumers having aggregate installed transformer/apparatus capacity up to 1000 KVA to be supplied at voltage upto 11 KV and 2500 KVA at higher -voltages (above 11 KV and not exceeding 33 KV).

(iii) a circuit breaker by HV consumers having an aggregate installed

transformer/apparatus capacity above 1000 KVA and supplied at 11 KV and

above 2500 KVA supplied at higher voltages (above 11 KV and not exceeding 33 KV).

(iv) a circuit breaker by EHV consumer;

Provided that where the point of commencement of supply and the consumer apparatus are near each other one linked switch with fuse(s) or circuit breaker near the point of commencement of supply as required by this clause shall be considered sufficient for the purpose of this rule;

(b) In case of every transformer the following shall be provided: -

(i) On primary side for transformers a linked switch with fuse(s) or circuit breaker of adequate capacity:

Provided that the linked switch on the primary side of the transformer may be of such capacity as to carry the full load current and to break only the magnetising current of the transformer:

[Provided further that for transformers--

(A) having a capacity of 5000 KVA and above and installed before the commencement of the Indian Electricity (Amendment-1) Rules, 2000 and

(B) having a capacity of 1000 KVA and above and installed on or after the commencement of the Indian Electricity (Amendment-1) Rules, 2000 a circuit breaker shall be provided.]

Provided further that the provision of linked switch on the primary side of the transformer shall not apply to the unit auxiliary transformer of the generator.

(ii) In respect of all transformers installed on or after the commencement of the Indian Electricity (Amendment-1) Rules, 2000, on the secondary side of all transformers transforming HV to EHV, MV or LV a circuit breaker of adequate rating shall be installed:

Provided that for supplier's transformers of capacity upto 630 KVA, a linked switch with fuse or circuit breaker of adequate rating shall be installed on secondary side.]

(c) Except in the case of composite control gear designed as a unit distinct circuit is protected against excess energy by means of suitable cut-out or a circuit breaker of adequate breaking capacity suitably located and, so constructed as to prevent danger from overheating, arcing or scattering of hot metal when it comes into operation and to permit for ready renewal of the fusible metal of the cut-out without danger;

(d) The supply of energy of each motor or a group of motors or other apparatus meant for operating one particular machine is controlled by a suitable linked switch or a circuit breaker or an emergency tripping device with manual reset of requisite capacity placed in such a position as to be adjacent to the motor or a group of motors or other apparatus readily accessible to and easily operated by the person incharge and so connected in the circuit that by its means all supply of energy can be cut off from the motor or group of motors or apparatus from any regulating switch, resistance of other device associated therewith;

(e) All insulating materials are chosen with special regard to the circumstances of its proposed use and their mechanical strength is sufficient for its purpose and so far as is practicable of such a character or so protected as to maintain adequately its insulating property under all working conditions in respect of Temperature and moisture; and

(f) Adequate precautions shall be taken to ensure that no live parts are so

exposed as to cause danger."

(2) Where energy is being supplied, transformed, converted or used the

[consumer, supplier or the owner] of the concerned installation shall be responsible for the continuous observance of the provisions of sub-rule (1) in respect of his installations.

(3) Every consumer shall use all reasonable mean to ensure that where energy is supplied by a supplier no person other than the supplier shall interfere with the service lines and apparatus placed by the supplier on the premises of the consumer.]"

77. Clearance above ground of the lowest conductor-(1) No conductor of an overhead line, including service lines, erected across a street shall at any part thereof be at a height of less than--

(a) For low and medium voltage lines 5.8 metres

(b) For high voltage lines 6.1 metres

(2) No conductor of an overhead line, including service lines, erected along any street shall at any part thereof be at a height less than--

(a) For low and medium voltage lines 5.5 metres

(b) For high voltage lines 5.8 metres

(3) No conductor of in overhead line including service lines, erected elsewhere than along or across any street shall be at a height less than--

(a) For low, medium and high voltages lines upto and including 11,000 volts, if bare 4.6 metres

(b) For low, medium and high voltage lines upto and including 11,000 volts, if insulated 4.0 metres

(c) For high voltage lines above 11,000 volts 5.2 metres

(4) For extra-high voltage lines the clearance above ground shall not be less than 5.2 metres plus 0.3 metre for every 33,000 volts or part thereof by which the voltage of the line exceeds 33,000 volts.

Provided that the minimum clearance along or across any street shall not be less than 6.1 metres."

5 A plain reading of the aforesaid Rules as well as factual matrix on record, prima facie makes out a case for payment of compensation since electrical line was not maintained in terms of Rules (supra).

6 Rule 29 (supra) makes it mandatory to maintain electricity supply line and its insulation with sufficient mechanical strength. It is because of the failure on the part of the respondents in maintaining the electricity line that the petitioner's husband has succumbed to electrocution.

7 Petitioner's counsel also relied upon a circular dated 19.6.2008 contained

in Annexure No.9 to the writ petition. For convenience, the entire office memorandum dated 19.6.2008is reproduced as under:-

** m0 iz0 ikoj dkjiksjs'ku fyfeVsM
¼m0 iz0 ljdkj dk midze½
U.P. POWER CORPORATION LIMITED
(Govt. of Uttar Pradesh Undertaking)
_____
_____

'kfDr Hkou foLrkj] 14&v'kksd ekxZ] y[kuÅ&226001

la[;k% 2400 vkS0 l0@2008&19 ¼125½ ,0 ,l0@2001 fnukad% 19 twu] 2008

dk;kZy;&Kki

m0iz0 ikoj dkjiksjs'ku fyfeVsM ds =qfViw.kZ fo|qrh; vf/k"Bkiu ds lEidZ esa vkus ls ckgjh O;fDr;ksa dh ?kkrd ,oe~ lk/kkj.k nq?kZVuk ls gqbZ viaxrk ij vuqxzg /kujkf'k vuqeU; fd;s tkus lecU/kh dk;kZy; Kki la[;k&1780&vkSl0 la0&17@ikdkfy@2006&19 ¼125½ ,0 ,l0@2001] fnukad 19-4-06 esa fuEuor~ la'kks/ku rRdky izHkko ls fy;s tkrs gSa%&

¼d½ orZeku esa ?kkrd ekuo fo|qr nq?kZVuk ds QyLi:i vuqeU; ns; vuqxzg /kujkf'k #0 50]000@& ¼#i;k ipkl gtkj½ ds LFkku ij #0 1]00]000@&¼#i;k ,d yk[k½ izfr O;fDr gksxhA

¼[k½ ckgjh O;fDr@O;fDr;ksa dh lk/kkj.k nq?kZVuk eas gqbZ iw.kZ viaxrk dh fLFkfr esa orZeku esa vuqeU; {kfriwfrZ #0 50]000@&¼#i;s ipkl gtkj½ ls c<+kdj #0 1]00]000@&¼#i;s ,d yk[k½ izfr O;fDr rFkk vkaf'kd viaxrk dh fLFkfr esa #0 1]00]000@&¼ #0 ,d yk[k½ dh /kujkf'k dks vtZu {kerk esa fpfdRlh; izek.k i= ds vk/kkj ij gq, izfr'kr g'kl ds vuqlkj x.kuk dj vuqikfr vuqxzg /kujkf'k vuqeU; dh tk;sxh ftldh vf/kdre lhek #0 ,d yk[k gksxhA

¼x½ i'kqvksa dh ?kkrd nq?kZVuk gsrq vuqeU; vuqxzg /kujkf'k #0 5000@&¼#i;s ikap gtkj½ vuqeU; dh tk;sxhA

izR;sd fo|qr nq?kZVuk dh fo|qr lqj{kk funs'kky; vFkok vU; laLFkkuksa }kjk dh xbZ tkWapksa dks laKku esa ysdj foHkkxh; tkWap dh tk;s vkSj {kfriwfrZ ds :i esa Hkqxrku dh xbZ /kujkf'k dh olwyh fo|qr nq?kZVuk gsrq mRrjnk;h ¼;fn dksbZ gks rks½ dkfeZd ¼vf/kdkjh@deZpkjh½ ls vuq'kklfud dk;Zokgh ds vfrfjDr dh tk;sA

mDr vkns'k fnukad 19-6-2008 vFkok blds mijkUr gksus okyh fo|qr nq?kZVuk ds izdj.k ds lEcU/k esa izHkkoh gksaxsaA

v/;{k

la[;k% 2400 ¼1½ vkSl&17@ikdkfy@2008&rn~fnukad%

izfrfyfi fuEufyf[kr dks lwpukFkZ ,oe~ vko';d dk;Zokgh gsrq izsf"kr %&

1½ leLr izcU/k funs'kd] iwokZaUpy@if'pekapy@e/;kapy@nf{k.kkapy fo|qr forj.k fuxe fyfeVsM@dsLdks] okjk.klh@esjB@y[kuÅ@vkxjk@dkuiqjA

2½ eq[; vfHk;Urk ¼ty&fo|qr½] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

3½ leLr eq[; vfHk;Urk ¼ forj.k ½] m0 iz0 ikoj dkjiksjs'ku fyfeVsM dks bl vk'k; ls fd os vius Lrj ls mDr vkns'k dh izfr vf/kuLFk vf/kdkfj;ksa@bdkbZ;ksa dks miyC/k djk nsaA

4½ leLr mi egkizcU/kd] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

5½ leLr vf/k'kklh vfHk;Urk] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

6½ egkizcU/kd] ys[kk ,oe~ lEizs{kk] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

7½ mi egkizcU/kd] ¼ys[kk½] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

8½ leLr ojf"B dkfeZd vf/kdkjh@dkfeZd vf/kdkjh] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

9½ vuqlfpo] dkfeZd foRr uhfr] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

10½ dkjiksjs'ku ¼eq0½] 'kfDr Hkou ds leLr vf/kdkjh@vuqHkkx@f'kfojA

11½ dEiuh lfpo] m0 iz0 ikoj dkjiksjs'ku fyfeVsMA

12½ dV Qkby@i=koyh la[;k&8&,e@92 A

vkKk ls]
viBuh;
¼v'kksd dqekj½
mi egkizcU/kd ¼vkS0 la0½ **

8 A plain reading of the aforesaid office memo of U.P. Power Corporation Limited shows that the sufferer shall be entitled to Rs.1,00,000/- as a measure of immediate compensatory payment. Why respondent U.P. Power Corporation Limited has failed to discharge its statutory obligation is not borne out from the record. Otherwise also, the amount of Rs.1,00,000/- is too meagre in the event of death on account of electrocution.

Office memorandum (supra) grants non-statutory immediate relief. Courts may provide compensation in view of actual damage caused, which may be much higher than it (supra).

9 Rule 29 of the Indian Electricity Rules, 1956 (supra), provides that all electricity supply line and apparatus shall contain sufficient safeguard and insulation to check such incident. There appears to be no room of doubt that in case respondents would have taken necessary steps in pursuance of statutory duty, then incident would not have happened and petitioner's husband aged about 26 years of life, would not have suffered with untimely death.

Thus, it appears that on account of negligence on the part of U.P. Power Corporation Limited, vis-a-vis respondent No.6, the incident occurred and petitioner's husband died because of electrocution.

10 While submitting reply to the present writ petition, it has been submitted by the respondents that under Section 161 of Indian Electricity Act, 2003, the Directorate Electrical Supply has been assigned duty for inquiry of such incident. According to report of the Director, Electricity Safety, Farrukhabad, 80 kilo volt ampier was given to the Industrial Training Institute, Farrukhabad campus by the Dakshinanchal Vidyut Vitran, Limited Fatehgarh, Farrukhabad on low transmission line. It has also been stated that the maintenance of electricity after the energy meter was the sole responsibility of Industrial Training Institute, Farrukhabad. One Ram Naresh Instructor Machine, Industrial Training Institute, Farrukhabad is allotted residential house in the campus where he lives along with family

members. At the relevant time, he was posted at ITI, Allahabad. Being close friend of Ram Naresh, Sri Amrendra Singh was staying in his house. According to the report, when Amrendra Singh was going to take bath, he came into contact with broken cable at the stairs of the bathroom. In consequence thereof, he was electrocuted. A finding has been recorded by the inquiry officer that the electricity maintenance of the house was not in accordance with Rules 29, 30 (4), 50 (1), 77 (3) of the Indian Electricity Rules, 1956. A finding has been further recorded that it was sheer negligence on the part of the Principal, ITI, Farrukhabad with defective installation of electricity line. The Director Electrical Safety, submitted report on 30.9.2009 and also furnished a copy thereof to the petitioner informing her to contact the Principal ITI, Farrukhabad for payment of compensation. Thus, the respondent No.5, U.P. Power Corporation Limited avoided responsibility to pay compensation in spite of the fact that a finding has been recorded with regard to negligence in maintenance of power connection.

11 It is submitted by the learned counsel for the respondent U.P. Power Corporation Limited that the Director, Electrical Safety Farrukhabad has nowhere recorded finding that the U.P. Power Corporation Limited is liable to make payment of compensation. In view of the above, the U.P. Power Corporation Limited has set up a case that it shall not be liable to make payment of compensation. The responsibility to pay compensation in pursuance of report of the Director Electrical Safety, has been shifted on the Principal ITI who has also disowned the liability to pay compensation. In such a situation, a question has cropped up as to who is responsible to pay the compensation on account of electrocution of petitioner's husband.

12 The statutory provisions discussed hereinabove, provides to maintain the electricity line or cables strictly in accordance with Rules to avoid any such incident.

13 Rule 29 (supra) casts a duty on U.P. Power Corporation Limited also to do needful with regard to installation, protection and maintenance of electricity supply line and apparatus. U.P. Power Corporation Limited cannot shirk from the statutory duty to ensure that the electricity lines are maintained in accordance with Rules and sufficient safeguard.

14 Nothing has been brought on record while filing counter affidavit that the required inspection has been done in accordance with rules by the officers of the U.P. Power Corporation Limited to check the maintenance of electricity line. Being a connection of high voltage, it was expected that the U.P. Power Corporation Limited shall ensure that the consumer is maintaining the electricity line in accordance with Rules. It does not mean that the consumer can disown the liability with regard to maintenance of electricity line within its own premises. Section 31 of the Indian Electricity Rules, 1956, also casts duty on the consumer with regard to maintenance of electricity line within its own premises. For convenience, Section 31 (supra) is reproduced as under:

"31. Cut-out on consumer's premises.--(1) The supplier shall provide a suitable cut-out in each conductor of every service-line other than an earthed or earthed neutral conductor or the earthed

external conductor of a concentric cable within a consumer's premises, in an accessible position. Such cut-out shall be contained within an adequately enclosed fireproof receptacle. Where more than one consumer is supplied through a common service-line, each such consumer shall be provided with an independent cut-out at the point of junction to the common service.

(2) Every electric supply line other than the earth or earthed neutral conductor of any system or the earthed external conductor of a concentric cable shall be protected by a suitable cut-out by its owner.

1[(3) * * * * *]

1. Sub-rule (3) omitted by GSR 358, dt. 30.4.1987, w.e.f. 5.9.1987."

15 In the present case, it appears that the respondent Industrial Training Institute as well as U.P. Power Corporation Limited, have failed to discharge their statutory obligation with regard to maintenance of electricity line. The report submitted by the Director Electrical Safety is the eye opener which shows how the consumer and U.P. Power Corporation Limited have been negligence in the discharge of their statutory duty. While supplying electricity line to the industrial consumers, it shall always be obligatory on the part of the Electricity Department to have a regular check with regard to use of electricity line by such industrial units. In case the the U.P. Power Corporation Limited would have done regular inspection of respondent industrial unit, such incident would not have occurred.

16 The husband of the petitioner had visited his friend for personal reason and stayed in the premises in question. It is not only the consumer but whosoever visits the consumer and suffers from such incident/accident, shall be entitled for payment of compensation in pursuance of office memo of the U.P. Power Corporation Limited (supra). Accordingly, we are of the view that not only the U.P. Power Corporation Limited but also the respondent Industrial Training Institute shall be liable to pay compensation. Both are jointly responsible and seem to be negligent to maintain electricity line. A person who had gone to attend his friend in young age, had suffered with the accident leaving behind the petitioner widow, without any source of livelihood, in such situation, it shall be appropriate that the petitioner be awarded some compensatory costs and the U.P. Power Corporation Limited may also be directed to pay compensation in accordance with statutory Rules (supra) which shall be in addition to the damages claimed by the petitioner by filing a suit or approaching other appropriate alike forum for payment of compensation.

17 Death because of electrocution in view of ill-maintenance of electricity line by the respondents, is violative of Article 21 of the Constitution of India. In the matter involving infringement or deprivation of fundamental right, this Court has got ample power to award compensation under Article 226 of the Constitution of India.

In the present case, because of ill-maintenance of electricity line as held in the report of the Director, Electrical Safety, the husband became victim of it. Hence in such a situation, this Court may direct for payment of compensation.

18 In the case reported in 2012 (9) SCC 791: Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra, while considering the ambit and scope of Article 21 and its violation, and court's right to payment compensation, their lordships held as under:-

17 It is trite principle of law that in matters involving infringement or deprivation of a fundamental right; abuse of process of law, harassment etc., the courts have ample power to award adequate compensation to an aggrieved person not only to remedy the wrong done to him but also to serve as a deterrent for the wrongdoer.

18 In Rudul Sah Vs. State of Bihar, Y.V. Chandrachud, CJ, speaking for a Bench of three learned Judges of this Court had observed thus: (SCC p. 147, para 10)

"10. ...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. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt."

19 In Bhim Singh, MLA Vs. State of J & K, holding illegal detention in police custody of the petitioner Bhim Singh to be violative of his rights under Articles 21 and 22(2) of the Constitution, this Court, in exercise of its power to award compensation under Article 32, directed the State to pay monetary compensation to the petitioner. Relying on Rudal Sah , O. Chinnappa Reddy, J. echoed the following views: (SCC p.686, para 2)

"2. ... When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation..."

20. In Nilabati Behera (Smt) Alias Lalita Behera Vs. State of Orissa, clearing the doubt and indicating the precise nature of the constitutional remedy under Articles 32 and 226 of the Constitution to award compensation for contravention of fundamental rights, which had arisen because of the observation that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial" in Rudul Sah (SCC p. 147, para 10), J.S. Verma, J. (as His Lordship then was) stated as under: (Nilabati Behera case, SCC pp. 762-63, para 17)

"17 It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right.

The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights."

(emphasis supplied)

21. In the same decision, in his concurring judgment, Dr. A.S. Anand, J. (as His Lordship then was), explaining the scope and purpose of public law proceedings and private law proceedings stated as under: (Nilabati Behera case, SCC pp. 768-69, para 34)

"34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law." (emphasis supplied)

22. The power and jurisdiction of this Court and the High Courts to grant monetary compensation in exercise of its jurisdiction respectively under Articles 32 and 226 of the Constitution of India to a victim whose fundamental rights under Article 21of the Constitution are violated are thus, well-established. However, the question now is whether on facts in hand, the appellant is entitled to monetary compensation in addition to what has

already been awarded to him by the High Court. Having considered the case in the light of the fact- situation stated above, we are of the opinion that the appellant does not deserve further monetary compensation."

19 Accordingly, in view of above, since in the present case, the petitioner's husband suffered because of negligence on the part of the respondents No.2, 5 and 6, and while staying with his own friend petitioner's husband died on account of electrocution at the young age of 26 years

21 In such a situation, where a young man of 26 years electrocuted because of fault of respondent U.P. Power Corporation Limited as well as respondent No.6, appropriate compensation may be awarded as a measure of immediate relief to the widow apart from the costs in view of the judgment reported in (2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India. We assess the compensation to the tune of Rs.10,00,000/- (ten lakhs) which shall be paid by respondent U.P. Power Corporation Limited, as well as respondent No.6 equally (five lakh each).

We further assess the costs to both of them to the tune of Rs.1,00,000/-, one lakh each (total rupees two lakhs). The compensation paid in pursuance of the present judgment, shall be in addition to whatever is being paid to the petitioner widow of the deceased husband by other forum in a civil suit or other statutory authority. We feel that amount of Rs.12,00,000/- (twelve lakhs) shall not compensate the vacuum created in the life of widow but it shall be a solace to her to prepare a future plan of life and deterrent to wrong doers.

leaving the petitioner widow, this Court may grant compensation which shall be in addition to the petitioner's right in accordance with law before the appropriate court or forum.

20 It shall be appropriate that the respondent No.5 U.P. Power Corporation Limited Respondent No.6 Principal, Industrial Training Institute (ITI), Farrukhabad, who seems to be equally responsible for ill-maintenance of electricity connection be directed to pay compensation.

22 Accordingly, the writ petition is allowed. A writ in the nature of mandamus is issued directing the respondent No.2 and 5, and respondent No.6 to pay an amount of Rs.5,00,000/- each (total rupees ten lakhs). The costs is assessed to Rs.1,00,000/- each payable by respondent No.2 and 5, and respondent No.6 (total rupees two lakhs).

Let the amount of Rs.12,00,000/- (total rupees twelve lakhs) be deposited by the respondent No.2 and 5 and respondent No.6 equally within two months in this Court to which the petitioner shall be entitled to withdraw. In the event of failure on the part of the respondent No.2 and 5 and respondent No.6 to deposit the aforesaid amount, the District Magistrate, Lucknow as well as District Farrukhabad shall recover the same from the respondent No.2 and 5 and respondent No.6, as arrears of land revenue and remit it to this Court which the petitioner shall be entitled to withdraw. Registry of this Court to take follow up action.

The writ petition is allowed accordingly. The compensation paid in

pursuance of the present judgment, shall be in addition to compensation claimed by the petitioner in suit before appropriate court, authority or forum.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2014

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 27946 of 2013

Akhilesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Q.H. Siddiqui

U.P. Recruitments of Dependents of Government Servant (Dying in Harness) Rules 1974-Rule-2 (c)(v)-word "Family" whether of includes brother-after death of unmarried brother where father alive but living separately with second wife after death of mother of petitioner-held-'Yes' in view of full Bench decision of Sheo Kumar Dubey.

Held: Para-14
Therefore, in my opinion the "family" of late Manoj Kumar is to be seen for the purpose of Dying in Harness Rule, 1974 and not that of Sri Chhote Lal, father of the petitioner who got remarried as back as in the year 1998 and was living with Radhika Devi and three daughters born out of second marriage and was not maintaining the petitioner and his brothers including deceased Manoj Kumar. As such for all purposes under the provisions of Dying in Harness Rule 1974 his family became different family as contemplated in the aforesaid Rules 1974 and to hold otherwise would defeat the purpose of the said Rules.

(B)U.P. Recruitment of dependents of Government Servant (Dying in Harness) Rules 1974-Rule-5-Compassionate appointment-petitioner being brother of unmarried deceased employee-fully dependent-having no source of income-applying golden Rule of interpretation-entitled for compassionate appointment-even the father being working ---------- still alive-but living separately with second wife and her children-order quashed consequential direction given.

Held: Para-20
In the present as already held that the petitioner has included in the family of late Manoj Kumar as defined under Rule 2 (c) (iv) of the Dying in Harness Rule 1974, as such the petitioner who is brother of the deceased and is not in service is entitled for appointment on compassionate ground provided he maintains other family members of the deceased namely his younger brother Amit Kumar, who is also living with him and was also dependent of late Manoj Kumar. Admittedly, deceased Manoj Kumar was unmarried as such the question of spouse being being in service does not arise. It is also undisputed fact that the petitioner Akhilesh Kumar is not in service of Central Govt. or State Govt. or in any Corporation as mentioned in Rule 5 of the Act.

Case Law discussed:
2014 (123) RD 504 (FB);2014 (2) (ADJ) 312 (FB).

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

2. Facts of the case are that late Manoj Kumar, the brother of the petitioner, was working as Junior Engineer (Civil) in Jal Nigam, who

expired on 13.1.2010, while he was posted in Jal Nigam Corporation. It is alleged that after the death of the mother of the petitioner Smt. Prabhawati Devi, the father of the petitioner married again with one Radhika in the year 1998 and started living separately from late Manoj Kumar (brother of the petitioner), Akhilesh Kumar (petitioner) and his younger brother Amit Kumar. It para 18 and 19 of the petition it has been categorically stated that from his second wife the father of the petitioner Chhote Lal also has three daughters aged about 9 years, 13 years and 14 years and he is maintaining his second wife and three daughters only. Since the petitioner and his younger brother Amit Kumar were financial dependent on their brother late Manoj Kumar as such after his death an application dated 5.5.2011 was filed by the petitioner for seeking appointment on compassionate ground, a copy whereof is Annexure-1 to the petition. The papers were forwarded by the Executive Engineer, Division Office Pratapgarh to the Superintendent Engineer at Allahabad, which in turn, were further forwarded by the Superintendent Engineer to the Chief Engineer, Jal Nigam Lucknow. It is also on record that a communication dated 11.7.2011 was issued by the Chief Engineer Lucknow to the Executive Engineer Allahabad to consider the case of the petitioner as per the Dying In Harness Amendment Rules 2001, a copy whereof is Annexure-2 to the writ petition. Further correspondence amongst the respondent authorities has also been placed on record, which shows that the case of the petitioner was being considered for this purpose. The aforesaid correspondent are Annexures 5, 6, 7 and 8, which demonstrate that a finding of fact has come that petitioner and his younger brother Amit Kumar, were dependent on them deceased brother Manoj Kumar and were living with him. It was also recorded that the father of the petitioner is alive and is working in Akashvani.

3. On the basis of the aforesaid information, the application of the petitioner, seeking compassionate appointment, was rejected vide order dated 1.12.2011, a copy whereof is Annexure-9 to the petition. The petitioner filed a representation before the Managing Director, Jal Nigam, Lucknow, challenging the aforesaid communication. In the order dated 1.12.2011 two grounds for rejecting the claim of the petitioner were mentioned. First ground is that the petitioner is son of Chhote Lal and as such he is his family member and second ground is that since Chhote Lal is alive and is working in Akashvani, therefore, he would be treated as dependent of his father Chhote Lal and cannot be treated a dependent of his brother Manoj Kumar and it will also be deemed that the financial condition of the family of Chhote Lal is sound. It was further observed that in case the petitioner is not able to maintain himself, his father is liable to maintain him and for this purpose he may proceed against his father and that under these circumstances compassionate appointment cannot be granted to him. Thereafter the petitioner filed a petition being Writ Petition No. 3287 of 2013, highlighting the communication dated 1.12.2011 regarding the rejection of his claim and that the matter on his further representation is not being proceeded with by the competent authorities. In the aforesaid writ petition a direction was issued to the concerned authority to finalise the proceedings preferably within two months from the

date of the production of the certified copy of the order before him, a copy of the judgement and order dated 21.1.2013 passed in Writ Petition No. 3287 of 2013 is Annexure-12 to the writ petition.

4. Subsequently, the representation of the petition was dismissed by the Executive Engineer, Allahabad, vide his order dated 27.4.2013, which is Annexure-13 to the petition. In this order apart from the grounds which were earlier mentioned in the order dated 1.12.2011 namely, that his father is alive and is working in Akashvani, an additional ground was added that his mother Smt. Prabhawati Devi lives in Allahabad along with her children whereas the mother of the late Monoj Kumar was one Smt. Radhika Devi and as such the petitioner being the step brother of Manoj Kumar cannot be treated his dependent and is not entitled for compassionate appointment.

5. In so far as the petitioner Akhilesh Kumar being stepbrother of Manoj Kumar is concerned, Sri Siddharth Khare submitted that his ground is neither here nor there and is contrary to the evidence on record. For this purpose he has drawn the attention of this court to Annexure-15 of the petition, which is a High School Examination 2006 Certificate of the petitioner Akhilesh Kumar where in his mother is shown to be Prabhawati Devi. He has thereafter placed the High School Examination Certificate 2001 of Manoj Kumar where again late Smt. Prabhawati Devi has been shown as his mother. A perusal thereof clearly shows that the mother of the petitioner Akhilesh Kumar as well as of late Manoj Kumar was same namely, Prabhawati Devi.

6. Assertion with regard to the aforesaid fact have been made in para 28 to 34 of the petition. In the counter affidavit in para 19 the said fact has not been denied by the respondents. It had also not been denied that no opportunity of hearing was accorded to the petition to prove his case that the mother of both, Akhilesh Kumar petition as well as late Manoj Kumar was one and same namely Smt. Prabhawati Devi. Therefore, in view of the aforesaid record available before this court, to which there is no specific denial, there appears to be no hesitation in holding that a new ground has been inserted while rejecting the claim of the petitioner which is contrary to the record available. This fact is further fortified from the inquiry report dated 30.9.2011, which is on record as Annexure-8 to the petition wherein a categorical finding of fact has come that the father of the petitioner had solemnized second marriage and is living separately. It was also recorded that deceased and his younger brother Amit Kumar were dependent of their brother late Manoj Kumar and was living separately with him. It is needless to note that had Smt. Prabhawati Devi, mother of the petitioner and first wife of Chhote Lal being alive, he could not have entered into second marriage on 3.4.1998 as it is proved from the marriage agreement dated 3.4.1998, which is Annexure-14 to the writ petition. For the purpose of the present case death of Smt. Prabhawati Devi is not very relevant once it is proved that the petitioner was dependent on late Manoj Kumar. Therefore, the controversy raised regarding the petitioner being stepbrother of late Manoj Kumar appears to be an afterthought and has no legs to stand as per the record available before this court.

7. Now coming to the second issue that as to whether the petitioner comes within the definition of family member of late Manoj Kumar within the meaning of the U.P. Recruitment of Dependents of Government Servant Dying in Harness Rule 1974 as amended from time to time herein after referred to as Dying in Harness Rules 1974. Thereafter the issue would be as to whether the petitioner is entitled for recruitment on compassionate ground as per Rule 5 of the Dying in Harness Rules 1974, in view of the fact that his father is alive and is in Government/Corporation service, For this purpose it is necessary to note the relevant un-amended and amended Dying in Harness Rules relating to the present controversy.

8. First of all definition of family is to be noted which has under gone various amendments. Definition as given in Rule 2 (c) of "family" as provided originally in Dying in Harness Rule 1974 is quoted below :-

(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters;

9. Subsequently, an amendment was made in the definition and vide Notification dated 12.10.2001, following clause was added which is quoted here in under :-

(iv) If the deceased was unmarried Government servant, brother, unmarried sister and widowed mother dependant on the deceased Government servant.

10. Rule 5 which provides for a recruitment for a member of family of deceased originally quoted herein under :-

5. Recruitment of a member of the family of the deceased.

(1) 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 or a corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or 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 a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfils the educational qualifications prescribed for the post.

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State government is satisfied that the time- limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider

necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

11. Subsequently vide Notification dated 12.10.2001 Sub Rule 3 and 4 were added to Rule 5 which are quoted herein under:-

3. Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

4. Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time.

12. The aforesaid amendments in the Dying in Harness Rules, 1974 would clearly indicate that consciously, on one hand, the inclusion of family members has been increased in the definition of "family" as given in Rule 2 (c) of the aforesaid Rules and on the other hand, in Rule 5 by adding sub-rule 3 and 4, a condition has been imposed on such family member, who is seeking appointment on compassionate ground that he would maintain other family members. Not only this, it has also been provided that in case he refuses to maintain other members, his services may be terminated. Thus, clearly the effort is not only to increase the number of family members, who may seek compassionate appointment but such entitlement would come with the liability to maintain other persons. As such the intention of the Legislature is to be seen in the light of the aforesaid amendments.

13. Now in view of the aforesaid provisions and the amendments consciously made therein the claim of the petitioner is to be tested.

14. In so far as the facts of the case regarding petitioner being a member of the family is concerned, the record clearly shows that the mother of the deceased and the petitioner Smt. Prabhawati Devi died in the year 1997 as nothing contrary exist on record. Thereafter the father of the petitioner Chhote Lal remarried on 3.4.1998 with one Radhika Devi and as per inquiry conducted by the respondent authorities he is undisputedly living separately with three daughters born out of the second marriage. A further finding of fact was clearly recorded in the inquiry conducted is that the petitioner along with his younger brother Amit Kumar was living separately along with the deceased Manoj Kumar and were completely financial dependent on him for his education and living etc. Therefore, in my opinion the "family" of late Manoj Kumar is to be seen for the purpose of Dying in Harness Rule, 1974 and not that of Sri Chhote Lal, father of the petitioner who got remarried as back as in the year 1998 and was living with Radhika Devi and three daughters born out of second marriage and was not maintaining the petitioner and his brothers including

deceased Manoj Kumar. As such for all purposes under the provisions of Dying in Harness Rule 1974 his family became different family as contemplated in the aforesaid Rules 1974 and to hold otherwise would defeat the purpose of the said Rules.

15. Now coming to the question of petitioner falling in the family of late Manoj Kumar is concerned, newly added clause (iv) clearly provides that if the deceased was unmarried government servant brother dependent on the deceased employee deceased government servant would be included in the family, and therefore, can claim the compassionate appointment under Dying in Harness Rule 1974.

16. A reference may be made to a judgement of this court in Indrapal Singh Vs. State of U.P. and others 2014 (123) RD 504 (FB) wherein Full Bench of this court was considering the expression of "family" and 'house-hold' under the U.P. Scheduled Commodities Distribution Ordinance, 2004 and Clause 2 (0) and the Government Order dated 3.7.1990. For the purpose of arriving at right conclusion, in para 29 of the aforesaid judgement, it was observed that the definition has to be interpreted and understood in the context in which they have been used. For this purpose para 30, 31, 32 and 34 are quoted here in under :-

30. In Francis Bennion's Statutory Interpretation, purposive construction has been described as under :

"A purposive construction of an enactment is one which gives effect to the legislative purpose by (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)."

31. In 'The Interpretation and Application of Statutes' by Reed Dickerson, the author at p.135 has discussed the subject while dealing with the importance of context of the statute in the following terms:

"... The essence of the language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called "conceptual map of human experience".'

32. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [(1987) 1 SCC 424] Apex Court stated as follows:

".....If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act....."

34. Apex Court in the case of Chairman, Indore Vikas Pradhikaran vs. M/s. Pure Industrial Cock & Chemicals

Ltd AIR 2007 SC 2458 has mentioned that an act should be interpreted having regard to its history and the meaning given to a word cannot be read in a different way than what was interpreted in the earlier repealed section and the words have to be incorporated in the context in which they are used. Apex Court, once again in the case of State of Gujarat Vs. Justice R.A. Mehta, 2013 (1) scale 7, has once again reiterated the same principle, that every statute has, therefore, to be construed in the context of a scheme as a whole. Consideration of context, it is trite, is to be given the meaning to legislative intention according to the terms it has been expressed.

17. The aforesaid observation of the Full Bench leaves no room to doubt that in the present case that the family of late Manoj Kumar, who was undisputedly unmarried on the date of his death, has to be considered and on meaningful consideration the present petitioner Akhilesh Kumar clearly falls within the definition of family of late Manoj Kumar as per Rule 2 (c) (iv).

18. Now next question that as to whether in view of the fact that father of the petitioner was alive and was in Government/Corporation service, the petitioner could not have been granted compassionate appointment, is to be considered. For this purpose a reference may be made to certain observation of this court made in Full Bench decision in Sheo Kumar Dubey and others Vs. State of U.P. and others 2014 (2) (ADJ) 312 (FB). Para 3,6 and 29 are quoted here in under :-

3. Before we elucidate the principles which emerge from the body of precedent on the subject, it would, at the outset, be necessary to emphasise certain basic precepts and interpret the provisions of the Rules as they stand. Appointments to public offices have to comply with the requirements of Article 14 and Article 16 of the Constitution. Article 16 provides for equality of opportunity in matters of public employment. Compassionate appointment is in the nature of an exception to the ordinary norm of allowing equality of opportunity to every eligible person to compete for public employment. The reason for the exception as envisaged in the Rules is that the immediacy of the financial hardship that is sustained by a bereaved family by the death of its earning member is sought to be alleviated in a situation in which the government servant died while in service. Rule 5 of the Rules applies where a government servant has died in harness after the commencement of the Rules.

6. The Rules have been framed by the State Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The Rules make it abundantly clear that the purpose and object underlying the provision for compassionate appointment is not to reserve a post for a member of the family of a deceased government servant who has died while in service. The basic object and purpose is to provide a means to alleviate the financial distress of a family caused by the death of its member who was in government service. This is the underlying theme or thread which cuts across almost every provision of the Rules. Firstly, the spouse of the deceased government servant must not already be employed in the Central or State Governments or their Corporations. If the spouse is so employed, then obviously, there would be no warrant to grant compassionate appointment since the spouse would be expected to provide

to the members of the family a nucleus for sustaining their livelihood. Secondly, the applicant himself should not be employed with the Central or State Governments or their Corporations. Thirdly, an application for appointment has to be made within five years from the date of death of the government servant. The rationale for imposing a limit of five years beyond which an application cannot be entertained is that the purpose of compassionate appointment is to bridge the immediacy of the loss of an earning member and the financial distress that is sustained in consequence. A lapse of time is regarded by the Rules as leading to a dilution of the immediacy of the requirement. The first proviso to Rule 5, however, confers upon the State Government a discretion to dispense with or relax the requirement of submitting an application in five years. This power is not unguided and is not left to the arbitrary discretion of the decision-making authority. Every discretionary power in public law has to be structured on objective principles. The first proviso requires the Government to be satisfied that the strict application of the norm of five years for submitting an application would cause undue hardship. The dispensation or relaxation is in order to deal with a case in a just and equitable manner. Under the second proviso, the burden has been cast on the applicant to furnish reasons and produce a justification together with evidence in the form of documents and proof in support of the cause for the delay in making an application within the stipulated period. Finally, on this aspect of interpretation, it must be emphasized that an applicant for employment under the Rules has to disclose in a full, true and candid manner, details of the financial condition of the family as well as all relevant details pertaining to the members of the family of the deceased including their names, age and status in regard to their marriage, employment and income. All these aspects have a bearing on the financial need of the family which has to be assessed before a decision is taken to grant compassionate appointment. The discretionary power to relax the time limit of five years is in the nature of an exception. It is a power which is vested in the State Government, a circumstance which is indicative of the fact that the subordinate legislation expects it to be exercised with scrupulous care. Ordinarily, the time limit of five years governs. The State Government may relax the norm on a careful evaluation of the circumstances mandated by the second proviso. It is but a matter of first principle that a discretionary power to relax the ordinary requirement should not swallow the main or substantive provision and render the basic purpose and object nugatory. The Rules indicate, in consequence, that an application for compassionate appointment, which is in relaxation of the normal recruitment Rules, must be made within a period of five years of the date of death of the government servant. But the State Government is conferred with a discretionary power to relax the requirement of five years in order to alleviate a situation of undue hardship so as to deal with a case in a just and equitable manner. The satisfaction of the State Government before it exercises the power of relaxation is not a subjective satisfaction but must be based on objective considerations founded on the disclosures made by the applicant for compassionate appointment. Those disclosures, in writing, must necessarily have a bearing on the reasons for the delay and on whether undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused by the application of the time limit of five years. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances including the income of the family, its financial condition and the extent of dependency.

29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the

operation of the rule is not suspended during the minority of a member of the family.

19. There is no doubt that immediacy of financial hardship is to be considered and the claim of the applicant is to be considered within the parameter of Rule 5 of Rule Dying in Harness Rule 1974 as amended from time to time.

20. In the present as already held that the petitioner has included in the family of late Manoj Kumar as defined under Rule 2 (c) (iv) of the Dying in Harness Rule 1974, as such the petitioner who is brother of the deceased and is not in service is entitled for appointment on compassionate ground Akhilesh Kumar and younger brother Amit Kumar, the purpose and scheme of Dying in Harness Rule 1974 would be served by providing financial assistance to the petitioner by appointing him on compassionate ground who had filed his application well within time on 5.5.2011 whereas Manoj Kumar has expired on 13.1.2010 after completion of 18 years of his age. There is no evidence on record that the petitioner had any source of income to maintain himself and his younger brother Amit Kumar, who is now his dependent. Therefore, applying the golden Rule of interpretation which says that every statute has to be construed in the context of a scheme as a whole and is to be given the meaning of the legislative intention according to the terms it has been expressed. Therefore, in view of the above discussion the impugned order dated 27.4.2013 is not sustainable and is liable to be quashed.

22. Consequently, the order dated 27.4.2013 passed by Superintendent Engineer, U.P. Jal Nigam, Allahabad is hereby quashed. The respondent authorities are, accordingly, directed to consider the claim of the petitioner for appointment of on provided he maintains other family members of the deceased namely his younger brother Amit Kumar, who is also living with him and was also dependent of late Manoj Kumar. Admittedly, deceased Manoj Kumar was unmarried as such the question of spouse being being in service does not arise. It is also undisputed fact that the petitioner Akhilesh Kumar is not in service of Central Govt. or State Govt. or in any Corporation as mentioned in Rule 5 of the Act.

21. As laid down in Full Bench decision in the case of Sheo Kumar Dubey (supra) para 29 (ii) (iii) (iv) suffice to say that once the father had left all the three brothers namely late Manoj Kumar, petitioner compassionate ground in Jal Nigam department and accordance with the educational qualifications and pass suitable order afresh, in the light of the above noted discussion, within a period of three months from the date of the production of the certified copy of this order.

23. The writ petition is, accordingly, allowed with the aforesaid observations.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2014

BEFORE
THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Misc. Application No. 40543 of 2014
(U/s 482 Cr.P.C.)

Dr. Malay Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Aditya Prasad

Counsel for the Respondents:
A.G.A., Sri Swetashwa Agarwal

Cr.P.C. Section 482-Quashing of complaint case-offence u/s 506 I.P.C. no independent witness-applicant also working in same hospital-present prosecution-on malafide ground-held-prima facie offence made out-considering amendment by notification 21.08.89-offence under section 506 IPC punishable with 7 years rigorous imprisonment-is cognizable offence under definition of 2-D of Cr.P.C.-no relief can be granted-application rejected.

Held: Para-7

Perusal of the record shows that vide State amendment notification No. 777/VIII 9-4(2)-87, dated 31st July, 1989, published in U.P. Gazette, Extra, Part A, Section (Kha), dated 2nd August, 1989. It has been specified that any offence punishable under Section 506 I.P.C. if committed in the State of Uttar Pradesh shall be cognizable and if threat be to cause death or grievous hurt, punishment should be for seven years or fine or both. Thus, since section 506 I.P.C is a cognizable offence, the definition of Section 2D Cr.P.C. defining a complaint shall not be applicable in this case. As far as the fact that only the witnesses of hospital have been sighted in the first information report, this matter and all the other disputed defences of the accused cannot be looked into at this stage by this court in the jurisdiction under Section 482 Cr.P.C.

(Delivered by Hon'ble Mrs. Ranjana Pandya, J.)

1. Heard learned counsel for the applicant, Sri Swetashwa Agrawal, Advocate who has put his appearance on behalf of the opposite party no. 2 and learned A.G.A. for the State.

2. Counsel for the applicant has argued that the applicant was also working in the Jaswant Rai Hospital, Meerut at the time of occurrence. All the witnesses cited in the first information report are those who were working in Jaswant Rai Hospital, Meerut. The case has no merit and the application is liable to be allowed.

3. The contention of the counsel for the applicant is that no offence against the applicant is disclosed and the present prosecution has been instituted with mala fide intention for the purposes of harassment.

4. From the perusal of the material on record and looking into the nature of the case at this stage it cannot be said that no offence is made out against the applicant.

5. All the submissions made at the bar relates to a disputed questions of fact which cannot be adjudicated upon by this court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of law laid down by the Supreme Court in cases of R.P. Kapur Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.

6. He has further relied on a judgment passed in application under Section 482 No. 27543 of 2011, in which this court disposed of the application. The order passed in Application No. 27543 of 2011 cannot be looked into, neither it can be considered because that court did not look into the amendment as incorporated by the State of U.P. and thus, that order cannot be relied on.

7. Perusal of the record shows that vide State amendment notification No. 777/VIII 9-4(2)-87, dated 31st July, 1989,

published in U.P. Gazette, Extra, Part A, Section (Kha), dated 2nd August, 1989. It has been specified that any offence punishable under Section 506 I.P.C. if committed in the State of Uttar Pradesh shall be cognizable and if threat be to cause death or grievous hurt, punishment should be for seven years or fine or both. Thus, since section 506 I.P.C is a cognizable offence, the definition of Section 2D Cr.P.C. defining a complaint shall not be applicable in this case. As far as the fact that only the witnesses of hospital have been sighted in the first information report, this matter and all the other disputed defences of the accused cannot be looked into at this stage by this court in the jurisdiction under Section 482 Cr.P.C.

8. The application is devoid of merits and is liable to be dismissed.

9. Accordingly the application is dismissed.
