APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2015

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Contempt Appeal No. 4 of 2014

Sri Anil Kumar Gupta & Anr. ...Appellants
Versus
Pawan Kumar Singh & Ors. Respondents

Counsel for the Appellants:
Sri Neeraj Upadhyay, Sri Piyush Shukla, Sri Ramesh Upadhyay, C.S.C.

Counsel for the Respondents:
Sri V.K. Singh, Sri G.K. Singh, Sri H.P. Sahi

Contempt of Court Act 1971-Section 19-Contempt Appeal-maintainability against order-requiring appellant to appear in person-without indication that charge shall be framed-held-being interlocutory order-appeal not maintainable.

Held: Para-18
By the impugned order, the appellants have merely been summoned in the Court. The impugned order does not even say anything that on the date fixed, charges would be framed against them. Even if assuming that their personal appearance was required for framing of charges against them in the contempt proceeding, but there is absolutely no indication that by the impugned order, the learned Single Judge has imposed any punishment on the appellants for contempt. Hence, in view of the well settled legal position as discussed above, we have no doubt in holding that the impugned order is an interlocutory order against which an appeal under Section 19 of the Contempt of Courts Act, 1971 is not maintainable. Therefore, the present appeal is liable to be dismissed as not maintainable. However, the appellants are not remediless and they are at liberty to avail any other remedy available to them under law, if so advised, in wake of the law laid down by the Apex Court in Midnapore's case (supra), wherein it has been held that if the High Court, in a contempt proceeding, decides an issue or makes any direction, relating to the merits of the dispute between the parties, the aggrieved person is not without remedy and he can challenge it by means of intra court appeal if the order is of Single Judge and by seeking special leave to appeal under Article 136 of the Constitution of India in other cases, but not by way of filing an appeal under Section 19 of the Contempt of Courts Act.

Case Law discussed:
(2000) 4 Supreme Court Cases 400; (2006) 5 SCC 399; (2006) 2 SCC 282; 2014 STPL (Web) 70 SC; (2005) 3 UPLBEC 2415; (2011) 12 SCC 736; (2005) 7 SCC 406; (2002) 5 SCC 406; (2002) 5 SCC 352; Contempt No. 1782 of 2013; 1996 (4) SCC 411; (2006) 5 SCC 399; (2005) 3 UPLBEC 2415; (2000) 4 Supreme Court Cases 400; (1988) 3 SCC 26; (1996) 4 SCC 411; (1978) 2 SCC 370; (2009) 2 SCC 641; Contempt Appeal No. 7 of 2009.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The present appeal, under Section 19 of the Contempt of Courts Act, 1971, has been filed by Principal Secretary Home, Government of U.P. Lucknow and Director General of Police, U.P. Lucknow, questioning the legality and correctness of the order dated 05.03.2014, passed by learned Single Judge of this Court in Civil Misc. Contempt Petition No. 1140 of 2009; Pawan Kumar Singh & others Vs. Kunwar Fateh Bahadur Singh, Principal Secretary, Lucknow & others, whereby the learned Single Judge, while observing that a prima facie case of non compliance of the judgment of the writ Court is made out, has directed both the appellants to remain present before the Court on the date fixed.

2. Heard Sri Ramesh Upadhyay, learned Chief Standing Counsel, assisted by Sri Neeraj Upadhyay, learned Additional Chief Standing Counsel and Sri Piyush Shukla, learned Standing Counsel, for the appellants and Sri G.K. Singh, assisted by Sri H.P. Sahi, learned counsel for the respondents. Perused the record.

3. The order assailed in this appeal, for convenience, is quoted below:-

"Heard learned counsel for the applicants and Sri Ramesh Upadhyay, learned Chief Standing Counsel, representing the Principal Secretary (Home), U. P. Government, Lucknow and the Director General of Police, U.P., Lucknow.

Services of about 20,000 constables of civil police (including the applicants) were terminated enmass in the year 2007 by a couple of Government orders. The Government orders were challenged by way of large number of writ petitions which were clubbed together and the writ Court vide order dated 8th December, 2008 allowed the writ petitions and quashed the Government orders whereby the termination had been directed. The State Government preferred intra court appeals which were also dismissed by the Division Bench on 4th March, 2009. Thereafter contempt proceedings were initiated. In the meantime the State Government filed Special Leave Petition before the Apex Court and ultimately under interim order of the Apex Court dated 25.5.2009 the terminated constables were given appointment letters and were allowed to join on 27.05.2009. Subsequently the Special Leave Petition has been got dismissed as withdrawn by the State on 3.3.2013. The effect of the dismissal of the Special Leave Petition as withdrawn is that the judgement of the writ Court stands affirmed and its implementation is to be considered.

The effect of the termination orders being quashed would be that there was no termination order in the eye of law and the terminated employees would be deemed to be in continuous service and entitled to all consequential benefits. It is not an issue that all the terminated constables have been reinstated w.e.f. 27.5.2009 and they are receiving their salary ever since then. The only issue which remains to be considered is as to whether they would be entitled to uninterrupted service benefits from the date of entering into service and also with regard to their entitlement to payment of salary / back wages for the period they have remained under termination i.e. from the date of termination till the date of reinstatement.

According to Sri Upadhyay the judgement of the writ Court has been fully complied with and nothing further remains to be implemented. Learned Chief Standing Counsel has relied upon large number of decisions of the Apex Court and this Court in support of his argument that until and unless the Court while allowing the writ petition had also directed for award of back wages and consequential benefits, there can be no claim or justification for payment of back wages. Further according to him this is also the stand taken by the State as is apparent from the affidavit dated 03.03.2014 duly sworn by the Special Secretary (Home).

On the other hand learned counsel for the applicants submitted that once termination had been quashed all the terminated employees were entitled to full back wages and consequential benefits as

the writ Court had not given any direction for reducing their back wages on the principle of no work no pay. It is also case of the applicants that writ Court had found that the termination enmass by the Government was illegal and once termination was held to be illegal, applicants would be entitled to all the benefits. It has also been submitted that the applicants and all other constables in any case would be entitled to their salary from the date of judgement of the writ Court. The Division Bench as also the Supreme Court had dismissed the intra Court appeal and the Special Leave Petition.

It may be an arguable case that applicants may not be entitled to back wages for the period when the orders for termination were in force but there can be no issue that applicants would not be entitled to the salary from the date of judgement of the writ Court. Thus, prima facie case of non compliance of the judgement of the writ Court is made out. Accordingly, the Principal Secretary (Home), U.P. Lucknow and the Director of General of Police, U.P. Lucknow need to be summoned. Since this matter is engaging attention of the Government for quite some time, learned Advocate General and learned Chief Standing Counsel have already appeared on a number of occasions and the stand taken by them has already come on record it is not necessary to issue formal notices to the present Principal Secretary (Home) and the Director General of Police.

Sri Anil Kumar Gupta, present Principal Secretary (Home) has already been arrayed as opposite party no.7. Upon oral request learned counsel for the applicant is permitted to implead Sri Anand Lal Banerjee, Director General of Police, U.P. Lucknow, as opposite party no.8 during the course of the day.

Sri Upadhyay, learned Chief Standing Counsel accepts the notices on their behalf and shall communicate them of this order.

List this case on 13th March, 2014.

On the said date the Principal Secretary (Home) and the Director General of Police, U.P. Lucknow would remain present before this Court.

A copy of this order may be provided to Sri Ramesh Kumar Upadhyay, learned Chief Standing Counsel, free of costs within 24 hours for necessary compliance."

4. At the very outset, learned counsel for the respondents Sri G.K. Singh has raised a preliminary objection with regard to the maintainability of this contempt appeal. In this respect, learned counsel for the respondents has drawn our attention to the report of Stamp Reporter dated 10th March, 2014, according to which this contempt appeal is not maintainable. Apart from this, learned counsel for the respondents has placed before us the following judgments of Hon'ble Supreme Court in support of his contention:-

Midnapore Peoples' Co-op. Bank Ltd. and others Vs. Chunilal Nanda and others (2006) 5 SCC 399.

Nand Lal Yadav v. Raja Ram and others (Contempt Appeal (Criminal) No. 1 of 2010).

S.M.A. Abdi, the Principal Secretary (Law) Government of Uttar Pradesh and another v. Private Secretaries Brotherhood and another 2009 (4) AWC 4026.

Dr. Lalji Singh & others v. Dr. Anil Kumar Chauhan (Contempt Appeal No. 6 of 2014).

5. Sri Ramesh Upadhyay, learned Chief Standing Counsel on the other hand

has submitted that the appeal is maintainable in view of the law laid down by the Apex Court in case of R.N. Dey and others v. Bhagyabati Pramanik and others, (2000) 4 Supreme Court Cases 400. He has also placed reliance on the judgment rendered in Midnapore Peoples' Coop Bank Ltd and others Vs. Chunilal Nanda and others (2006)5 SCC 399, wherein the Apex Court has carved out an exception by holding that appeal is maintainable where such direction is incidental to or inextricably connected with the order punishing for contempt. Learned Chief Standing Counsel has drawn our attention to the earlier order of this Court passed in this appeal on 12.3.2014, which is reproduced below:-

"On the matter being taken up today, preliminary objection has been raised in regard to maintainability of appeal in question.

Sri. R.N. Singh, Senior Advocate has contended that as per settled law in the case of Midnapore Peoples' Coop Bank Ltd and others Vs. Chunilal Nanda and others (2006)5 SCC 399, appeal can be filed only when jurisdiction to punish for contempt has been exercised and only exception that has been carved out where such direction is incidental to or inextricably connected with the order punishing for contempt only then appeal under Section 19 of the Contempt of Courts Act, 1971 an encompass such a situation, and the case in hand is not at all falling under such an exception.

Sri V.C. Mishra, Senior Advocate/ Advocate General, assisted by Sri Ramesh Upadhya, Chief Standing Counsel on the other hand contended that case in hand falls within the exception that has been carved out by Supreme Court as here in spite of precise submission having been made qua entitlement, same has not been adverted to in its correct perspective and what has not been provided for in the judgment, in the threat of contempt proceeding same is being sought to be awarded, and ignoring the stand of State, opinion has been formed for awarding salary and Officers of State, for its implementation are being summoned in Court for framing of the charges whereas there is an application moved by the appellants for discharge taking stand that order stands complied with in its words and spirit. Summoning of incumbents in person is nothing but arm twisting device.

Specific query has been raised to both the counsels, as to whether, Hon'ble Apex Court on any subsequent occasion has clarified the situation, as to in what contingency, case in question would fall within the category of incidental to or inextricably connected with the order punishing for contempt. The answer has been in negative.

Issue requires consideration by this Court as to whether case in hand falls within the category of incidental to or inextricably connected with the order punishing for contempt.

In view of the same, it is necessary to answer this question, as such list this case for final hearing on 4.4.2014. Record of single judge be summoned and no further action be taken till that date."

6. Sri Upadhyay has further submitted that the impugned order clearly comes within the purview of the exception carved out by the Apex Court in Midnapore's case (supra) because a definite opinion has been formed by learned Single Judge that contempt of court has been committed by the State and the officers of the State have been summoned in the Court for framing of

charges against them. Learned Chief Standing Counsel has also placed reliance on the following judgments in support of the his contention.

A.P. SRTC & another vs. B.S. David Paul; (2006) 2 SCC 282.

Sudhir Vasudeva vs. M. George Ravishekaran & others; 2014 STPL (Web) 70 SC.

Director of Education, Uttaranchal and others vs. Ved Prakash Joshi & others; (2005) 3 UPLBEC 2415.

Abdul Gani Bhat Vs. Chairman, Islamia College Governing Board and others; (2011) 12 SCC 736.

Rajasthan State Road Transport Corporation vs. Shyam Bihari Lal Gupta; (2005) 7 SCC 406.

Jhareswar Prasad Paul and another vs. Tarak Nath Ganguly and others; (2002) 5 SCC 352.

Harendra Maurya and 79 others vs. Shri R.M. Srivastava (Contempt No. 1782 of 2013).

State of Maharastra vs. Mahboob S. Allibhoy and others; 1996 (4) SCC 411.

Midnapore Peoples' Co-op. Bank Ltd. And others vs. Chuni Lal Nanda and others; (2006) 5 SCC 399.

7. The appellants have challenged the validity of the impugned order mainly on the ground that the contempt Court cannot traverse beyond the order or cannot test the correctness or otherwise of the order giving additional directions or delete any direction as it would amount to exercising review jurisdiction. Placing reliance on the law laid down by the Hon'ble Supreme Court in the case of Director of Education, Uttaranchal v. Ved Prakash Joshi (2005) 3 UPLBEC 2415, learned Chief Standing Counsel has vehemently argued that the judgment dated 8.12.2008, passed by the writ Court is totally silent on the issue whether the terminated Constables, who have been reinstated, are entitled for back wages or not. He has submitted that the contempt court is not entitled to decide this issue by reviewing the judgment of writ Court. He has drawn our attention to the following paragraphs of the impugned order, wherein the learned Single Judge has observed as under:

".....It is not an issue that all the terminated constables have been reinstated w.e.f. 27.5.2009 and they are receiving their salary ever since then. The only issue which remains to be considered is as to whether they would be entitled to uninterrupted service benefits from the date of entering into service and also with regard to their entitlement to payment of salary / back wages for the period they have remained under termination i.e. from the date of termination till the date of reinstatement.

It may be an arguable case that applicants may not be entitled to back wages for the period when the orders for termination were in force but there can be no issue that applicants would not be entitled to the salary from the date of judgement of the writ Court. Thus, prima facie case of non compliance of the judgement of the writ Court is made out. Accordingly, the Principal Secretary (Home), U.P. Lucknow and the Director of General of Police, U.P. Lucknow need to be summoned....."

8. Relying on the judgment rendered in Ved Prakash Joshi's case (supra) Sri Upadhyay has contended that if the writ Court is silent on the issue of payment of back wages to the reinstated employees,

the contempt Court has no jurisdiction to decide this issue by reviewing the judgment of the writ Court.

9. In Ved Prakash Joshi's case (supra), the Hon'ble Supreme Court, while setting aside the order passed by Allahabad High Court in Civil Misc. Contempt Application No. 3797 of 1998 held as under:-

".....The Court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the Court passing the judgment or order. Right or wrong the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. While dealing with an application for contempt the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the High Court is set aside."

10. Learned Chief Standing Counsel has submitted that the appeal against the impugned order is maintainable in view of the law laid down by Supreme Court in case of R.N. Dey and others v. Bhagyabati Pramanik and others, (2000) 4 Supreme Court Cases 400, in which the Apex Court has held that when the court either suo motu or on a motion or a reference, decides to take action and initiate proceedings for contempt and if the order is passed not discharging the rule issued in contempt proceedings, it would be an order or decision in exercise of its jurisdiction to punish for contempt. Against such order appeal would be maintainable.

11. We have given our thoughtful consideration to various pleas advanced by learned counsel for the parties.

12. The present contempt appeal has arisen in the backdrop of the facts that services of about 20,000 Constables of Civil Police (including the appellants) were terminated en-mass in the year 2007 by a couple of Government Orders. Those Government Orders were challenged by way of large number of writ petitions, which were clubbed together and the writ Court vide order dated 8.12.2008 allowed the writ petitions and quashed the Government Orders, whereby the termination had been directed. The State Government preferred intra court appeals against the order of Single Judge, which were also dismissed by the Division Bench on 4.3.2009. The State Government filed Special Leave Petition before the Apex Court and under interim order of the Apex Court dated 25.5.2009, the terminated Constables were given appointment letters and were allowed to join their services on 27.5.2009. Subsequently, the Special Leave Petition got dismissed as withdrawn by the State on 3.3.2013. The effect of the dismissal of the Special Leave Petition as withdrawn was that the judgment of the writ Court stood affirmed. However, when the judgment of writ Court was not complied by the State in its letters and spirit, contempt proceedings were initiated

before this Court by means of filing Civil Misc. Contempt Petition No. 1140 of 2009. In the aforesaid contempt petition, the learned Single Judge on 20.5.2009 after a detailed discussion of the matter, held as under:

"The Court is left with no option but to record its satisfaction that a prima facie case for willful disobedience and total non-compliance of the judgment of this Court is made out. The opposite parties no. 2 to 6 are directed to remain present before this Court on the next date which is being fixed as 27.5.2009 for framing of the charges.

At this stage on the request of the learned Advocate General one more opportunity is given to the opposite parties to make compliance of the judgment of this Court by the next date fixed failing which they shall appear before this Court. In case of compliance having been made and an affidavit to that effect being filed by the Principal Secretary, Department of Home, Government of U.P. their personal appearance would not be necessary.

List on 27.5.2009.

A copy of the order may be provided to Sri M.C. Chaturvedi, learned Chief Standing Counsel free of cost within 48 hours for necessary compliance and to the other parties on payment of usual charges within the same time."

13. The record shows that despite having ample time and opportunity, when the State did not comply the order dated 8.12.2008, passed in Civil Misc. Writ Petition No. 45645 of 2007, the learned Single Judge of this Court, finding that prima facie case of non compliance of judgment of the writ Court was made out, summoned the Principal Secretary Home, Government of U.P. Lucknow and Director General of Police, U.P. Lucknow in Court on 13.3.2014 personally vide impugned order.

14. As the respondents have raised a preliminary objection on the maintainability of this contempt appeal, the issue regarding the maintainability of the appeal is to be decided at the first instance.

15. Section 19 of the Contempt of Courts Act, 1971 provides that an appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt. Section 19 of the Contempt of Courts Act, 1971 read thus:-

"19. Appeals.--(1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt--

(a) where the order or decision is that of a single Judge, to a Bench of not less than two Judges of the Court;

(b) where the order or decision is that of a Bench, to the Supreme Court:"

16. There is a plethora of judgments of Hon'ble Supreme Court on the law regarding maintainability of contempt appeal.

1. In D.N. Taneja v. Bhajan Lal (1988) 3 SCC 26, the three judge bench of Hon'ble Supreme Court has held that "an appeal will lie under Section 19(1) of the Act only when the High Court makes an order or decision in exercise of its jurisdiction to punish for contempt. The High Court exercises its jurisdiction or power as conferred on it by Article 215 of the Constitution when it imposes a

punishment for contempt. When the High Court does not impose any punishment on the alleged contemnor, it does not exercise its jurisdiction or power to punish for contempt under Article 215."

2. In State of Maharashtra vs. Mahboob S. Alibhoy (1996) 4 SCC 411, the Hon'ble Apex Court has held that "words 'any order' must be read with 'decision' so as to exclude any interlocutory order of the High Court from scope of appeal. Unless by the order High Court imposes punishment in exercise of its jurisdiction to punish for contempt, no appeal will lie against it."

3. In Purshotam Dass Goel v. B.S. Dhillon (1978) 2 SCC 370, the Hon'ble Apex Court has held that "the order or decision appealed against under section 19 must be such that it decides some bone of contention raised before the High Court affecting the right of the party aggrieved. Mere initiation of a proceeding for contempt by the issuance of the notice on the prima facie view that the case is a fit one for drawing up the proceeding, does not decide any question."

4. In Parents Assn. of Students' v. M.A. Khan (2009) 2 SCC 641, it has been held by Hon'ble Apex Court that special appeal from interim order passed by Single Judge in exercise of contempt jurisdiction if, in view of provisions of Section 19 of the Contempt of Courts Act, is not maintainable. (Allahabad High Court Rules, 1952, Ch. VIII Section B).

5. In S.M.A. Abdi's case (supra), this Court has held as follows:-

"It is not to be emphasised that right of appeal is a creature of statute and unless the law specifically provides for filing the appeal, that cannot be permitted. Any order or decision as referred in Section 19 of the Act cannot be read independently from an order of punishing for contempt."

6. In Smt. Sudha Shukla v. Ausan and others, Contempt Appeal No. 7 of 2009, decided on 26.05.2009, this Court has observed as under:-

"....unless any adverse order having immediate effect causing injury is passed, that cannot be appealed either by filing contempt appeal or even by filing Special Appeal if it is not so provided."

7. In Tamilnad Mercantile Bank Shareholders Welfare Association's case (supra), the Apex Court has approved the judgments of the Calcutta High Court rendered in the case of Ashoke Kumar Rai v. Ashoke Arora and another (96 CWN 278), wherein it has been held as under:-

"The right of appeal will be available under Sub- section (1) of Section 19 only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. In this connection, it is pertinent to refer to the provision of Article 215 of the Constitution which provides that every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Article 215 confers on the High Court the power to punish for contempt of itself. In other words, the High Court derives its jurisdiction to punish for contempt from Article 215 of the Constitution. As has been noticed earlier, an appeal will lie under Section 19(1) of the Act only when the High Court makes an order or decision in exercise of its jurisdiction to punish for contempt. It is submitted on behalf of the respondent and, in our opinion rightly, that the High Court exercises its jurisdiction or power as conferred on it by Article 215 of the Constitution when it imposes a

punishment for contempt. When the High Court does not impose any punishment on the alleged contemner, the High Court does not exercise its jurisdiction or power to punish for contempt. The jurisdiction of the High Court is to punish. When no punishment is imposed by the High Court, it is difficult to say that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution....."

8. In Midnapore's case (supra) Hon'ble Supreme Court, after a detailed discussion of its several earlier judgments has summed up the matter with the following observations:-

"The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarized thus:-

"I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

17. In wake of the several pronouncements of Hon'ble Supreme Court and also of this Court, cited above and considering the facts and circumstances of the present case, in our considered opinion, it cannot be said that by the order impugned, any punishment has been imposed on the appellants.

18. By the impugned order, the appellants have merely been summoned in the Court. The impugned order does not even say anything that on the date fixed, charges would be framed against them. Even if assuming that their personal appearance was required for framing of charges against them in the contempt proceeding, but there is absolutely no indication that by the impugned order, the learned Single Judge has

imposed any punishment on the appellants for contempt. Hence, in view of the well settled legal position as discussed above, we have no doubt in holding that the impugned order is an interlocutory order against which an appeal under Section 19 of the Contempt of Courts Act, 1971 is not maintainable. Therefore, the present appeal is liable to be dismissed as not maintainable. However, the appellants are not remediless and they are at liberty to avail any other remedy available to them under law, if so advised, in wake of the law laid down by the Apex Court in Midnapore's case (supra), wherein it has been held that if the High Court, in a contempt proceeding, decides an issue or makes any direction, relating to the merits of the dispute between the parties, the aggrieved person is not without remedy and he can challenge it by means of intra court appeal if the order is of Single Judge and by seeking special leave to appeal under Article 136 of the Constitution of India in other cases, but not by way of filing an appeal under Section 19 of the Contempt of Courts Act.

19. Accordingly, the appeal is dismissed.

20. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2015

BEFORE
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.
THE HON'BLE RAGHVENDRA KUMAR, J.

Criminal Appeal No. 552 of 2009
along with
Criminal Appeal No. 550 of 2009, No. 551 of 2009, No. 611 of 2009; No. 282 of 2009, No. 327 of 2009 and 4596 of 2013

Santosh alias Neta Khatik ...Applicant
Versus
State of U.P. ...Opp. Parties

Counsel for the Applicant:
Sri Sanjay Mishra, Sri I.M. Khan, Sri Neeraj Singh, Sri Upendra Kumar Singh

Counsel for the Respondents:
A.G.A.

Criminal Appeal-conviction based upon confession of co-accused-held-not proper-reasons discussed.

Held: Para-35 & 37-

35. Perusal of the aforementioned case laws makes it abundantly clear that the confession of co-accused cannot be made basis for conviction. The reason behind is that the said confession was recorded by the police officer while the maker was in police custody. The second reason is that the accused has no opportunity to test the same through cross-examination nor evidence of such maker of the confession is recorded in his presence. Thus so far as the five appellants (from whom or on whose pointing out no recovery has been made) are concerned, the trial court was swayed away by the seriousness of the offence and also by the fact that the appellants have a very strong criminal background. But this, by itself, cannot be a ground to hold a person guilty. If the independent witnesses would have cooperated the prosecution and would have supported the case of the prosecution then the position would have been different. The apathy of the public in cooperating the prosecution is a great hurdle in the effective administration of criminal justice and because of this apathy of the public, the courts are left with no option but to acquit the hardened criminals accused of heinous offences.

37. Law is settled on the point that no person can be convicted unless and until the prosecution succeeds in proving its case beyond reasonable doubt against the accsued persons. Since the only

evidence available against the above-named five accused was either their own confession or confession of co-accused, therefore, keeping in view the legal pronouncement of Hon'ble the Apex Court, mentioned above, the conviction of these five appellants, rendered by the trial court become unsustainable under law. Accordingly Criminal Appeal No. 552 of 2009 preferred by Santosh alias Neta Khatik Criminal Appeal No. 550 of 2009 preferred by appellant Pappu alias Fakku, Criminal Appeal No. 551 of 2009 preferred by appellant Nankai, Criminal Appeal No. 327 of 2009 preferred by appellant Ramesh and Criminal Appeal No. 4596 of 2013 preferred by appellant Rakesh deserve to be allowed.

Case Law discussed:
AIR 2011 SC 2283; (2011) 14 SCC 117; (2011) 11 SCC 724; (2014) 10 SCC 264; AIR 1964 SC 1184; (2012) 4 SCC 722; (2013) 13 Supreme Court Cases 1; (2014) 13 SCC 90; (2012) 7 Supreme Court Cases 646; (2007) 4 SCC 266; (2007) 8 Supreme Court Cases 254; (2011) 10 Supreme Court Cases 165; (2014) 5 Supreme Court Cases 509.

(Delivered by Hon'ble Surendra Vikram Singh Rathore, J.)

1. Since all the aforesaid criminal appeals arise out of common judgment, therefore, these are being simultaneously decided by a common judgment.

2. Criminal Appeal no. 552 of 2009 has been preferred by appellant Santosh alias Neta Khatik, Criminal Appeal No. 550 of 2009 has been preferred by appellant Pappu alias Fakku, Criminal Appeal No. 551 of 2009 has been preferred by appellant Nankai, Criminal Appeal No. 611 of 2009 has been preferred by Kallan, Criminal Appeal No. 282 of 2009 has been preferred by Phool Chandra, Criminal Appeal No. 327 of 2009 has been preferred by appellant Ramesh and Criminal Appeal No. 4596 of 2013 has been preferred by appellant Rakesh.

3. Heard Mr. S.K. Dwivedi and Mr. Upendra Kumar Singh, learned counsel for the appellants, learned A.G.A. for the State and perused the lower court record.

(B) Sentence imposed by trial court:

4. Under challenge in the aforesaid criminal appeals is the judgment dated 17.12.2008 and order dated 18.12.2008 passed by the learned Additional Sessions Judge, Court No. 4, Fatehpur in Sessions Trial No. 1108 of 2001 arising out of Case Crime No. 101 of 2001, Police Station Husainganj, District Fatehpur whereby all the aforesaid appellants were convicted for the offence under Section 364 I.P.C. and they were sentenced with imprisonment for life and also with fine of Rs. 5,000/- each with default stipulation of three months additional imprisonment. All the appellants were convicted for the offence under Section 379 I.P.C. and were sentenced with imprisonment of three years. They were further convicted for the offence under Section 302/149 I.P.C. and were sentenced with imprisonment for life and also with fine of Rs. 5,000/- each with default stipulation of three months additional imprisonment and also convicted for the offence under Section 201 I.P.C. and each of them were sentenced with imprisonment for five years each and also with fine of Rs. 5,000/- each with default stipulation of three months additional imprisonment. Appellant Kallan, in Criminal Appeal No. 611 of 2009, was also convicted for the offence under Section 411 I.P.C. and was sentenced with three years imprisonment.

All the sentences were directed to run concurrently. By the same judgment, accused persons, namely, Ram Swaroop, Jagroop and Naresh were acquitted of the charges levelled against them. It was directed that the recovered sheeps, goats, horse and calf be directed to handed over to the successors of the deceased persons.

(C) Facts as narrated in the F.I.R.:

5. In brief, the case of the prosecution was that complainant Jugal Kishore lodged a F.I.R. at Police Station Husainganj on 9.6.2001 at 13:00 hours alleging therein that complainant had asked (1) Chinni Pal, (2) Bheda Pal (3) Ram Raj Pal, (4) Narendra Pal, (5) Chhote Lal Pal, (6) Jitendra Pal and (7) Ram Prasad Pal to keep their sheeps in his field for manuring. On 8.6.2001, above-named seven persons had come to the house of the complainant to take ration for them. On 9.6.2001 when the complainant went to his field then he found that neither the above named persons were there nor their sheeps and animals were there. Their belongings and their clothes were scattered in the field. One dog was also sitting in the field, who was barking at the persons. These circumstances raised a suspicion in the mind of the complainant that the above-named seven persons have been abducted and animals have been stolen.

(D) Facts revealed during Investigation:

6. After registration of the case, the investigation proceeded. The Investigating Officer went to the place of occurrence and took the scattered belongings of the above-named seven persons and its recovery memo was prepared. On the same day, while S.O. Maksudan Singh, along with other police personnel, was busy in the search of the accused persons and the victims and reached at the Bhitaura road at Tiraha, then S.O. got a secret information that three miscreants are going from the road towards Nauwagaon and from there they will go to Kolkata on trucks. Immediately police party took the informer with them and went towards the place as informed by the informer. When these persons reached near the culvert of canal then they saw that three persons were going by the side of the canal. Seeing the police party, the miscreants leaving the animals started running away. The police party with the help of Bal Kishan, Ram Raj arrested appellant Kallan. The other appellants, namely, Khalil and Mehandi Hasan were successful in fleeing away from there. They were recognized by the witnesses and the police personnel. From the possession of appellant Kallan 700 sheeps (300 female + 200 male and 200 lambs) and one small horse and calf and five goats were recovered. Accused Kallan was enquired about the recovered animals then he disclosed that he along with his other companions Khalil, Mehandi Hasan, Pappu alias Fakku and Phool Chandra with five other miscreants, who were brought by Pappu alias Fakku and were not known to appellant Kallan, had assembled at the house of Phool Chandra where from they went to Gram Chhauwa where the sheeps were sitting in the field. Pappu alias Fakku and Phool Chandra were armed with country made pistols. In the said field there were eight shepherds. All were sleeping in the field. Out of eight shepherds, seven were abducted by them and the 8th one was successful in fleeing away from there. Appellants Kallan, Khalil, Mehandi Hasan took the animals towards Nauwagaon and other accused persons took seven abducted

persons towards Gaya. The recovery memo was accordingly prepared and the recovered animals were handed over to Bal Kishan, memo to this effect was also prepared in the presence of Ram Raj and Bal Kishan. On the very next day i.e. on 10.6.2001, the police party was engaged in the search of the remaining accused persons and also of abducted persons. When the police party reached at 7 Mill Chauraha, then they got an information through secret informer that one of the miscreant named Phool Chandra was standing near 7 Mill Canal Culvert waiting for a transport and by immediate action, he can be arrested. The police party left the jeep there and went along with the informer to the place where accused Phool Chandra was present. The informer pointed towards the said person and at about 11:00 a.m., he was taken into custody by the police. He disclosed his name as Phool Chandra. He was enquired about the remaining accused persons and also about the abducted persons. Initially he avoided to disclose anything but subsequently he disclosed that in the intervening night of 8/9.6.2001 he along with Kallan, Khalil, Mehandi Hasan, Pappu alias Fakku, Santosh alias Neta Khatik, Rakesh and Ramesh went to village Chhibuwa and in the night at about 11:00 p.m., they abducted seven shepherds while they were sleeping in the field. One of the shepherds, was successful in making good his escape. They took the seven shepherds, after tying their hands and closing their eyes, with them. However, Kallan, Khalil and Mehandi Hasan were asked by him to take the sheeps towards Nauwagaon and they will come and join them after disposing of the seven shepherds. The second group, under the leadership of appellant Phool Chandra, took seven abducted shepherds to Raano well near Mahadevpur. At that time, it was 12:00 in the night. It was disclosed by appellant Phool Chandra that appellant Pappu alias Fakku, with axe caused the death of three shepherds and remaining four shepherds were thrown in the well in the same condition with their hands tied and other three injured shepherds were also thrown in the same well. Phool Chandra also offered that he can get the dead bodies of all the seven persons recovered. So the police party asked appellant Phool Chandra to sit in the jeep and as pointed out by Phool Chandra, came to the Raano well. Because of the mud on the way, the jeep was stopped and from there they went on foot to the said well. Accused Phool Chandra was ahead of the police party and told the police party that this is the well in which they have thrown all the seven persons. Thereafter the police party made arrangement of several persons of the village and with the help of hook and rope and with the help of one Sheetala Prasad Dwivedi, who went inside the well, all the seven dead bodies were taken out. In the meantime, one Sant Ram and Durjan, who are relatives of one of the deceased reached there and identified the dead bodies. A fard (Ex. Ka-6) was prepared on 10.6.2001. Inquest proceedings of all the seven dead bodies were conducted and the dead bodies were sent for postmortem.

(E) Result of Postmortem:

The postmortem on the dead body of Medha was conducted on 11.6.201 at 3:15 p.m. and following injuries were found on his person:-

(i) Lacerated wound 15 c.m. x 6 c.m. x bone deep on left side head, 8 c.m. away from left ear. Left parietal bone fractured.

(ii) Abrasion 4 c.m. x 5 c.m. on right wrist joint.

(iii) Abrasion 4 c.m. x 3 c.m. on left wrist joint.

Postmortem on the body of Ram Raj Pal was conducted on the same day at 3:45 p.m. and following injuries were found on his person:-

(i) Lacerated wound 8 c.m. x 2 c.m. x bone deep on right side head, 5 c.m. away from right ear. Right parietal bone was fractured.

7. Postmortem on the body of Chinni was conducted on the same day at 4:10 p.m. and following injuries were found on his person:-

(i) Lacerated wound 6 c.m. x 3 c.m. x bone deep on left side head, 9 c.m. away from left ear. Right and left parietal bones were fractured

(ii) Lacerated wound 2 c.m. x 1 c.m. x gone deep on left side head, 7 c.m. away from left ear.

In the opinion of the doctor, the cause of death of all above-named three persons was due to comma as a result of ante-mortem head injuries and duration was two and a half days old.

Postmortem on the body of deceased Bhaiya Lal was conducted on the same day at 2:30 p.m. and following injuries were found:-

(i) Abrasion 6 c.m. x 4 c.m. on right forearm above right wrist joint.

Postmortem on the body of Chhote Lal was conducted on the same day at 4:30 p.m. and no ante mortem injury was seen on his body.

Postmortem on the body of Ram Prasad was conducted on the same day at 3:30 p.m. and no external ante mortem injury was seen on the body.

Postmortem on the body of Narendra was conducted on the same day at 5:00 p.m. and no ante mortem injuries were visible on his body.

In the opinion of the doctor, the cause of death of these four persons was asphyxia as a result of ante mortem drowning.

8. After concluding the investigation, charge sheet was filed against all the seven accused persons, whose names emerged during investigation.

(F) Defence of appellants:

9. The case of the appellants was of total denial and their false implication. Appellant Phool Chandra has also pleaded that his father was murdered by the police and the police has falsely implicated him in this case because an F.I.R. was lodged against police personnel for the murder of his father.

(G) Prosecution evidence:

10. In order to prove its case, the prosecution has examined PW-1 Jugal Kishore, who has lodged the F.I.R. PW-2 is Bal Krishan, as per case of the prosecution, initially the recovered animals were given in the custody of this witness. PW-3 is Dhunni, as per prosecution case, appellant Phool Chandra was arrested in his presence and in his presence on his pointing out, the dead bodies were recovered. PW-4 Bhagwati was also a witness of the same fact. PW-5 Sheetala Prasad Dwivedi, is the person, who had assisted the police party in taking out the dead bodies from the well. PW-6 Sant Raj, is also a witness of the recovery of seven dead bodies from the well. PW-7 Babu Lal, he is the 8th shepherd, who was successful in fleeing away from the place of occurrence. PW-8 is

Daya Shankar, he is the witness on the point that he saw the accused persons taking away the abducted persons in the night. PW-9 Ram Raj, is a witness regarding recovery of 700 sheeps and other animals from the possession of appellant Kallan. PW-10 Ram Kishan, is the witness regarding recovery of scattered articles of seven abducted persons from the field of complainant Jugal Kishore. All these independent witnesses except the complainant have not supported the case of the prosecution and have been declared hostile. PW-11 is S.O. Madhusudan Singh, who has recovered the animals from the possession of appellant Kallan and also arrested appellant Phool Chandra, thereafter recovered seven dead bodies on his pointing out. PW-12 Nand Kishore, has stated that on 13.6.2001, recovered animals were given in his custody from the first Supurdar Bal Kishan and he has supported this part of the prosecution case and he has also produced the said recovered shepherds before the court during trial. PW-13 S.I. Ranveer Singh, is the Investigating Officer of this case. PW-14 is Dr. P.A. Lari, who had conducted the postmortem on the dead bodies of Merha Pal, Ram Raj Pal, Ginni Pal and Jitendra Pal. PW-15 Dr. A.S. Khan, who has conducted postmortem on the dead bodies of Chhote Lal Pal, Narendra Pal and Ram Prasad Pal, PW-16 Head Constable Amit Kumar, who has prepared chik report and G.D. of this case and PW-17 is S.I. R.K. Mishra, who had conducted the inquest proceedings of seven dead bodies under the supervision of S.O. Madhusudan Singh.

(H) Defence evidence:

11. On behalf of appellant Phool Chandra, DW-1 Head Moharir Shiv Bhawan Singh was examined in his defence, who has proved the extract of crime register Ex. Kha-1 and Kha-2. On the strength of the said register, he has stated that a F.I.R. was lodged on 29.9.1996 by Nankai son of Vindeshwari and after the investigation, C.O. Sadar, District Fatehpur had filed final report in the said case, which was accepted vide order dated 4.12.1997. The said F.I.R. was lodged against six named police personnel and 18 other police personnel of Police Station Hussainganj.

(I) Finding of the trial court:

12. After appreciating the evidence on available on record, learned trial court has convicted the accused appellants as above, hence these criminal appeals. Howsever, accused Ram Swaroop, Jagroop and Naresh were acquitted. Allegation against these three acquitted persons was that they were asked to make arrangement of trucks and the only evidence against them was confession of co-accused Pappu alias Fakku.

(J) Submissions on behalf of the appellants:

13. Submission of learned counsel for the appellants was that in the instant case, recovery is alleged to have been made only from the possession of appellant Kallan and dead bodies were recovered on the pointing out of appellant Phool Chandra, therefore, the only evidence against remaining five appellants was the confession of the accused appellants Kallan and Phool Chandra whereby they have named these appellants. Since the said confession does not stand corroborated by any other evidence, so the same cannot be made basis for conviction of these appellants. So far as appellants Phool Chandra and Kallan are concerned, learned counsel for these appellants have argued that

apart from the evidence of police personnel, not even a single independent witness has supported the factum of recovery or the arrest of the appellants. No independent witness has supported the factum of recovery of dead bodies on the pointing out of the appellant Phool Chandra. In this background, the sole evidence of police personnel cannot be treated to be wholly reliable. It has further been submitted that except the evidence of these police witnesses there is no evidence to connect the appellants Kallan and Phool Chandra with this case. The prosecution has proposed to prove its case on the basis of the circumstantial evidence produced by the prosecution. The chain of circumstances was not complete. The trial court only on the basis of the recovery from the possession of appellant Kallan and Phool Chandra has drawn an inference that they are the persons, who are responsible for the death of seven persons and only on the strength of such shaky evidence, has convicted the appellants. Thus, the judgment of the trial court becomes unsustainable under law as learned trial court has given undue weightage to the evidence of police personnel and has not appreciated the evidence in accordance with the settled principles of appreciation of evidence.

(K) Submission on behalf of the State:

14. Learned A.G.A. has submitted that the trial court has recorded the conviction keeping in view the evidence available against the appellants and also keeping in view the pronouncement of Hon'ble the Apex Court in some cases and the said approach of the trial court cannot be said to be illegal or irregular. It was a very serious offence wherein seven persons were done to death brutally. Appellant Kallan and Phool Chandra could not furnish any explanation for their false implication and the recoveries. Appellant Kallan could not furnish any explanation regarding recovery of such huge quantity of animals from his possession and he has nowhere claimed that he was the owner of these animals. It has also been argued that appellant Phool Chandra has stated that his father was murdered by the police personnel, therefore, he has been falsely implicated in this case. It is submitted that DW-1 has stated that the said F.I.R. was lodged on 29.9.1996 for an offence of murder alleged to have been committed on 24.9.1996. After investigation of the said case it was found to be false and final report was filed which was accepted on 4.12.1997. So the said report cannot be the reason for false implication as the said F.I.R. was lodged by Nankai, brother of appellant. So the trial court has right convicted the appellants.

(L) Discussion of evidence and legal points involved:

15. In view of the rival submissions, we have considered prosecution evidence. Before proceeding further in the matter, we would like to address ourselves regarding the standard of proof, which is required to prove a case based on circumstantial evidence.

(L i) Standard of proof required in cases of circumstantial evidence:

16. Hon'ble the Apex Court in the case of S.K. Yusuf v. State of West Bengal reported in AIR 2011 SC 2283 in para 26 has held as under:

"Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while

deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

17. Hon'ble the Apex Court in the aforesaid case has followed its earlier pronouncements in the following cases:

"Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430 and Wakkar and another v. State of Uttar Pradesh (2011) 3 SCC 306."

In the case of Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56, Hon'ble Apex Court following its earlier decision in the case of Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430 observed that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

"(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

Though a conviction may be based solely on circumstantial evidence, however, the Court must bear in mind the aforesaid tests while deciding a case involving the commission of a serious offence in a gruesome manner.

18. Hon'ble the Apex Court in the case of Manthuri Laxmi Narsaiah Vs. State of A.P. reported in (2011) 14 SCC 117 has held in paragraph no. 6 as under:-

"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."

19. Likewise in the case of Mustkeem Vs. State of Rajasthan reported in (2011) 11 SCC 724 Hon'ble the Apex Court in paragraph no. 24 has held as under:-

"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116 in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been

postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p. 185)

The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established;

The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

the circumstances should be of a conclusive nature and tendency;

they should exclude every possible hypothesis except the one to be proved; and

There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The aforementioned judgments have been followed in a recent judgment in the case of Sangili alias Sanganathan Vs. State of Tamilnadu reported in (2014) 10 SCC 264.

20. Keeping in view the aforementioned legal proposition, the evidence of the prosecution has to be appreciated. In the instant case, none was named in the F.I.R. The F.I.R. was lodged on the next day at about 1:00 p.m. at the Police Station Husainganj, which was situated at a distance of about one kilometer. It is true that the F.I.R. was slightly delayed in the instant case. The delay in lodging the F.I.R. has absolutely no relevance because in the F.I.R. no allegation has been made against any person and the complainant has simply informed the police that the sheeps and shepherds were missing and their belongings were lying scattered in his field. The purpose of F.I.R. is very limited and it is only to set the criminal law into motion. The complainant must have come to know this fact only when he would have visited his field. Thus delay in F.I.R. becomes immaterial.

21. In the instant case, investigation revealed that in the intervening night of 8/9.6.2001, seven persons were abducted from the field of complainant Jugal Kishore and their animals, which contained 700 sheeps and some other animals were stolen. This offence was committed under the leadership of appellant Phool Chandra. The investigation revealed that all the accused persons assembled at the house of appellant Phool Chandra. Thereafter they went to the field of complainant Jugal Kishore, abducted seven shepherds and have stolen their 700 sheeps and some other animals. They went towards Nauwagaon where appellant Phool Chandra made a separate party of three accused persons under the leadership of appellant Kallan and asked them to go towards Nauwagaon and told them that he shall soon join them after disposing of these seven abducted persons. Appellant Phool Chandra came along with other accused persons and brought seven abducted persons to Ranewell where some of the abducted persons were given blows with axe and thereafter all the seven persons were thrown into the well of Ranewell. Appellant Kallu was arrested on the very next day of the incident on 9.6.2001 at about 11:00 p.m. in the night and thereafter on the next day, on

10.6.2001 appellant Phool Chandra was arrested and after his arrest, on his pointing out, the dead bodies of seven abducted persons were recovered. Perusal of the record shows that after registration of the case, a message was flashed through R.T. Set regarding this incident that seven persons have been abducted along with their animals and S.O. during investigation got the information about the same through his secret informers.

22. Thus in the instant case, there are definitely two different sets of accused persons. One is of appellant Phool Chandra and appellant Kallan. Appellant Kallan was arrested by the police and from his possession the stolen animals were recovered. Likewise, appellant Phool Chandra was also arrested by the police and on the basis of his information, a recovery under Section 27 of the Indian Evidence Act was made and seven dead bodies were recovered. The other set of five remaining appellants stands on different footing. Nothing incriminating is alleged to have been recovered from their possession. The name of six accused persons came into light in the statement of co-accused persons, who were arrested by the police. So the case of both the set of accused persons has to be dealt with separately. Regarding the accused persons, who were either not arrested by the police or from whose possession, nothing incriminating is alleged to have been recovered, it has been submitted that the only evidence available against them was either their own confession or confession of the accused persons made in the police custody. Apart from it, there is no other evidence to connect them with the instant offence.

23. Submission is that the confession of the co-accused person, by itself, cannot be held to be sufficient to record a conviction. On this point, learned counsel for the appellants has placed reliance on the pronouncement of Constitution Bench of Hon'ble the Apex Court in the case of Haricharan Kurmi, Jogia Hajam Vs. State of Bihar reported in AIR 1964 SC 1184. Our attention was drawn towards the following part of the judgment, which reads as under:-

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against other accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chockerburty, ILR 38 Cal 559 a confession can only be used to "lend assurance to other evidence against a co-accused". In Periyaswami Moopan v. Emperor. ILR 54 Mad 75 Reilly, J., observed that the provision of S. 30 goes not further than this, "where there is evidence against the co-accused sufficient, "if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as a additional reason for believing that evidence." In Bhuboni Sahu v. The King, 76 Ind App. 147 the Privy Council

has expressed the same view. Sir. John Beaumont who spoke for the Board, observed that

"a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3 of the Evidence Act. It is not required to be give on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. S. 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Chearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

24. Regarding appellants Phool Chandra and Kallan, learned counsel for the appellants has submitted that all the public witnesses, who were made witness of the recovery by the police, have not supported the case of the prosecution. Thus the sole evidence to prove these circumstances, remains the evidence of only police personnel and the sole evidence of police personnel cannot be acted upon by the court. So the first point to be considered is whether the evidence of police personnel can be acted upon.

(L ii) Whether evidence of police personnel can be acted upon:

25. Before proceeding further in the matter, we would like to address ourselves on the point as to whether the evidence of police personnel can be acted upon or the same should be discarded only on the ground that they are police personnel. In the case of Govindaraju alias Govinda Vs. State (By Sriramapuram Police Station and another) reported in (2012) 4 SCC 722 Hon'ble the Apex Court in paragraph nos. 30 and 31 has held as under:-

"30. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

31. This Court in the case of Girja Prasad (2007) 15 SCC 760 while particularly referring to the evidence of a police officer, said that it is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favor of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an

attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration."

26. In the case of Rohtash Kumar Vs. State of Haryana reported in (2013) 14 Supreme Court Cases 434, Hon'ble the Apex Court in paragraph no. 35 has held as under:-

"35. The term witness, means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise. In Pradeep Narayan Madgaonkar and Ors. v. State of Maharashtra (1995) 4 SCC 255, this Court examined the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court herein held, that the same must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belonged to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars, should be sought. (See also: Paras Ram v. State of Haryana (1992) 4 SCC 662; Balbir Singh v. State (1996) 11 SCC 139; Kalpnath Rai v. State (Through CBI) (1997) 8 SCC 732; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence (2003) 8 SCC 449; and Ravinderan v. Superintendent of Customs (2007) 6 SCC 410)."

(underlined by us)

27. Similar view was expressed by Hon'ble the Apex Court in the case of Yakub Abdul Razak Memon Vs. State of Maharashtra reported in (2013) 13 Supreme Court Cases 1.

28. It is true that in the instant case, the public witness regarding recovery and arrest of appellant Phool Chandra and arrest of appellant Kallan, recovery of dead bodies on the pointing out of appellant Phool Chandra have turned hostile, inspite of the fact that their signatures were present on the recovery memos but they have stated that their signatures were obtained subsequently. Keeping in view the facts of the instant case, where the accused persons are alleged to have murdered seven persons simply for animals, then how a person of rural background with virtually having no protection against such criminals can dare to depose against them. In our considered opinion, this was the main reason as to why these witnesses have not supported the case of the prosecution.

(L iii) Whether evidence of hostile witness stands wiped out from record:

29. Law is settled on the point that even if the witnesses have been declared hostile, even then their evidence does not stand wiped out from the record and the court would be lawful in seeking corroboration from the said evidence on any point where the evidence of such witness supports the case of the prosecution. Reference may be made on this point to the pronouncement of Hon'ble the Apex Court in the case of Rohtash Kumar (supra) wherein Hon'ble the Apex Court has observed that the evidence of a hostile witness cannot be rejected in toto merely because the prosecution choose to treat him as hostile and cross examined him. This point has

been considered in the aforementioned case in paragraph nos. 25, 26 and 27, which reads as as under:

"25. It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.

26. In State of U.P. v. Ramesh Prasad Misra and Anr. (1996) 10 SCC 360, this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with the either case of the prosecution, or that of the defence, may be relied upon. (See also: C. Muniappan and Ors. v. State of Tamil Nadu (2010) 9 SCC 567; Himanshu @ Chintu v. State (NCT of Delhi) (2011) 2 SCC 36; and Ramesh Harijan v. State of U.P. (2012) 5 SCC 777).

27. Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny."

30. Similar view was expressed by Hon'ble the Apex Court in the case of Paulmeli and another Vs. State of Tamil Nadu through Inspector of Police reported in (2014) 13 SCC 90 and also in the case of Shyamal Ghosh Vs. State of West Bengal reported in (2012) 7 Supreme Court Cases 646.

31. In view of the aforementioned legal proposition, we first consider the case of five appellants, namely, Santosh alias Neta Khatik, Pappu alias Fakku, Nankai, Ramesh and Rakesh, from whose possession or on whom pointing out nothing incriminating is alleged to have been recovered. Learned trial court in its judgment has observed that all the appellants have very strong criminal history against them including the offences of murder. Perusal of the record also shows that appellant Ramesh and Pappu alias Fakku were arrested during investigation and made confessions in police custody but admittedly nothing incriminating is alleged to have been recovered from their possession or on their pointing out. Thus, their confessions, in police custody, are hit by the provisions of Sections 25 and 26 of the Indian Evidence Act. The only evidence that remains against the above-named five appellants is the confession of co-accused.

(L iv) Evidentiary value of confession of co-accused:

32. The Constitution Bench of Hon'ble the Apex Court in the case of Haricharan Kurmi (Supra) has held that the confession of co-accused is a weak type of evidence. The view expressed by Hon'ble the Apex Court in the aforementioned case of Haricharan Kurmi has been followed by Hon'ble Apex Court in its subsequent judgment in the case of Prakash Kumar Vs. State of Gujarat reported in (2007) 4 SCC 266. Hon'ble the Apex Court in paragraph no. 7 has held as under:

"7. The prosecution could not adduce any other supporting evidence to prove the guilt of the appellant. Even based on

the confession of the co-accused, the only allegation against the appellant is that he was in the company of the other co-accused and had pointed out towards the victim by making a sign whereupon the other accused over-powered the victim and took him forcibly in the Maruti van. To prove that the appellant was in the company of other accused, there is no other independent evidence. Even though the prosecution adduced other evidence to prove that the victim Babulal Misrimal Jain was forcibly taken and kept in unlawful custody, the complicity of the appellant could not be proved. The prosecution has failed to prove the case against the appellant."

33. In another case in the case of Mohtesham Mohd. Ismail Vs. SPL. Director, Enforcement Directorate and another reported in (2007) 8 Supreme Court Cases 254 Hon'ble the Apex Court has held in paragraph no. 19 as under:-

"19. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well- settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. [See Haricharan Kurmi etc. v. State of Bihar AIR 1964 SC 1184; Haroom Haji Abdulla v. State of Maharashtra AIR 1968 SC 832; and Prakash Kumar alias Prakash Bhutto etc. v. State of Gujarat (2007) 4 SCC 266]."

34. In the case of Pancho Vs. State of Haryana reported in (2011) 10 Supreme Court Cases 165, Hon'ble the Apex Court has placed reliance upon the pronouncement in the case of Haricharan Kurmi and has observed in paragraph no. 27 and 28 as under:-

"27. This Court in Haricharan case AIR 1964 SC 1184 further observed that Section 30 merely enables the court to take the confession into account. It is, not obligatory on the court to take the confession into account. this Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

28. This Court in Haricharan case AIR 1964 SC 1184 clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."

35. Perusal of the aforementioned case laws makes it abundantly clear that the confession of co-accused cannot be made basis for conviction. The reason behind is that the said confession was recorded by the police officer while the maker was in police custody. The second reason is that the accused has no opportunity to test the same through cross-examination nor evidence of such maker of the confession is recorded in his presence. Thus so far as the five appellants (from whom or on whose pointing out no recovery has been made) are concerned, the trial court was swayed away by the seriousness of the offence and also by the fact that the appellants have a very strong criminal background. But this, by itself, cannot be a ground to hold a person guilty. If the independent witnesses would have cooperated the prosecution and would have supported the case of the prosecution then the position would have been different. The apathy of the public in cooperating the prosecution is a great hurdle in the effective administration of criminal justice and because of this apathy of the public, the courts are left with no option but to acquit the hardened criminals accused of heinous offences.

36. In the case of Dharam Deo Yadav Vs. State of Uttar Pradesh reported in (2014) 5 Supreme Court Cases 509, Hon'ble the Apex Court in paragraph no. 30 has expressed its views on this aspect as under:-

"30. Criminal Judicial System in this country is at crossroads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. ....."

37. Law is settled on the point that no person can be convicted unless and until the prosecution succeeds in proving its case beyond reasonable doubt against the accsued persons. Since the only evidence available against the above-named five accused was either their own confession or confession of co-accused, therefore, keeping in view the legal pronouncement of Hon'ble the Apex Court, mentioned above, the conviction of these five appellants, rendered by the trial court become unsustainable under law. Accordingly Criminal Appeal No. 552 of 2009 preferred by Santosh alias Neta Khatik Criminal Appeal No. 550 of 2009 preferred by appellant Pappu alias Fakku, Criminal Appeal No. 551 of 2009 preferred by appellant Nankai, Criminal Appeal No. 327 of 2009 preferred by appellant Ramesh and Criminal Appeal No. 4596 of 2013 preferred by appellant Rakesh deserve to be allowed.

38. So far as the second set of accused appellants, namely, Kallan and Phool Chandra is concerned, the property of the seven deceased persons was recovered from the possession of appellant Kallan and on the basis of the information furnished by appellant Kallan involvement of appellant Phool Chandra came into light and he was arrested. On his pointing out, seven dead bodies were recovered.

39. In the instant case, the police has taken a very quick action. The F.I.R. was lodged at 1:00 p.m. Immediately thereafter, a message was flashed through

R.T. Set and only after about ten hours of the registration of the F.I.R., appellant Kallan was arrested along with 700 sheeps and some other animals. Here it is pertinent to mention that appellant Kallan has nowhere claimed the ownership of the recovered animals. The defence of appellant Kallan was that the said recovery has been falsely planted against him. Submission of learned counsel for the appellants was that PW-2 Bal Kishan and PW-9 Ram Raj have not supported the factum of recovery.

40. As stated earlier, these witnesses, namely, Bal Kishan and Ramraj, have not supported the case of the prosecution but the evidence of hostile witness, so far as it corroborates the case of the prosecution, can be taken into consideration. Perusal of PW-12 Nand Kishore shows that on 13.6.2001, the custody of the said recovered sheeps and other animals was transferred from PW-2 Bal Kishan to this witness. This witness has not only supported this fact but has also produced the recovered animals before the court during trial. This witness has also stated that prior to him the recovered sheeps and animals were in the custody of Bal Kishan. Thus the statement of this witness gives corroboration to the evidence of PW-11 S.O. Madhusudan Singh that the sheeps were recovered from the possession of appellants Kallan and were given in the custody of Bal Kishan on the date of recovery. This recovery was made very promptly after the incident and it is a huge recovery. It cannot be believed, by any stretch of imagination, that the police personnel instead of investigating this case made efforts to collect such large number of sheeps and animals to show a false recovery. Apart from it, had it been so then the original owner of the said sheeps must have come forward to claim the custody of these recovered sheeps and animals but neither it has been so pleaded by the defence nor there is any evidence that the recovered animals were the property of someone else. Thus on this point, the evidence of PW-11 S.O. Madhusudan Singh is found to be wholly reliable. The only submission of learned counsel for appellant Kallan, to discard the evidence of this witness, was that he is a police officer but we have already discussed the legal proposition on this point wherein it has been observed that the evidence of police officer cannot be discarded solely on the ground that he belongs to the police force but his evidence has to be considered as the evidence of any other witness. So after going through the evidence of PW-11 S.O. Madhusudan Singh, we are satisfied that the said evidence, regarding recovery of sheeps and animals from the possession of appellant Kallan is wholly reliable.

41. Now there remains the case against appellant Phool Chandra. According to the evidence of the prosecution, appellant Kallan informed the police regarding involvement of Phool Chandra and thereafter on the basis of secret information, appellant Phool Chandra was arrested. He, in his confession, has submitted that three of the deceased persons were given blows with axe and remaining were thrown into the well alive. It has nowhere the case of appellant Phool Chandra that he had seen any other person throwing the dead bodies in the well or he came to know this fact by some other means. But he has only made a bald denial that he has been falsely implicated and no such recoveries were made on his pointing out. On this

point again there is evidence of PW-11 S.O. Madhusudan Singh, which has been challenged on the ground that he is a police officer. But as discussed earlier, this by itself is no ground to discard his testimony. Apart from it, the evidence of PW-5 Sheetala Prasad also supports the fact of recovery of the dead bodies from the well. However, he has not stated that appellant Phool Chandra was present at the said time. But he has supported the fact recovery of the dead bodies from the well as stated by PW-11 S.O. Madhusudan Singh. He was the person who went inside the well and helped the police party in taking out the dead bodies.

(L v) Law regarding recovery made under Section 27 of the Indian Evidence Act:

42. Before proceeding further, we would like to discuss the law regarding the recovery made under Section 27 of the Indian Evidence Act. In the case of State of Maharashtra Vs. Suresh reported in (2000) 1 Supreme Court Cases 471, Hon'ble the Apex Court in paragraph no. 26 has held as under:-

"26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

(emphasis added by us)

43. In the case of Pawan Kumar alias Monu Mittal Vs. State of Uttar Pradesh reported in (2015) 7 Supreme Court Cases 148, Hon'ble the Apex Court in paragraph no. 29 has held as under:-

"29. It is settled principle of law that statements made by an accused before police official which amount to confession is barred Under Section 25 of the Indian Evidence Act. This prohibition is, however, lifted to some extent by Section 27 which reads thus:

27. How much of information received from accused may be proved.-- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

In the light of Section 27of the Evidence Act, whatever information given by the accused in consequence of which a fact is discovered only would be admissible in the evidence, whether such information amounts to confession or not. The basic idea embedded Under Section 27 of the Evidence Act is the doctrine of

confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information (see State of Maharashtra v. Damu (2000) 6 SCC 269)

(underlined by us)

44. Keeping in view the aforementioned proposition of law, in our considered opinion, it was not only the recovery of the seven dead bodies, which becomes admissible under the Act. But appellant Phool Chandra had also furnished information that three of the deceased persons were given blows with axe. Submission of learned counsel for the appellants was that lacerated wound was found on the head of deceased. But edge of the axe, used in the offence may not be sharp enough to cause incised wound or it might have been used by its blunt side. But perusal of the injuries clearly shows that said injuries were caused by a heavy weapon and this fact was also discovered in the postmortem. In our view, this fact was also discovered on the basis of the information furnished by the appellant. Apart from it, appellant Phool Chandra had also informed that four of the deceased persons were thrown alive in the well. Perusal of the postmortem reports of these four persons shows that no mark of injury was found on their bodies and cause of death was asphyxia as a result of ante mortem drowning and this fact, informed by appellant Phool Chandra was also discovered and stands verified by the postmortem reports of these four persons. Apart from it, other prosecution witness PW-17 S.I. R.K. Mishra, who had conducted the inquest proceedings of seven deceased persons also proves the fact of recovery of dead bodies from the said well. The evidence of subsequent Investigating Officer PW-13 S.I. Ranveer Singh also shows that some of the accused persons were arrested by him and they have confessed their guilt. But as stated earlier, nothing incriminating is alleged to have been recovered from their possession. It is nowhere the defence of appellant Phool Chandra that he had seen someone else throwing the dead bodies in the well or this fact came into his knowledge by any other means. So the case of Suresh (Supra) shall apply in full force in the fact of the instant case and the court can rightly presume that Phool Chandra was the person, who had thrown the dead bodies into the well.

(M) Defence of appellant Phool Chandra:

45. As per evidence of D.W.-1 Head Moharir Shiv Shankar Singh, one F.I.R. under Section 147, 148, 149, 364, 323, 342, 302 and 201 I.P.C. was lodged by Nankai son of Bindeshwari on 29.9.1996 at 10:00 p.m. making allegation of an incident that took place on 24.9.1996. Circle Officer had investigated the case and final report was filed after investigation which was accepted by the court. Appellant Phool Chandra happens to be brother of Nankai. Appellant ought to have filed F.I.R. of the said case which was lodged by Nankai against the then S.O. of Police Station Hussainganj and large number of other police personnel. It has nowhere been pleaded by appellant Phool Chandra that any effort was made from his side to file any protest petition

against the said final report. Apart from it, this incident had taken place after about five years of the registration of the said F.I.R. So such a long gap, that too, after acceptance of the final report by the court must have made this ground too stale to be a reason for false implication of appellant Phool Chandra. It has whereby been pleaded that any of the police personnel, who was made accused in that case was, in any manner, associated with the incident of this case. Hence the defence taken by appellant Phool Chandra was not the least probable.

46. Thus in view of the discussion made above, we are of the considered view that recoveries of the seven dead bodieswere made on the basis of the information furnished by appellant Phool Chandra.

47. Now cumulative effect of these two recoveries has to be considered. Appellant Phool Chandra had also informed the Investigating Officer that he had sent animals with Kallan and two other persons to Nauwagaon. Though it is true that before the said statement, recovery from the possession of appellants Kallan have been made. Apart from it, appellant Kallan disclosed the fact that appellant Phool Chandra had taken seven abducted persons to dispose of them and subsequently on the basis of the information furnished by Phool Chandra, seven dead bodies were recovered from the well. Though there is no direct evidence that all these persons assembled in the house of appellant Phool Chandra. But taking above two circumstances together, the conclusion is irresistible that they acted, in prosecution of their common object to take away the animals of seven persons after killing them, and both of them are responsible for the death of seven persons. Though the other appellants have not been found guilty but it does not mean that other persons were not involved in this offence. The prosecution story regarding involvement of several other persons in this incident has not been disbelieved. Such an offence could not have been committed unless and until several person worked together in prosecution of their common object. The other appellants have been acquitted only on the ground as there was no admissible and reliable evidence against them. So their acquittal would not lend any help to these two appellants against whom the case of the prosecution stands proved. Therefore, appellants have rightly been convicted for the offence with the aid of Section 149 I.P.C. Thus we hold that Criminal Appeal No. 611 of 2009 preferred by appellant Kallan and Criminal Appeal No. 282 of 2009 preferred by appellant Phool Chandra sans merits, deserve to be dismissed.

Order

48. Criminal Appeal No. 552 of 2009 preferred by Santosh alias Neta Khatik Criminal Appeal No. 550 of 2009 preferred by appellant Pappu alias Fakku, Criminal Appeal No. 551 of 2009 preferred by appellant Nankai, Criminal Appeal No. 327 of 2009 preferred by appellant Ramesh and Criminal Appeal No. 4596 of 2013 preferred by appellant Rakesh are hereby allowed. The aforesaid five appellants are hereby acquitted of the charges levelled against them. They be set at liberty. At present, they are in custody. They shall be released forthwith, if not wanted in any other case.

49. Criminal Appeal No. 611 of 2009 preferred by appellant Kallan and

Criminal Appeal No. 282 of 2009 preferred by appellant Phool Chandra are hereby dismissed. Both these appellants are in custody. They shall serve out their sentence awarded by the trial court.

50. Office is directed to communicate this order to the court concerned forthwith to ensure compliance and also to send back the lower court record.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal Defective No. 598 of 2015

Smt. Vijaya Jain ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Aishwarya Pratap Singh

Counsel for the Respondents:
C.S.C.

(A)Constitution of India. Art.-226-Writ Jurisdiction-dismissal on ground of alternative remedy-additional demand of stamp duty-without any material satisfaction about deficit amount-order passed ex-parte even recall application rejected-Learned Single Judge dismissed petition on ground against order impugned-provisions of statutory appeal or revision available-held-order passed ex parte without affording opportunity of hearing-can not be relegated to avail alternative remedy.

Held: Para-14
In our opinion, therefore, since the proceedings had been taken ex parte against the appellant and in complete violation of the rudimentary requirements of a fair hearing, her case clearly fell in the first of the well recognized exceptions to a party being relegated to the alternative remedy.

(B)U.P. Stamp (Valuation of property) Rules 1997-Rule 4 and 7-circle rate fixed by D.M.-mere a guide line for valuation-but its potentiality should seen on date of execution of sole deed- and not future use-order impugned quashed remained for fresh decision.

Held: Para-26
The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The original petitioner is in appeal before us consequent to the order of the learned Single Judge dismissing her writ petition on 17 August 2015 holding that the petitioner had an equally efficacious statutory remedy of filing an appeal under Section 56 of the Indian Stamp Act 18991.

2. The writ petition laid challenge to an order dated 10 November 2014 passed by the Collector and District Magistrate, Gautambudh Nagar holding that the gift deed executed in favor of the appellant on 17 December 2012 was liable to be subjected to a levy of Rs.8,89,000/- as deficit stamp duty together with penalty of four times the deficit stamp duty amounting to Rs.35,56,000/-. Thus a total amount of Rs.44,45,000/- was sought to be recovered from the appellant. Apart from the above, the deficit amount of stamp duty was also subjected to a levy of interest at the rate of 1.5 % per month on simple interest basis from the date of execution of the instrument till the date of actual recovery of the sums

aforementioned. Since the order of 10 November 2014 was stated to have been made ex parte, the appellant sought recall of the same by moving an application before the second respondent. This application came to be rejected on 03 August 2015 and the original order of 10 November 2014 was maintained. It was aggrieved by the aforesaid two orders that the appellant filed a writ petition before this Court.

3. Before we proceed further, we would like to highlight here that the order of the second respondent refers to the instrument in question as a sale deed. However, a copy of the instrument, which has been produced before us and which fact was also borne out from the representation submitted by the appellant before the second respondent shows that it is in fact a gift deed dated 17 December 2012 executed by the husband of the appellant in her favour in respect of a plot described as Khasra No. 786 area 0.7160 hectare situate in village Surajpur, Pargana Dadri. The Collector proceeded to pass the impugned orders holding that the instrument had come to be taxed at rates applicable to agricultural land whereas in his opinion it was liable to be taxed treating the property comprised in the instrument as residential. He accordingly proceeded to apply the circle rate applicable to residential plots and held the Appellant liable to pay the amounts aforementioned.

4. The learned Single Judge has proceeded to dismiss the writ petition as noted above by holding that the appellant has an equally efficacious statutory remedy of filing an appeal under Section 56 of the Act. It is apposite to note here that the remedy of an appeal stands incorporated in Section 56 of the Act by virtue of insertion of sub-section (1-A) in the said provision in terms of U.P. Act No. 38 of 2001. The amendment came into force with effect from 20 May 2002. The proviso to sub-section (1-A) of Section 56 of the Act proceeds to impose a condition to the effect that no application for stay or recovery of any disputed amount of stamp duty including interest thereon or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one-third of the disputed amount. This condition, however, does not stand engrafted in sub-section (1) of Section 56 of the Act, which confers revisional power in the Chief Controlling Revenue Authority.

5. The distinction in the requirements of the two provisions noted above fell for consideration before a Full Bench of this Court in Gaurav Aseem Avej Vs. Chief Controlling Revenue Authority U.P. Allahabad and others2 . The Full Bench answered the questions framed for its consideration in the following terms: -

"Conclusion:

(1) In view of the foregoing discussions, we are of the considered opinion that sub-section (1) of section 56 of the Indian Stamp Act, 1899 does not stand deleted by insertion of sub-section (1-A) in section 56 of the Act by the U.P. Act No. 38 of 2001 and both the provisions of revision and appeal are available to an aggrieved person.

(2) If a revision is preferred under sub-section (1) of section 56 of the Act then there is no requirement of deposit of 1/3rd of the disputed amount of deficient stamp duty including interest or penalty,

if any while filing an application for grant of interim relief.

(3) The proviso of sub-section (1-A) of section 56 of the Act will apply only in cases where an appeal is preferred under sub-section (1-A) and its scope is restricted to appeal only.

(4) Sub-section (1-A) of section 56 of the Act as inserted by the U.P. Act No. 38 of 2001 is constitutionally valid."

6. We have, however, heard the learned counsel for the parties even on the assumption that the remedy of a revision was available to the appellant against the orders passed by the second respondent and whether in the facts and circumstances of the case, the appellant was liable to be relegated to the alternative remedy provided for under Section 56 of the Act.

7. The existence of an alternative statutory remedy as has been consistently held by the Courts is not a rule of inflexible character nor is it an inviolable condition. The Courts vested with the power and jurisdiction under Article 226 of the Constitution of India have always viewed this rule as a self imposed restriction rather than a rule which is to be blindly adhered to and which brooks of no exception. Some of the well settled exceptions to the rule of a petitioner being relegated to an alternative remedy are where the principles of natural justice have been violated or where orders are made without jurisdiction. Without burdening this judgment with precedent, we may refer to only two causes which travelled to the Supreme Court from proceedings arising out of the Stamp Acts of the respective States.

8. In Government of Andhra Pradesh and others Vs. Smt. P. Laxmi Devi3 while considering the validity of a provision requiring a pre-deposit for consideration of a revision petition against the order of the Collector, the Supreme Court observed as follows: -

"29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Articles 14 of the Constitution vide Maneka Gandhi vs. Union of India [(1978) 1 SCC 248]. Hence, the party is not remediless in this situation."

9. A similar issue fell for consideration before the Supreme Court in Har Devi Asnani Vs. State of Rajasthan4. Considering the judgment of the High Court relegating the appellants before it to the alternative remedy of preferring a revision under the provisions of the Stamp Act as applicable in Rajasthan, the Supreme Court held as follows: -

"12. We are, however, inclined to interfere with the order dated 21.10.2009 of the learned Single Judge of the High Court in SB Civil Writ Petition No.1244 of 2009 as well as the order dated 22.03.2010 of the Division Bench of the High Court in D.B. Civil Appeal (Writ) No.1261 of 2009. The learned Single Judge of the High Court and the Division

Bench of the High Court have taken a view that as the appellant has a right of revision under Section 65 (1) of the Act, the writ petition of the appellant challenging the determination of the value of the land at Rs.2,58,44,260/- and the demand of additional stamp duty and registration charges and penalty totaling to Rs.15,70,000/- could not be entertained under Article 226 of the Constitution. The learned Single Judge of the High Court and the Division Bench of the High Court have not considered whether the determination of market value and the demand of deficit stamp duty were exorbitant so as to make the remedy by way of revision requiring deposit of 50% of the demand before the revision is entertained ineffective. In Government of Andhra Pradesh and others Vs. Smt. P. Laxmi Devi (supra) this Court, while upholding the proviso to sub-section (1) of Section 47-A of the Indian Stamp Act introduced by Andhra Pradesh Amendment Act 8 of 1998, observed:

... ...

13. In our view, therefore, the learned Single Judge should have examined the facts of the present case to find out whether the determination of the value of the property purchased by the appellant and the demand of additional stamp duty made by the appellant by the Additional Collector were exorbitant so as to call for interference under Article 226 of the Constitution."

10. The law as authoritatively laid down by the Supreme Court in the aforementioned two judgments clearly establishes that a petitioner before the High Court is not liable to be relegated to the alternative remedy as a matter of rule. If in the facts of a particular case it is established that the principles of natural justice have been violated or that the order has been rendered without jurisdiction or if it is disclosed to the Court that grave injustice has been caused to the petitioner and it is found that his relegation to the alternative remedy would perpetuate injustice and cause prejudice, it is always open to this Court to exercise its prerogative constitutional powers and to issue an appropriate writ striking at the offending action. This principle stands extended in light of the abovementioned precedents to a case where the petitioner is foisted with an exorbitant and arbitrary demand in which case his relegation to the alternative remedy would not be justified.

11. The first issue that therefore falls for consideration is whether the case of the appellant fell within the exceptions referred to above and whether the facts of the present case justified the appellant being relegated to the alternative remedy.

12. Pursuant to the initial notice that was issued to the appellant on 9 September 2013, she filed a detailed reply for consideration of the second respondent on 3 October 2013. By her communication dated 7 July 2014, the appellant wrote to the District Magistrate that she had not heard back from his office subsequent to the reply being submitted and therefore presuming that the notice itself had been withdrawn, she requested the second respondent to send a letter or copy of the order which may have been passed confirming the above. The appellant does not appear to have received any reply from the office of the second respondent nor was she made aware of the continuance of the proceedings. On 9 January 2015, she again wrote to the second respondent,

drawing his attention to the fact that her attempts to meet him had proved unsuccessful and that the staff of the collectorate was most uncooperative. She accordingly requested to be granted an appointment and a specific date of hearing to be fixed so that the controversy could be brought to a close.

13. It is apparent from the above narration of facts that the order of 10 November 2014 had not been brought to the notice of the appellant. The writ petition then recites that it was only on 31 May 2015 when the Amin of the village sought to serve upon her a recovery certificate dated 29 May 2015, that she was made aware of an adverse order having been passed in the proceedings in question. She accordingly applied for a certified copy of the order passed on 10 November 2014 and made a representation for recall of the said order on 4 June 2015. The second respondent did not proceed to reject the said representation dated 4 June 2015 outright but curiously enough issued a communication to the Naib Tehsildar on 9 June 2015 to submit a report after undertaking a spot inspection. The Naib Tehsildar in turn appears to have inspected the plot in question on 17 July 2015 and submitted a report of even date. On 3 August 2015, the second respondent relying on this report of 17 July 2015, proceeded to reject the application dated 4 June 2015 for recall and maintained the order in original passed on 10 November 2014.

14. From the above narration of facts, it is evident that the proceedings against the appellant were taken ex parte and in violation of the principles of natural justice. The communications addressed by the appellant to the second respondent clearly establish that she was not served with any notice nor made aware of the proceedings which were at that stage pending before the second respondent. Her application for recall of the original order was not dismissed on the ground that the rules of natural justice had been complied with or that she had willfully refused to cooperate in the disposal of the proceedings. The application dated 4 June 2015 for recall of the order dated 10 November 2014 came to be rejected based upon the report of the Naib Tehsildar dated 17 July 2015 which in the understanding of the second respondent fortified the conclusions which stood recorded in the original order of 10 November 2014. In our opinion, therefore, since the proceedings had been taken ex parte against the appellant and in complete violation of the rudimentary requirements of a fair hearing, her case clearly fell in the first of the well recognized exceptions to a party being relegated to the alternative remedy.

15. There is another aspect of the matter which the learned Single Judge in our opinion failed to bear in mind while relegating the appellant to the alternative remedy.

16. As was noticed by us above, the proceedings taken by the District Magistrate stood initiated and in fact concluded against the appellant on the ground that the instrument executed in her favour on 17 December 2012 had escaped payment of stamp duty. The gift deed itself had been duly registered upon payment of stamp duty of Rs.1,13,000/- and returned to the appellant. The amount paid as stamp duty was found to be deficit by the second respondent and it was on

the above conclusion that the appellant was held liable to pay in total a sum of Rs.44,45,000/-. In addition to the above, the appellant was further called upon to pay interest on the deficit stamp duty @ 1.5 % per month on simple interest basis from the date of execution of the instruments till the date of recovery of the amount mentioned above. The demand therefore was an increase of almost forty times the original duty paid on the instrument. This in our opinion was clearly an exorbitant demand which stood raised against the appellant and therefore fell in the category of situations which were noticed by the Supreme Court in P. Laxmi Devi (supra) and Har Devi Asnani (supra). For this reason also, we are of the opinion that the learned single Judge clearly fell in error in relegating the appellant to the alternative remedy of an appeal under the Act.

17. Having arrived at the above conclusion we proceeded to hear the learned counsels for parties at some length on the merits of the issues raised in the writ petition. From the discussion that follows we are clearly of the opinion that the orders impugned in the writ petition were clearly unsustainable. We proceed to record our reasons hereinafter.

18. Before proceeding further, however, it would be relevant to note the salient statutory provisions that would have a bearing on the issues raised before us. The power of the Collector to move against an instrument on the ground of deficit stamp duty having been paid thereon is drawn from the provisions of Section 47-A of the Act. The relevant extracts of Section 47-A stand extracted below: -

"[47-A. Under-valuation of the instrument. -

(1) (a) If the market value of any property which is the subject of any instrument, on which duty is chargeable on the market value of the property as set forth in such instrument, is less than even the minimum value in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908, (Act no. 16 of 1908), notwithstanding anything contained in the said Act, immediately after presentation of such instrument and before accepting it for registration and taking any action under Section 52 of the said Act, require the person liable to pay stamp duty under Section 29, to pay the deficit stamp duty as computed on the basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in accordance with Section 23 of the Registration Act, 1908.

(b) When the deficit stamp duty required to be paid under clause (a) is paid in respect of any instrument and the instrument is presented again for registration, the Registering Officer shall certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person paying them and register the same.

(c) Notwithstanding contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed. 3

(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for registration, the registering officer shall, before registering the instrument refer the same to the Collector, for determination

of the market value of the property and the proper duty payable thereon.

(2) On receipt of a reference under sub- section (1), the Collector shall after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument and the proper duty payable thereon.

(3) the Collector may, suo motu, or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or from a Deputy Commissioner of Stamps or from an Assistant Commissioner of Stamps or any officer authorized by the State Government in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property, not already referred to him under sub- section (1), call for an examine the instrument for the purpose of satisfying himself as to the correctness of the market value, of the property which is the subject of such instrument and the duty payable thereon, and if, after such examination, he has reason to believe that market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon:

Provided that, with the prior permission of the State Government, an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.

Explanation: The payment of deficit stamp duty by any person under any order of registering officer under sub-section (1) shall not prevent the Collector from initiating proceedings on any instrument under sub-section (3).

(4) If on enquiry under sub-section (2) and examination under subsection (3) the Collector finds the market value of the property-

(i) truly set forth and the instrument duly stamped, he shall certify by endorsement that it is duly stamped and return it to the person who made the reference;

(ii) not truly set forth and the instrument not duly stamped, he shall require the payment of proper duty or the amount required to make up the deficiency in the same together with a penalty of an amount not exceeding four times the amount of the proper duty or the deficient portion thereof.

* [(4-A) The Collector shall also require along with the deficit stamp duty or penalty required to be paid under clause (ii) of sub-section (4), the payment of a simple interest at the rate of one and half percent per mensem on the amount of deficit stamp duty calculated from the date of the execution of the instrument till the date of actual payment:

Provided that the amount of interest under the sub-section shall be recalculated if the amount of deficit stamp duty is varied on appeal or revision or by any order of a competent Court or Authority.

(4-B) The amount of interest payable under sub-section (4-A) shall be added to the amount due and be also deemed for all purposes to be part of the amount required to be paid.

(4-C) Where realisation of the deficit stamp duty remained stayed by any order of any Court or Authority and such order of stay is subsequently vacated, the interest referred to in sub-section (4-A)

shall be payable also for any period during which such order of stay remained in operation.

(4-D) Any amount paid or deposited by or recovered from, or refundable to, a person under the provision of this Act, shall first be adjusted towards the deficit stamp duty or penalty outstanding against him and the excess, if any, shall then be adjusted towards the interest, if any, due from him.]"

19. The State Government in exercise of its rule making power has framed the Uttar Pradesh Stamp (Valuation of Property) Rules 19975. Rule 4 of the aforementioned rules, requires the Collector of the district to fix the minimum value per hectare/sq. mtr of agricultural and non agricultural land. The minimum value which is fixed by the Collector in exercise of powers conferred by rule 4 is commonly known as the circle rate. Rule 7 provides and lays down the procedure to be followed by the Collector where he chooses to exercise the power conferred upon him by virtue of Section 47-A of the Act. Rule 7 reads as follows:

"7. Procedure on receipt of a reference or when suo motu action is proposed under Section 47-A. (1) On receipt of a reference or where action is proposed to be taken suo motu under Section 47-A, the Collector shall issue notice to parties to the instrument to show cause within thirty days of the receipt of such notice as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him.

(2) The Collector may admit oral or documentary evidence, if any, produced by the parties to the instrument and call for and examine the original instrument to satisfy himself as to the correctness of the market value of the subject matter of the instrument and for determining the duty payable thereon.

(3) The Collector may-

(a) call for any information or record from any public office, officer or authority under the Government or a local authority;

(b) examine and record the statement of any public officer or authority

under the Government or the local authority; and

(c) inspect the property after due notice to parties to the instrument.

(4) After considering the representation of the parties, if any, and examining the records and other evidence, the Collector shall determine the market value of the subject-matter of the instrument and the duty payable thereon.

(5) If, as a result of such inquiry, the market value is found to be fully and truly set forth and the instrument duly stamped according to such value, it shall be returned to the person who made the reference with a certificate to that effect. A copy of such certificate shall also be sent to the Registering Officer concerned.

(6) If, as a result of inquiry, the instrument is found to be under-valued and not duly stamped, necessary action shall be taken in respect of it according to relevant provisions of the Act."

20. Having extracted the relevant statutory provisions above, the following principles emerge therefrom. Sub-section (1) (a) of Section 47-A of the Act empowers the registering officer to call upon the person who has presented an instrument for registration to pay deficit stamp duty. This power is exercisable by the registering officer immediately after presentation of an instrument and before

accepting it for registration and taking any action under Section 52 of the Act. This power is liable to be exercised in a situation where the market value of the property as set forth in the instrument is less than even the minimum value fixed by the Collector in accordance with the rules made under the Act. In distinction to the above, the power under sub-section (3) of Section 47-A is exercised by the Collector either suo motu or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps, Deputy Commissioner of Stamps, an Assistant Commissioner of Stamps or any officer authorized in that behalf by the State Government. This power confers jurisdiction and authority on the Collector to call for and examine any instrument for the purpose of satisfying himself as to the correctness of the market value of the property which forms the subject matter of the instrument and if upon such examination, he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may proceed to determine the market value of such property and the duty payable thereon. The first distinguishing feature of sub section (3) is that it is available to be exercised even after the instrument has been registered. Secondly the Collector proceeds under sub section (3) upon finding that the "market value" of the property has not been truly set forth in the instrument as distinct from the "minimum value fixed by the Collector in accordance with the rules made under the Act" which is the benchmark for initiation of action under sub section (1).

21. The manner in which the power under sub-section (3) of Section 47-A of the Act is to be exercised stands encapsulated in rule 7 of the Rules. Sub-rule (1) thereof enjoins the Collector to issue notice to the parties to the instrument to show cause as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him. The notice to show cause comes to be issued by the Collector on receipt of a reference or where action is proposed to be taken suo motu, of course, upon being satisfied that the market value of the property comprised in the instrument has not been truly set forth. In terms of sub-rule (2), the Collector is empowered to call for and examine the original instrument to satisfy himself as to the correctness of the market value of the subject matter of the instrument and for determining the duty payable thereon. In terms of the provisions of sub-rule (3), the Collector is empowered to call for any information, examine and record the statement of any public officer, or authority and inspect the property after due notice to the parties to the instrument. Sub-rule (4) mandates that after examining the record and other evidences, the Collector shall proceed to determine the market value of the subject matter of the instrument and the duty payable thereon. In terms of sub-rules (5) and (6), if as a result of such enquiry, the market value is found to be fully and truly set forth in the instrument and adequate duty paid thereon, the same is liable to be returned to the person who made the reference with a certificate to that effect. If as a result of enquiry, the instrument is found to be undervalued and not duly stamped, further action is liable to be taken in accordance with the relevant provisions of the Act.

22. Admittedly the gift deed executed on 17 December 2012 was duly

registered and returned to the appellant. The instrument thereafter appears to have been scrutinized by the Sub Registrar, Gautambudh Nagar and the Assistant Inspector General of Registration, Gautambudh Nagar who submitted confidential memos to the second respondent on 4 January 2013 and 20 February 2013 respectively. It was on the consideration of the above confidential memos that the notice came to be issued by the Collector, Gautam Budh Nagar on 9 September 2013. The notice called upon the appellant to show cause why deficit stamp duty of Rs. 8,89,000 be not recovered from her.

23. From the provisions extracted above, it is apparent that the Collector proceeds under sub section (3) of Section 47-A read with rule 7 when he has reason to believe that the market value of the property comprised in the instrument has not been truly set forth and that in the opinion of the Collector, circumstances exist warranting him to undertake the enquiry contemplated under rule 7. What we however find from the notice dated 09 September 2013 is that the Collector has proceeded to record, albeit prima facie, that the instrument in question has been insufficiently stamped to the extent of Rs.8,89,000/-. The notice apart from referring to a note dated 20 May 2013, received from the Assistant Inspector General of Registration neither carries nor discloses any basis upon which the Collector came to the prima facie conclusion that the appellant was liable to pay Rs. 8,89,000/ as deficit stamp duty. In our opinion a notice of this nature must necessarily disclose to the person concerned the basis and the reasons upon which the Collector has come to form an opinion that the market value of the property has not been truly set forth. In the absence of a disclosure of even rudimentary details on the basis of which the Collector came to form this opinion, the person concerned has no inkling of the case that he has to meet. A notice in order to be legally valid and be in compliance with the principles of natural justice must necessarily disclose, though not in great detail, the case and the basis on which action is proposed to be taken against the person concerned. Not only this and as is evident from a bare reading of rule 7, at the stage of issuance of notice, the Collector has to proceed on the basis of material which may tend to indicate that the market value of the property has not been truly and faithfully disclosed in the instrument. The stage of computation of market value comes only after the provisions of sub rules (2) (3) and (4) of rule 7 come into play. At the stage of issuance of notices, the Collector calls upon the person concerned to show cause "as to why the market value of the property.... be not determined by him".

24. In the facts of the present case, we find that the Collector had already prejudged the issue by recording that the appellant had paid deficit stamp duty to the extent of Rs.8,89,000/-. A reading of the order passed on 10 November 2014 then shows that the Collector proceeded to raise the demand against the appellant proceeding on the assumption that the property comprised in the instrument was liable to be taxed not as an agricultural land but as a residential plot. He accordingly proceeded to levy the circle rate for a residential plot to compute the market value of the property. The order of 10 November 2014 neither refers to nor relies upon any evidence to establish that the property was being used for a

residential purpose on the date of execution of the gift deed dated 17 December 2012. It is settled law that the market value of the property comprised in an instrument is liable to be computed with reference to the date on which it was executed.

25. A Full Bench of this Court in Shri Ramesh Chandra Srivastava, Rampur Vs.State of U.P and others6 was called upon to consider as to what should be the date with reference to which the market value of the property forming the subject-matter of the instrument is to be determined. Answering the above, the Full Bench explained the position of law in the following terms:-

"38. The above observation do support the view which we are proposing to take in the present case i.e. the relevant date for the purpose of determining the market value on which the stamp duty is payable is the date on which the instrument in question is executed, or in other words when the taxable event takes place.

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66. In view of the above discussion we answer the second question by holding that the relevant date for determining the market value of the property for being subject-matter of the sale deed is the third i.e. January 3, 1985 when the Court executed the sale deed in question on behalf of the vendors."

26. This Court on more than one occasion has held that the market value of the land is not liable to be determined with reference to the use to which a buyer intends to put it in future. The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date. We may in this connection refer to what was observed by a learned Single Judge in Veer Bal Singh Vs. State of U.P. And others7: -

"11. In M/s. Maya Food and Vanaspati Ltd. Co. V. Chief Controlling Revenue Authority (Board of Revenue) Allahabad, 1990 (90) RD 57, the Court held that the market value of the land could not be determined with reference to the use of the land to which the buyer intends to put in use. The Court held that a buyer may intend to establish an industrial undertaking thereon and that another buyer may intend to use it for agricultural purposes and a third person may intend to dedicate it for charitable purposes and that these different intentions of individual buyers may affect that price of each of them would be willing to pay for the property but the market value would not depend upon what each individual would offer for the property in question and that the market value would be that which a general buyer would offer and what the owner reasonably accepts for that property, the Court held that in determining the market value the potential of the land as on the date of sale alone could be taken into account in determining the market value and that the potential value of the land that could be put in use in future could not to be taken into consideration.

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14. The other limb of the argument is that the market value of the land cannot be determined with reference to use of the land to which buyer intends to put it in use, has substance. The matter in depth has been examined by this Court in Shakumbari Sugar and Allied Industries

Ltd. v. State of U. P. And others, 2007 (5) ADJ 602. In this case, reliance has been placed on earlier judgment in M/s. Maya Foods and Vanaspati Ltd., Allahabad v. Chief Controlling Revenue Authority, 1998 (4) AWC 636 wherein the following passage has been reproduced:

"Learned Chief Controlling Revenue Authority has observed that the land was purchased for an industrial purpose and the Collector is not arbitrary in deciding the price of the land on the basis of the proposed usage. This proposition is legally incorrect. The market value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. One buyer may intend to establish an industrial undertaking thereon, another may intend to use it for agricultural purpose and a third person may intend to dedicate it for charitable purposes like leaving it open as pasture ground or a cremation ground or a playground. These different intentions may affect the price that each of them may be willing to pay for the property and such prices have wide variations but the market value is not what each such individual may offer for the property. The market value is what a general buyer may offer and what the owner may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future."

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16. None of the authorities below besides the report of the Sub-Registrar has referred any other material in support of their orders. In Ram Khelawan @ Bachha v. State of U. P. Through Collector, Hamirpur and another, 2005 (98) RD 511, it has been held that the report of the Tehsildar may be a relevant factor for initiation of the proceedings under Section 47-A of the Act, but it cannot be relied upon to pass an order under the aforesaid Section. In other words, the said report cannot form itself basis of the order passed under Section 47-A of the Act. In the case of Vijai Kumar v. Commissioner, Meerut Division, Meerut, 2008 (7) ADJ 293 (para 17), the ambit and scope of Section 47-A of the Act has been considered with some depth. Taking into consideration the Division Bench judgment of this Court in Kaka Singh v. Additional Collector and District Magistrate (Finance and Revenue), 1986 ALJ 49; Kishore Chandra Agrawal v. State of U. P. and others, 2008 (104) RD 253 and various other cases it has been held that under Section 47-A (3) of the Act, the burden lay upon the Collector to prove that the market value is more than minimum as prescribed by the Collector under the Rules. The report of the Sub-Registrar and Tehsildar itself is not sufficient to discharge that burden"

27. The above principles of law enunciated in the aforementioned judgments have been consistently followed by this Court. We however find that the order of the Collector relies upon no evidence which would support imposition of residential rates on a property which was stated to be agricultural on the date of execution of the instrument.

28. We further find that after the appellant had filed an application for seeking recall of the ex parte order dated 10 November 2014, the Collector issued orders on 9 June 2015, calling upon the Naib Tehsildar to undertake an inspection. The inspection report is submitted on 17 June 2015. It records that the plot in

question falls within the embankment of the Hindon river and is flood affected. It further records that the plot has been fenced in and that while earlier one room existed, the same appeared to have been removed. It records that the plot is lying vacant. It further records that around and in the vicinity of the plot in question, certain persons have indulged in plotting of land for the purposes of erecting residential houses. This report forms the bedrock for the subsequent order passed by the Collector on 3 August 2015. Neither this report nor the orders impugned rely upon any evidence which may tend to indicate that the plot when it was purchased or when it had been gifted was being utilized for residential purposes. There is no material on record to indicate that it is recorded as being for residential use. More fundamentally, the inspection report in question records facts as existing in June 2015 when in fact the enquiry should have been with regard to the nature of the plot as obtaining on the date of execution of the instrument. We are therefore of the opinion that the orders passed by the Collector in the absence of any material could not have taxed the instrument proceeding on the mere assumption that the property comprised therein was residential.

29. The last issue which we must take notice of is the levy of penalty. While it is true that sub section (4) of section 47-A empowers the Collector to impose penalty not exceeding four time the proper stamp duty, the same stands attracted in a case where it is found that the market value of the property was not truly set forth. There must therefore necessarily be an intention to evade payment of duty, which entails the levy of penalty. Secondly the words "not exceeding..." confer on the Collector a discretion to levy penalty dependent upon the facts of each individual case. The mere prescription of a maximum does not necessarily mean that in each case a penalty equivalent to four times the proper duty is liable to be paid. In any view of the matter, the imposition of penalty has serious civil consequences and therefore must be preceded by due application of mind and a consideration of all relevant factors including whether there was an intention to evade payment of duty. We find that the Collector has failed to advert to this aspect also while passing the impugned orders.

30. On an overall conspectus of the above facts we find that the impugned orders are rendered unsustainable being in violation of the principles of natural justice, in breach of the procedure prescribed under the Act and even otherwise suffering from the vice of non application of mind to relevant facts and the position of law as laid down by this Court. The Collector in our opinion therefore must be commanded to reconsider the matter afresh in light of the observations made hereinabove.

31. It has been submitted before us that the circle rate which has been fixed by the Collector under the rules is only an aid or a guide for the registering officer and is not determinative of market value. It was therefore submitted that the same could not form the basis for levy of stamp duty. Referring to the Noida Master Plan, the learned counsel for the appellant submitted that no residential activity is permitted in the area in question which is otherwise a flood zone and therefore also the imposition of additional stamp duty was unjustified. We are of the opinion

that since the matter is being remitted back to the Collector it would be open to the appellant to raise all such and other pleas before the authority who would now proceed in the matter in light of the directions made hereinafter.

32. Accordingly, the Special Appeal shall stand allowed. The judgment and order of the learned Single Judge dated 17 August 2015 shall stand set aside. Consequent to what has been held above, the orders of the Collector dated 3 August 2015 and 10 November 2014 are hereby quashed. The matter shall stand remitted back to the Collector, Gautambudh Nagar for passing appropriate orders in accordance with law after affording due opportunity of hearing to the appellant.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1472 of 2012

Gullu & Ors. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Sudist, Sri Janardan Singh Yadav

Counsel for the Respondents:
A.G.A.

Criminal Appeal-offence under section 498-A, 304-B and ¾ D.P. Act-conviction of life imprisonment-keeping in view the object of criminal law-appropriate adequate and proportionate-considering gravity age of mother-in-law-not expected to do such thrashing of deceased-hence conviction reduced to 7 years-but the husband bound by his moral duty to protect his wife-deserves appropriate punishment of 12 years rigorous imprisonment.

Held: Para-30
From the facts and circumstances of the case it is clear that the appellants had initially no intention or premeditation for murder/ homicide and the deceased had been inflicted grievous injuries on her legs only. This possibility cannot be ruled out that in a domestic quarrel the appellants, who are rustic villagers, had beaten the bahu (daughter-in-law) of the house savagely due to which such injury or shock had been caused that resulted in the death of the victim. Appellants had no criminal history and they are in incarceration for about more than five years. Their age is also pertinent. Considering their age at the time of their statement u/s 313 CrPC, the Bal Chand and Smt. Ramwati Devi are senior citizens, and their age at present is more than 63 years and 60 years respectively. In ordinary course they are not expected to do such thrashing of the deceased. They may be dealt with some leniency. But the age of appellant Gullu is about 37-38 years at present, and being the husband of the deceased it was his legal and moral duty to protect his wife, but instead he was involved in beating his wife to the extent that she succumbed to her injuries. He deserves appropriate punishment without much leniency. When we apply the settled principle of law which has been enumerated in the aforementioned cases, the sentence of life imprisonment of the appellants under Section 304 IPC appears inappropriate. In the present case after considering the circumstances presented before the Sessions Judge and before us during hearing of appeal, it appears appropriate that, in the present case the sentences of appellants Bal Chand and Smt. Ramwati should not exceed more than 7 years' imprisonment, but the sentence of Gullu should be 12 years.

Case Law discussed:
(2008) 15 SCC 753; (2013) 9 SCC 516; (1994) 6 SCC 727; (2015) 6 SCC 1; (1976) 1 SCC 281; (2009) 15 SCC 635.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This appeal has been preferred against the conviction and punishment dated 28.2.2012 passed in State Vs. Gullu and others relating to Case Crime No. 689 of 2010, police station Mardah, district Ghazipur by which three accused Gullu, Bal Chand and Smt . Ramwati were convicted for charge under section 302/34 IPC and were punished with imprisonment for life and fine of Rs. 5000/- (in default of payment three months simple imprisonment).

2. Prosecution case in brief was that Tuliya Devi, daughter of informant Bhullu Rajbhar (PW-1) was married to Gullu 5 years ago. After marriage Tuliya Devi was treated with cruelty by her husband Gullu, father-in-law Bal Chand and mother-in-law Ramwati for demand of dowry. For this reason these three accused had committed murder of Tuliya Devi on 8.5.2010 by inflicting injuries on her body at their house situate in village Chaubepur, police station- Mardah, district Ghazipur and tried to dispose of her dead body. After receiving knowledge of this incident, victim's father Bhullu (informant) had given a written report (Ex-Ka-1) to the police on the basis of which case crime no. 689 of 2010 was registered.

3. In the aforesaid case inquest of the dead body was performed on 08.05.2010 and postmortem of the deceased was conducted the same evening at 9:50 pm. In the postmortem report several lacerated wounds and other marks of injuries were found on the dead body of the deceased. In postmortem (Ex-Ka-1) the doctor had opined that cause of death was haemorrhage and shock as a result of the said ante-mortem injuries. In this report approximate time of death was reported about 1 day from the time of postmortem. After completion of investigation police had submitted charge-sheet against three accused Gullu, Bal Chand and Ramwati for offences under section 498-A, 304-B IPC and under section 3/4 Dowry Prohibition Act.

4. During trial all the accused were charged for offences under section 498-A, 304 B IPC and under section 3/4 Dowry Prohibition Act, alongwith alternative charge framed later on for offence under section 302 IPC. Accused had pleaded not guilty and claimed to be tried.

5. In support of charges prosecution side examined PW-1, Bhullu (informant), PW-2 Barmati (mother of the deceased), PW-3 - Constable Sunil Kumar Singh (who prepared chik FIR and registerd case), PW-4 - Dr. Krishna Kumar Verma (who performed the postmortem), PW-5 Vinay Kumar Rai, Naib Tehsildar (for inquest report) and PW-6 Chrinjeev Nath Sinha (Investigation Officer). These witnesses had proved documents of the prosecution marked as EX-Ka-1 to Ex-Ka-14.

6. After closure of prosecution evidence statement of accused were recorded in which they denied the facts of charge as well as evidence adduced against them, without any specific averments. Defence side had examined DW-1 Madan, r/o village Chaubeypur.

7. After receiving evidence from both the sides and after affording opportunity of hearing as well as considering the argument of the parties, learned Addl. Sessions Judge

passed judgment dated 28.2.2012 by which all the accused were acquitted from the charges under section 498-A, 304-B IPC and 3/4 Dowry Prohibition Act, but were convicted for the charge under section 302-IPC. Thereafter the trial court had afforded an opportunity of hearing on the point of quantum of sentence to the accused and passed orders of punishment as above. Aggrieved by this judgment dated 28.2.2012 all the three accused have preferred the present appeal.

8. Sri Sudist and Sri Janardan Singh Yadav appeared for appellants; and State was represented by Mrs. Usha Kiran, AGA.

9. A perusal of evidence adduced during trial indicates that during post-mortem following ante-mortem injuries were found on the dead body of the deceased Tuliya Devi that were caused or occurred approximately at the time mentioned in the charge, i.e., anytime in the night of 8/9-5-2010:

1.Lacerated wound left side chin 6 cm x 1 cm mussel deep chin.

2.Lacerated wound from right shoulder to just below right elbow 35 cm x 2 cm x bone deep.

3.Abrasion 5cm x 2 cm just laterac of left eye.

4.Abrasion on top of right shoulder 8 cm x 4 cm.

5.Abrasion 20cm x 10 cm right side chest.

6.brasion 8 cm x 2 cm right iliac chest.

7.Lacerated wound 5 cm x 3 cm at middle of front of right of leg underlying bond was fractured.

8.Lacerated wound 6 cm x 3 cm just below right knee.

9.Lacerated wound 8 cm x 3 cm below front of left kneel under lying bone was fractured.

10. PW-4 the doctor reported that the cause of death of victim-deceased Tuliya Devi was shock and haemmerhage due to the above mentioned ante-mortem injuries. Although the defence had adduced one witness to indicate that the cause of death of the deceased may be accidental falling from the roof, and DW-1 Madan was examined in this regard but these facts could not be substantiated in the light of available evidence and circumstances.

11. A perusal of the impugned judgment reveals that this finding of learned Additional Sessions Judge is correct that deceased Tuliya Devi had died due to injuries found on her body in the house of the accused-appellants at about the time mentioned in the charge, and the accused-appellants were responsible for causing such injuries to Tuliya Devi. In these circumstances, the trial court had rightly reached to the conclusion that due to the above mentioned deliberate caused injuries Tuliya Devi died, and accused-appellants are responsible for inflicting those homicidal injuries.

12. Learned Additional Sessions Judge had considered facts and circumstances including evidence adduced and reached to the conclusion that though there is no conclusive evidence relating to dowry death and demand of dowry, but injuries found on body of the deceased were not accidental. Trial Court found that those injuries were homicidal, for inflicting of which accused persons were responsible, because it were

only they who were present in their house when such injuries had occurred on the body of the deceased Tuliya Devi.

13. Learned counsel appearing for the appellants fairly admitted the contents of facts relating to charge, namely victim Tuliya Devi having succumbed to the injuries found on her body in the house of appellants. He argued that he is not challenging the findings of fact of the impugned judgment, but is questioning the nature of the offence and the sections on which the accused-appellants were charged and convicted and the quantum of sentences awarded. According to him, taking note of various factors including the age of the appellants-accused, their first guilt, the charged incident was committed without premeditation in a sudden quarrel in the heat of passion, the injury being on the non-vital part of the body and the death was because of such injuries which were not sufficient to cause death in ordinary course, the award of life imprisonment and fine of Rs. 5000/- in default, to further undergo RI for three months is excessive. He pointed out that these points were mentioned during the arguments and at the time of hearing on the point of quantum of sentence, but were not considered in the judgment of conviction and at the time of awarding punishment because punishment was being awarded for Section 302 IPC in which life sentence is minimum. Learned counsel for the appellants contended that in this case conviction should be for the offence under section 304 IPC, and for the aforesaid reasons punishment should not be the maximum possible, and the said sentence of punishment should be mitigated.

14. Learned A.G.A. appearing for the respondent State submitted that the Court had not erred in conviction or award of punishment. He also contended that the Court has always the liberty to impose an appropriate sentence as that is permissible in law.

15. We have given our anxious consideration to the rival submissions and perused the material available on record of the court below. The appeal is being disposed off with the consent of the learned counsel for both sides dispensing with the formality of availability of paper books.

16. After the perusal of original record and the evidence available we are of the opinion that this finding of fact is not erroneous that the three accused Gullu Rajbhar, Bal Chand and Smt. Ramwati had been involved in causing such injuries. These injuries, due to which Tuliya Devi was seriously injured and later died, were of course on non-vital part of the body of deceased, but she died due to haemorrhage and shock of these injuries. A minute scrutiny of the nature of injuries show that either there were superficial injuries of abrasions on the body of victim or there were grievous injuries on non-vital part of body (that is two fractures on legs). Therefore, in such circumstances, it has to be considered as to whether the act causing injuries to the deceased resulting in her death was murder or whether it was a culpable homicide not amounting to murder.

17. Culpable homicide is murder if the act which causes death is done with the intention of causing death or is done with intention of causing a bodily injury and injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. All murder is culpable homicide but not vice versa. It is the degree of probability of death which determines whether a culpable homicide

is of the gravest, medium or the lowest degree.

18. In "Kesar Singh v. State of Haryana, (2008) 15 SCC 753" Hon'ble Apex had held :

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly":

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under Section 300 "Thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

19. In the matter in hand it is proved from the evidence that the charged act was committed by appellants without intention of murder, without use of any formal weapon and without any pre-planning. From the evidence, it appears probable that the appellants had willfully caused injures to the deceased and these injures were inflicted without properly knowing as to whether they may cause death or not. Though two of the injuries caused by them were grievous but there was every possibility of the deceased's survival, as they were fractures of leg. The grievous injuries were on non-vital part of the body. Other injuries were simple and superficial. Apparently knowing these facts fully well the appellants had inflicted blows at the deceased. This matter therefore comes within exception 1 of Section 300 IPC. Therefore the appellants are found guilty of act of culpable homicide not amounting to murder which is punishable under section 304 IPC.

20. The maximum punishment for the offence u/s 304 IPC is imprisonment

for life. It has to be be considered as to whether sentence of life imprisonment awarded in the present case by the trial court is appropriate. It is settled law that the courts are obliged to respect the legislative mandate in the matter of awarding of sentences in all such cases. In "Hazara Singh v. Raj Kumar, (2013) 9 SCC 516" Hon'b'e Apex Curt had held that :

"it is clear that the maximum punishment provided therein is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the Judges in arriving at a fair and impartial verdict."

"17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

21. Only because Section 304 IPC provides for life imprisonment as the maximum sentence, does not mean that the Court should mechanically proceed to impose the maximum sentences, more particularly when the incident had occurred suddenly, during the heat and passion of any domestic quarrel, without pre-meditation or pre-planning.

22. In Hem Chand v. State of Haryana, (1994) 6 SCC 727 Hon'ble Apex Court had held that :

"As mentioned above, Section 304-B IPC only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case."

23. In Devidas Ramachandra Tuljapurkar v. State of Maharashtra, (2015) 6 SCC 1 Hon'ble Apex Court had held :

"While we see no reason to differ with the concurrent findings recorded by the trial court and the High Court, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have

already been in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellants is reduced."

24. In 'Ramashraya Chakravarti v. State of M.P., (1976) 1 SCC 281' Hon'ble Apex Court had observed :

"To adjust the duration of imprisonment to the gravity of a particular offence is not always an easy task. Sentencing involves an element of guessing but often settles down to practice obtaining in a particular court with inevitable differences arising in the context of the times and events in the light of social imperatives. It is always a matter of judicial discretion subject to any mandatory minimum prescribed by law."

"In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts trial courts in this country already overburdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value."

25. One of the prime objectives of criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. For sentencing an accused on proof of crime the courts have evolved certain principles; the twin objective of the sentencing policy is deterrence and correction. It lies within the discretion of the court to choose a particular sentence within the available range from minimum to maximum. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

26. In considering the adequacy of the sentence which should neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and situation in life of the offender.

27. In Gurmukh Singh v. State of Haryana, (2009) 15 SCC 635 Hon'ble Apex Court had discussed points to be taken into account before passing appropriate sentence as under :

"23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

(a) Motive or previous enmity;

(b) Whether the incident had taken place on the spur of the moment;

(c) The intention/knowledge of the accused while inflicting the blow or injury;

(d) Whether the death ensued instantaneously or the victim died after several days;

(e) The gravity, dimension and nature of injury;

(f) The age and general health condition of the accused;

(g) Whether the injury was caused without premeditation in a sudden fight;

(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;

(i) The criminal background and adverse history of the accused;

(j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;

(k) Number of other criminal cases pending against the accused;

(l) Incident occurred within the family members or close relations;

(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The effort of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."

28. Now the matter is limited to sentence for offence u/s 304 IPC, and we have to consider about the appropriate sentence for the appellants in this case. For it aggravating circumstances relating to the crime while mitigating circumstances relating to the criminal has to be considered.

29. So far as aggravating circumstances relating to the crime is concerned, from the evidence of the case it is clear that the appellants had deliberately been instrumental in causing injuries on the whole body of deceased who was a young lady, without any satisfactory explanation, and had tried to conceal their guilt by adducing evidence to prove it to be a case of accident by fall from roof.

30. From the facts and circumstances of the case it is clear that the appellants had initially no intention or premeditation for murder/ homicide and the deceased had been inflicted grievous injuries on her legs only. This possibility cannot be ruled out that in a domestic quarrel the appellants, who are rustic villagers, had beaten the bahu (daughter-in-law) of the house savagely due to which such injury or shock had been caused that resulted in the death of the victim. Appellants had no criminal history and they are in incarceration for about more than five years. Their age is also pertinent. Considering their age at the time of their statement u/s 313 CrPC, the Bal Chand and Smt. Ramwati Devi are

senior citizens, and their age at present is more than 63 years and 60 years respectively. In ordinary course they are not expected to do such thrashing of the deceased. They may be dealt with some leniency. But the age of appellant Gullu is about 37-38 years at present, and being the husband of the deceased it was his legal and moral duty to protect his wife, but instead he was involved in beating his wife to the extent that she succumbed to her injuries. He deserves appropriate punishment without much leniency. When we apply the settled principle of law which has been enumerated in the aforementioned cases, the sentence of life imprisonment of the appellants under Section 304 IPC appears inappropriate. In the present case after considering the circumstances presented before the Sessions Judge and before us during hearing of present case the sentences of appellants Bal Chand and Smt. Ramwati should not exceed more than 7 years' imprisonment, but the sentence of Gullu should be 12 years.

31. In view of above facts and discussion, the order of conviction u/s 302 IPC imposed on the each appellants is hereby modified u/s 304 IPC, and the sentence of imprisonment for life is modified for appellants Bal Chand and Smt. Ramwati to rigorous imprisonment for seven years each. The sentence of appellant Gullu Rajbhar is modified to rigorous imprisonment for twelve years. With these modifications of conviction, punishment and sentence, the appeal stands disposed off.

32. Let the copy of this judgment be sent to Sessions Judge, Ghazipur of ensuring compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2015
BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 4357 of 2015

Vinod Valmiki ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vikas Chandra Tiwari, Sri Sudhir Mehrotra

Counsel for the Respondents:
A.G.A., Sri Brij Lal, Sri Vikas Chandra Tiwari, Sri Vijay Mishra

National Security Act-Section-3(3)-Detention on ground of taking part in illegal activities detenue already in jail-without recording satisfaction of being enlarged on bail can repeat offence-such omission vitiated the impugned-order.

Held: Para-16
In the present case the detaining authority has merely mentioned in the ground of detention that the bail application filed by the petitioner before the Chief Judicial Magistrate-Ist, Ghaziabad was rejected and thereafter the petitioner had moved his bail application before the Sessions Judge, Ghaziabad and there was possibility of the petitioner's indulging in similar activities prejudicial to the maintenance of public order on his being enlarged on bail. He has not recorded his satisfaction in the impugned order that there was real possibility of his being released on bail which omission in our opinion has totally vitiated the impugned order.

Case Law discussed:
(1975) 3 SCC 198; 1990 (27) ACC 621.

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Heard learned counsel for the petitioner, learned A.G.A. for the State and Sri Brij Lal, learned counsel for the Union of India.

2. The petitioner has been detained by the District Magistrate, Ghaziabad vide his order dated 20.09.2014 passed by him in the exercise of his power under Section 3(3) of the National Security Act (hereinafter referred to as the 'Act').

3. The relevant facts giving rise to this writ petition as narrated in the grounds of detention under Section 8 of the Act which were served upon the petitioner along with the detention order on 20.09.2014 while he was in District Jail, Ghaziabad on account of his being accused in Case Crime no. 2233 of 2014, P.S. Loni, district-Ghaziabad are that following lodging of an F.I.R. at P.S. Loni, district-Ghaziabad under Section 354(B) and 506 I.P.C. by one Smt. Kishan Kumari against one Sayeed Mohammad alleging there in that aforesaid Sayeed Mohammad had committed rape of her minor daughter Rakhi, aged about ten years, which was later converted under Section 376(2) (D) I.P..C and Section 4 The Protection of Children From Sexual Offences Act and aforesaid Sayeed Mohammad being arrested and sent to jail, the petitioner along with his associates, with the object of giving a communal complexion to the whole incident and disturb communal harmony started indulging in hooliganism against the muslim community as a result fear and terror prevailed amongst the public causing a stampede with people running helter-skelter leaving behind their shoes and slippers on the road and hiding themselves in their houses and shops by closing the doors of their houses and downing the shutters of their shops. Apart from the aforesaid, the movement of vehicles deployed for supplying milk and vegetables to Baghpat, ambulance and vehicles engaged in supplying gas was totally disturbed. However the situation was brought under control by the police force which had reached the place of occurrence.

4. The grounds of detention further reveal that on 28.8.2014 the petitioner along with his associates (about 150 in number) with the common intention of disturbing the communal harmony reached Sunita Vihar shouting slogans of 'Jai Sri Ram' and organised a road block at no.2. Bus Station Indrapuri on Loni-Delhi Saharanpur National Highway. Upon being informed about the activities of the petitioner and his companions Gorakh Nath Yadav, Inspector Incharge, PS Loni reached the place of road block with his force and tried to coax and persuade the petitioner and his associates to lift the road block but instead of listening to him they became agitated and started firing at the police force and created obstruction in the performance of their official duties by the police officers and the members of the police force. They also set ablaze old tyres and wooden benches of the shops of public by pouring kerosene oil thereon and indulged in arson and looting in the nearby shops. Government vehicles of the police officers who had reached the spot were also damaged. Not only this the petitioner and his associates had pelted stones at Mustafa Masjid and Ek Minar Masjid situate in Mangal Bazar, Sunita Vihar 100 fit road and Saraswati Vihar (Kirti Vihar) respectively and shouted anti-muslim slogans which caused a commotion forcing shop keepers to close their shops.

Fear and terror prevailed all over and communal harmony was totally disturbed and public order shattered.

5. People were prevented from going to their offices and establishments and an atmosphere of undeclared curfew prevailed Additional forces had to be requisitioned from other police stations and adjoining districts after Senior Superintendent of Police, Ghaziabad was compelled to enforce Red Scheme and it was only after three or four hours that situation could be brought under control on the arrival of additional police forces. The aforesaid incident had caused tremendous resentment amongst the muslim community. On the basis of F.I.R. of the aforesaid incident lodged by the Inspector Incharge Gorakh Nath Yadav at police station-Loni Case Crime no. 2235 of 2014, under sections 147, 148, 149, 436, 341, 336, 332, 353, 153A, 395, 397, 307 and 427 I.P.C. and section ¾ Prevention of Damages to Public Property Act and section 7 Criminal Law Amendment Act was registered against the petitioner and his associates.

6. Grounds of detention also indicate that complicity of the petitioner and his associates in the commission of the aforesaid offences was fully established from the statements of the witnesses recorded during free and fair investigation of the aforesaid incident and after completion of investigation charge sheet was submitted against the petitioner and all his associates under the aforesaid offences. News of the aforesaid incident was published in several national level news papers. The petitioner who was in Ghaziabad District Jail had moved an application for being released on bail before the Sessions Judge, Ghaziabad after his bail application was rejected by the Chief Judicial Magistrate-Ist, Ghaziabad and there was real possibility of petitioner indulging in similar activities prejudicial to the public order on his being enlarged on bail.

7. On account of the above the detaining authority was satisfied that detention of the petitioner under the Act was essential for preventing the petitioner from indulging in activities prejudicial to maintenance of public order. The detention order dated 20.09.2014, grounds of detention under Section 8 of the Act and other relevant papers were sent by the respondent no. 2 through a special messenger to the State Government on the same day which were received in the Home Department of the State Government on 21.09.2012. Petitioner was produced before the U.P. Advisory Board on 13.10.2014. After the detention order was approved by the U.P. Advisory Board, the report of the U.P. Advisory Board and the record of the case were transmitted to the State Government along with a letter of Registrar, U.P. Advisory Board (detention) dated 30.10.2014 which was received in the concerned section of the State Government on 03.11.2014. On receipt thereof the State Government took a decision on 07.11.2014 to confirm the detention order and keep the petitioner under detention for a period of twelve years from the date of passing of the order of detention on 20.09.2014.

8. Learned counsel for the petitioner submitted that the District Magistrate, Ghaziabad has not applied his mind to the facts of the case and the material on record and he has passed the impugned order in a routine manner on the report submitted to him by the police authorities.

The detention authority has failed to record any satisfaction in the impugned order that there was real possibility of the petitioner, who was already in judicial custody, being released on bail. Further the material before the detaining authority was not sufficient to satisfy him that after being released on bail the petitioner shall again indulge in activities prejudicial to the public order and hence, the impugned order which is per-se illegal may be set aside and the petitioner be set at liberty forthwith.

9. Per contra, learned A.G.A. submitted that the impugned order has been passed by the detaining authority on the basis of petitioner's involvement in two incidents which had taken place on 27.08.2014 and 28.8.2014 in Ghaziabad city along with his associates (approximately 150 in number). The F.I.R. of the aforesaid incident which was lodged by the Inspector Incharge Gorakh Nath Yadav was registered as Case Crime no. 2235 of 2014, under Section 354(B) and 506 I.P.C. against the petitioner and his associates at police station-Loni, district-Ghaziabad. The allegations against the petitioner were that he along with his associates had indulged in activities on both the aforesaid dates which had the effect of totally disturbing the communal harmony and shattering public order as they had tried to give communal complexion to an isolated incident which had taken place on 27.08.2014, in which a minor girl Rakhi aged about ten years was raped by one Sayeed Mohammad although on the basis of the first information report lodged by the mother of the victim Case Crime no. 2233 of 2014, was registered at PS-Loni, district-Ghaziabad initially under section 354(B) & 506 IPC against the aforesaid Sayeed Mohammad which was later converted into section 376(2)(D) and Section 4 of POCSO Act and aforesaid Sayeed Mohammad was arrested and sent to jail. There was no inaction or any laxity on the part of the local police in taking necessary action against the accused warranting the activities in which petitioner and his associates had indulged on 27.8.14 & 28.8.14 which had totally disturbed the public order and tranquility.

10. Learned A.G.A. further submitted that in the aforesaid incidents the petitioner and his associates had not only indulged in acts of arson and looting but had also illegally blocked the Loni-Delhi-Saharanpur highway disrupting the movement of the vehicles deployed for supplying vegetables and milk to Hapur and supplying gas and ambulance services as well. Not only this the petitioner and his associates had fired at the police officers and the members of the police force, who had reached the place of incident and tried to persuade him and his associates to stop their activities and they had also caused damage the government vehicles.

11. Learned A.G.A. lastly submitted that detaining authority had passed the impugned order after being fully satisfied on the basis of the material produced before him that on being released on bail the petitioner may again indulge in activities prejudicial to the public order and the same does not suffer from any illegality or infirmity, hence the present writ petition which is devoid of any merits is liable to be dismissed.

12. After having very carefully examined the submissions made by learned counsel for the parties and

perused the impugned order as well as the other material brought on record, we find that the only issue involved in this writ petition is that whether the failure of the District Magistrate to record in the impugned order that there was strong possibility of the petitioner, who was already in judicial custody on account of his being accused in Case Crime no. 2235 of 2014, under sections 147, 148, 149, 436, 341, 336, 332, 353, 153A, 395, 397, 307 and 427 I.P.C. and section ¾ Prevention of Damages to Public Property Act and section 7 Criminal Law Amendment Act being released on bail has vitiated the impugned order and whether the subsequent recording of his satisfaction that on being released on bail there was possibility of the petitioner's indulging in similar activities which were prejudicial to the public order on his being enlarged on bail would validate the impugned order.

13. The Hon'ble Supreme Court of India in paragraph 35 of its judgment rendered in the case of Haradhan Saha & Another vs The State Of West Bengal & Ors. reported in (1975) 3SCC 198 observed that where the concerned person is actually in jail custody at the time when the order of detention is passed against him, and is not likely to be released for a fairly long time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in the activities which would jeoparadise the security of the State or the public order.

14. The Hon'ble Supreme Court has laid down the principles as to when a detention order can be passed with regard to a person already in judicial custody in the case of Kamarunnissa vs. Union of India and another reported in 1990(27) ACC 621 SC and in paragraph 13 of the aforesaid case the The Hon'ble Supreme Court has held as hereunder :-

"13. From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody a detention order can validly be passed(1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him(a) that there is real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order can not be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question of before a higher Court."

15. What follows from the above is that a valid preventive detention order passed against a person in judicial custody must fulfill the conditions spelt out herein above by the Apex Court and one such essential condition is that there should be real possibility of the person being released on bail.

16. In the present case the detaining authority has merely mentioned in the ground of detention that the bail application filed by the petitioner before the Chief Judicial Magistrate-Ist, Ghaziabad was rejected and thereafter the petitioner had moved his bail application before the Sessions Judge, Ghaziabad and

there was possibility of the petitioner's indulging in similar activities prejudicial to the maintenance of public order on his being enlarged on bail. He has not recorded his satisfaction in the impugned order that there was real possibility of his being released on bail which omission in our opinion has totally vitiated the impugned order.

17. The writ petition accordingly succeeds and is allowed. The impugned order dated 20.09.2014 passed by District Magistrate, Ghaziabad is hereby quashed.

18. Let the petitioner, Vinod Valmiki be released from jail forthwith, if he is not wanted in any other case. There shall be however, no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2015

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 4714 of 2015
(Matters under Article 227)

Smt. Manju Devi & Ors. ...Petitioners
Versus
Motor Accident Claims Tribunal/Spl. Judge/A.D.J. Muzaffar Nagar ...Respondents

Counsel for the Petitioners:
Sri Onkar Singh

Counsel for the Respondents:

Constitution of India, Art.-227-Application to with draw half of amount-invested in fixed deposit-Accident Claim Tribunal rejected saying ruse to withdraw the amount by claimant-held-Tribunal ought to have approach the problems of claimant-who were indebted by Bank loan-order not sustainable-quashed-direction to reduce the amount by forthwith.

Held: Para-9 & 11

9. Thus, once the application for withdrawal of money is filed by the claimants, the Tribunal has to apply its mind whether it would be in the interest of the widow, or illiterate, or minor claimants to release the amount or not. While taking decision in that regard, the Tribunal has to approach the problem from the view point of the claimants.

11. As regard the shares of petitioner no. 1, it is noticeable that there are two demand notices brought on record by her. The first notice dated 29.4.2014 by Allahabad Bank requires her to pay a sum of Rs.59,339/- as the amount due and payable towards loan taken by her late husband Dhamendra Mohan. The second notice of even date refers a loan taken by her on 22.10.2012, wherein she is required to pay Rs.37,611/- alongwith interest. Thus, there was sufficient material before the Tribunal to establish that the claimants were indebted to the bank and were in need of money.

Case Law discussed:
(1994) 2 SCC 176; 2012 ACJ 698.

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

1. Heard learned counsel for the petitioners.

2. The petitioners alongwith one Smt. Vedvati made a claim for grant of compensation under the provisions of the Motor Vehicles Act, 19881 on account of death of Dharmendra Mohan in a motor accident. The petition was registered as claim petition no. 401 of 2011. Dharmendra Mohan, who died in a road accident, was the husband of petitioner no.1, father of petitioners no.2 and 3 and son of Smt.

Vedvati. The Motor Accident Claims Tribunal by an award dated 31.10.2012 allowed the claim petition in part and directed for payment of compensation of Rs.3,19,000/- to the claimant alongwith interest @ 6% per annum, since 19.4.2011, the date on which the claim petition was filed. The award passed by the Motor Accident Claims Tribunal further provides that petitioner no.1 would become entitled to half of amount of compensation awarded by the Tribunal and the remaining claimants would each get 1/6 of the total amount. A further direction was issued that the amount coming to the share of the petitioner no.1 and Smt.Vedvati would be released only to the extent of half of the amount and the remaining amount would be invested in a fixed deposit of a nationalised bank for a period of three years. In respect of petitioners no. 2 and 3, there was a specific direction for payment of entire amount coming to their share by means of a crossed cheque.

3. In compliance of the award, it is not in dispute that a sum of Rs.3,44,000/- was deposited in Indian Bank by a cheque dated 5/2/2014. The Tribunal by order dated 9.4.2014 directed the bank to apportion the amount deposited in favour of the claimants in the following manner :-

half of the amount alongwith interest to be deposited in favour of the petitioner no.1, 1/6 each in favour of petitioner no.2 and 3 and the remaining 1/6 in favour of Smt. Vedvati. A further direction was issued to the bank that half of the amount coming to the share of each of the claimant would be paid to them and remaining half would be deposited in fixed deposit for a period of three years.

4. Evidently, the direction issued by the Tribunal for payment of only half of the amount coming to the share of petitioner no. 2 and 3 and for deposit of remaining half in a fixed deposit was contrary to the direction given in the award dated 31.10.2012, whereunder the entire amount coming to their share was to be paid by means of a cheque.

5. The petitioners moved an application dated 11.2.2014 with a request to the Tribunal to permit premature encashment of fixed deposit receipts. It was stated in the application that the deceased Dharmendra Mohan had taken loan from the bank under KSY scheme and to liquidate the debt, a sum of Rs.59,339/- was to be paid. Alongwith the application, various notices issued by the Allahabad Bank calling upon the petitioners to deposit the remaining amount due and payable under KSY scheme, failing which legal action would be taken against them, were duly filed. The first notice dated 29.4.2014 calls upon petitioner no.1 to pay a sum of Rs.59,339/-, the second notice dated 29.4.2014 requires petitioner no.1 to pay a sum of Rs. 37,611/-, notices of even date requires petitioner nos. 3 and 4 to deposit Rs.57,960/- and Rs.37,386/- respectively.

6. The Motor Accident Claims Tribunal by impugned order dated 22.4.2014 rejected the application filed by the petitioners for premature encashment of the fixed deposit receipts. The Tribunal has held that it appears from the notice that the aforesaid loan was taken by them in the year 2012 whereas, under the award of the Motor Accident Claims Tribunal, sufficient amount was paid to them on 9.4.2014. As such, they could have appropriated the said amount towards payment of the loan liability but it seems that the same was not done and thus the

application is merely a ploy employed by the claimant to withdraw the money.

7. Learned counsel for the petitioners submitted that the impugned order passed by the Tribunal is manifestly illegal and contrary to the guidelines, laid down by the Supreme Court in the case of General Manager, Kerala State Road Transport Corporation vs Susamma Thomas2. It is further urged that the Tribunal has failed to apply its mind to the genuine need of money on part of the petitioners to liquidate the loan liability. The Tribunal, it is urged, has failed to take into consideration the fact that the only person in the family who was earning, had expired and therefore, certain amount was also required for daily expenses and thus, it cannot be said that the application filed by them was a ploy to get the fixed deposit receipts encashed prematurely.

8. The Supreme Court in the case of Susamma Thomas (supra) has issued certain guidelines in order to "safeguard the feed from being frittered away by the beneficiaries owing to ignorance, illiteracy and susceptibility to exploitation". However, even according to the guidelines given in the said judgment, the Tribunal is required to apply its mind to the need of the claimants. It has been held in the said decision that in case the money is required for expending any existing business or for purchase of property for earning the livelihood, the Tribunal can release the whole amount of compensation to the claimant.

9. The directions given by the Supreme Court in the aforesaid decision have since been incorporated by carrying out amendment in the U.P. Motor Vehicle Rules, 2008, by inserting section 220-B, relevant extract whereof is as under :-

"(i).The Claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn;

(v). In the case of widows the Claims Tribunal should invariably follow the procedure set out in (i) above;

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency, if the amount awarded is substantial, the Claims Tribunal may invest it in more than one Fixed Deposit so that if need be one such F.D.R. can be liquidated."

Thus, once the application for withdrawal of money is filed by the claimants, the Tribunal has to apply its mind whether it would be in the interest of the widow, or illiterate, or minor claimants to release the amount or not. While taking decision in that regard, the Tribunal has to approach the problem from the view point of the claimants.

10. In the instant case,the first thing which the Tribunal failed to notice is that in the original award, direction was for payment of entire compensation coming to the share of the petitioners no. 2 and 3 directly to them by means of a crossed cheque. No part of the amount coming to their share was to be deposited in fixed deposit. However, contrary to the direction in the award dated 31.10.2012, the Tribunal vide its order dated 9.4.2014 required the bank to invest 50% of the

amount coming to their shares in fixed deposit. Thus, the direction for deposit of 50% of the amount coming to the share of petitioner no.2 and 3 being contrary to the directions given in the award dated 31.10.2012, cannot be sustained and is hereby set aside.

11. As regard the shares of petitioner no. 1, it is noticeable that there are two demand notices brought on record by her. The first notice dated 29.4.2014 by Allahabad Bank requires her to pay a sum of Rs.59,339/- as the amount due and payable towards loan taken by her late husband Dhamendra Mohan. The second notice of even date refers a loan taken by her on 22.10.2012, wherein she is required to pay Rs.37,611/- alongwith interest. Thus, there was sufficient material before the Tribunal to establish that the claimants were indebted to the bank and were in need of money.

12. A supplementary affidavit has been filed by learned counsel for the petitioners stating that a sum of Rs.88,000/- was paid to petitioner no.1 and an equal amount was deposited in fixed deposit in her name. It is not in dispute that Dharmendra Mohan, the bread earner for the family had died. In such situation, it should have been visualised by the Tribunal that there are several other liabilities apart from daily expenses which the claimants were to meet. In such view of the matter, the request for release of additional sum which is in fixed deposit cannot be said to be unreasonable or arbitrary or a mere ruse to withdraw the amount. The Tribunal while deciding the application has approached the controversy in a lopsided manner, without appreciating the view point of the claimants.

13. In the case of A. V. Padma and others vs. R. Venugopal and others3, the Supreme Court permitted withdrawal of money deposited in fixed deposit in favour of widow to enable her to provide a dwelling unit to her second daughter who is co-owner in the house, but was residing in a rented accommodation on exorbitant rent. It is held that the widow was obliged to provide shelter to her daughter, and if the money remains locked in fixed deposit, it would only yield paltry interest, whereas, the daughter would be compelled to pay exorbitance rent. It was held that the decision of the Tribunal to invest the amount in fixed deposit was a result of rigid and mechanical approach. The decision fully supports the case of the petitioner herein.

14. In view of the discussions made above, the impugned order passed by the Tribunal dated 22.4.2012 is set aside. The application filed by the petitioners paper no. 13-Ga shall stand allowed. The tribunal shall permit premature encashment of the FDR in favour of the petitioners, leaving alone the FDRs in the name of Smt. Vedvati, for which no request for premature encashment was made.

15. The Tribunal shall ensure that compliance of this order is made within a period of three weeks from date of production of certified copy of this order, by the petitioners, before the Tribunal.

16. The petition stands allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2015

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 5490 of 2015
(Mattes under Article 227)

Muntjir ...Petitioner
Versus
General Manager, PNB Metlife India Insurance Co. Ltd. & Ors. Respondents

Counsel for the Petitioner:
Sri V.C. Dixit

Counsel for the Respondents:

Constitution of India, Art.-226-Jurisdiction-writ of certiorari-order passed by permanent lok adalat-stamp reporter-objected to convert petition under Art.-227-in view of Radhey Shyam case-held-misconceived order passed by Tribunal stand on different footing-Tribunal-not within perview of Civil Court-held-writ petition under Art.-226-maintainable.

Held: Para-7
Thus, it is clear that the judgment in the case of Radhey Shyam (supra) lays down the law only in relation to the orders of civil courts and it does not extend to the orders passed by inferior tribunals or courts, which are not civil courts.

Case Law discussed:
(2015) 5 SCC 423; (2003) 6 SCC 675; AIR 1967 SC 1

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

1. This petition as originally drafted under Article 226 of the Constitution is for quashing of the order passed by the Permanent Lok Adalat constituted under the provisions of the Legal Services Authorities Act, 1987. It is pointed out by learned counsel for the petitioner that the Stamp Reporter refused to accept the petition on the ground that a petition under Article 226 would not be maintainable, and the petitioner can only file a petition under Article 227 of the Constitution. It is further pointed out by learned counsel for the petitioner that he personally went to the Stamp Reporter and requested him to accept the petition, as framed, inasmuch as, there is no legal embargo in maintaining a petition under Article 226 of the Constitution, challenging the order of a tribunal.

2. He also placed reliance on the judgment of the Supreme Court in the case of Radhey Shyam & another Vs Chhabi Nath & Others1 wherein, according to him, the legal embargo in maintaining a petition under Article 226 of the Constitution, is in respect of orders passed by the Civil Courts and not in respect of the order passed by a tribunal. He points out that Stamp Reporter refused to accept the petition and therefore, he was compelled to change the provision of law under which, the petition is being filed from that under Article 226 to Article 227 of the Constitution.

3. He further submitted that the petitioner is still seeking a writ of certiorari and a writ of mandamus, as the petition is directed against the order of Permanent Lok Adalat, which is acting as a tribunal and not a civil court.

4. The submission made by learned counsel for the petitioner appears to have force. In the case of Radhey Shyam (supra), the Supreme Court was considering the reference made to it by a two judge bench, expressing doubts about correctness of the law laid down in Surya Dev Rai vs Ram Chander Rai and others2 in so far as it held that interference with

the judicial orders of civil courts is permissible by issuing a writ of certiorari. In paragraph 27 of the referring order, reliance was placed on paragraph 63 of the Constitutional Bench judgment of 9 judges in the case of Naresh Shridhar Mirajkar and others vs State of Maharashtra3. Paragraph 27 of the referring order is extracted herein below:-

"It is clear from the law laid down in Mirajkar in para 63 that a distinction has been made between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or court which are not civil courts and which can not pass judicial orders. Therefore, judicial orders passed by civil courts of plenary jurisdiction stand on a different footing in view of the law pronounced in para 63 in Mirajkar. The passage in the subsequent edition of Halsbury (4th Edn.) which has been quoted in Surya Dev Rai does not show at all that there has been any change in law on the points in issue pointed out above."

(emphasis supplied)

5. Thus, while referring the matter to a Larger Bench, their Lordships of the Supreme Court, drew a distinction between the orders passed by the inferior courts of civil jurisdiction and the order of inferior tribunals or courts, which are not civil courts. Thus, the reference to the larger bench was confined only to the consideration of the question regarding scope of a writ of certiorari in relation to the orders of civil courts and not those of inferior tribunals.

6. The Supreme Court while answering the reference held that the orders of the civil courts are not amenable to writ jurisdiction under Article 226 of the Constitution. But the said dictum of law, as noted above, is confined only to judicial orders of civil courts and not those of the tribunals, which as noted above, stand on a different footing. This is also clear from the following observations made by the Supreme Court while answering, the reference:-

"... All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts....."

(emphasis supplied)

7. Thus, it is clear that the judgment in the case of Radhey Shyam (supra) lays down the law only in relation to the orders of civil courts and it does not extend to the orders passed by inferior tribunals or courts, which are not civil courts.

8. In such view of the matter, this Court is of the opinion that the objection being raised by the Stamp Reporter in relation to petitions filed under Article 226 of the Constitution, challenging

orders of tribunal is not correct. Accordingly, the petitioner is permitted to convert this petition into that under Article 226 of the Constitution, as it was originally drafted.

9. The office is directed to treat the petition, as one under Article 226 and to place it before the appropriate court hearing such matters, after registering as a petition under Article 226 of the Constitution, if possible as fresh case on 29.9.2015.

10. This order be placed before the Stamp Reporter, for its guidance in matters coming to it for reporting.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2015

BEFORE
THE HON'BLE SUNEET KUMAR , J.

Writ-C No. 6108 of 2004

State of U.P. & Ors. ...Petitioners
Versus
Raj Karan & Anr. ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
S.K. Srivastava, Amit Yadav, Anil Yadav, S.C., S.K. Chaubey, Shyam Narain, Sudhanshu Narain

U.P. Industrial Dispute Act-1947-Section-6-N- Retirement of Daily wagers-working for last 11 years-retaining juniors-termination without retrenchment compensation-or one month salary in lieu thereof-held-illegal-direction of reinstatement with 50% back wages-proper-warrant no interference by Writ Court.

Held: Para-18

The respondent was removed from service unceremoniously by the employer without any valid or cogent reason despite the workman having put in eleven years of service. The conduct of the petitioner-employer tantamounts to unfair labour practice as provided under the VIth schedule to the Industrial Disputes Act, by employing the workmen as temporaries and to continue them for such years with the object of depriving them of the status and privileges of permanent workmen.

Case Law discussed:
1990 (83) FLR 497; [2000 (86) FLR 649]; [2013 (139) FLR 541]; (1979) 2 SCC 80; (2007) 2 SCC 433; (2014) 7 SCC 177; (2007) 5 SCC 755; (2006) 4 SCC 1; (2009) 8 SCC 556; (2014) 7 SCC 190; [2005] 5 SCC 591; (2014) 11 SCC 85.

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

1. The petitioner/employer is assailing the award dated 05 March 2003 published on 15 October 2003 in Adjudication Case No. 528 of 1992 passed by Labour Court, Gorakhpur. State Government on 27 August 1992 referred the following dispute:

"Whether the termination of service of the workman Shri Raj Karan by its employer w.e.f. 01.12.1991 is legal and justified? If not, the relief workman is entitled to get?"

2. The case of the respondent/workman is that he was engaged as Beldar by the Irrigation Department of the State since 1980, worked for more than 240 days in a calander year but without notice or retrenchment compensation, was terminated by the employer on 01 December 1991.

3. The petitioner in their objection/written statement denied the allegations contenting that the respondent/workman was engaged on

dailywage basis for intermittent period on availability of work and funds. The respondent never worked for more than 240 days in a year. The Labour Court held that the workman had put in 240 days in a year, the provisions of 6N of the U.P. Industrial Disputes Act, 1947 was not complied, accordingly ordered reinstatement of the respondent/workman with 50% backwages with continuity of service.

4. Contention of learned counsel for the petitioner is that it is admitted that the respondent/workman was a dailywager, was engaged intermittently, accordingly the Labour Court erred in awarding reinstatement with 50% backwages, further the Irrigation Department not being an 'industry' within the meaning of the Act, the Labour Court would have no jurisdiction.

5. The Labour Court upon considering the muster roll, extracts of the muster roll register, the statement of witness (EW-1), the seniority list furnished by the workman concluded that the workman worked for more than 240 days. Admittedly, the provisions of the Act were not followed, retrenchment compensation or salary in lieu of notice was not paid to the workman, therefore, in my opinion there is no perversity in the finding recorded by the Labour Court that the workman was removed without complying the provision of law.

6. This Court in State of U.P. Versus Presiding Officer, Industrial Tribunal (V), Meerut and another1, held Irrigation Department to be an industry within the meaning of the Act which was followed subsequently in State of U.P. State Versus Labour Court, Dehradun and another2, I am, therefore not inclined to take a different view.

7. The only question for determination is as to whether the Labour Court erred in directing reinstatement of the workman with 50% backwages.

8. The Supreme Court in Deepali Gundu Surwase Versus Kranti Junior Adhyapak and others3, considered cases on the subject of reinstatement and culled out the propositions to be followed while considering the cases where reinstatement with continuity of service and back wages can be ordered:

"33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed onlesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because

it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited4.

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal5 (supra) that on reinstatement the employee/workman cannot claim

continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

9. The Supreme Court in B.S.N.L. Versus Bhurumal6, held that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, the Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious. (para 34 & 35)

"34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: State of Karnataka Versus Umadevi (3). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35.We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him wee regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

10. The Supreme Court in U.P. Power Corporation Ltd. Versus Bijli Mazdoor Sangh7, applied the principles of the Constitution Bench judgment in State of Karnataka Versus Umadevi (3)8 by observing that the question as regards the effect of the industrial adjudicators'

powers was not directly in issue in Umadevi case. But the foundation logic in Umadevi case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently. Therefore, the Court held that since the workman never worked as a pump operator, but was engaged as daily wage basis, who did not possess the requisite qualification. Looked at from any angle, the direction for regularization, as given, could not have been given in view of what has been stated in Umadevi case.

11. Supreme Court in Maharashtra SRTC Versus Casteribe Rajya Parivahan Karmchari Sanghatana9, held that Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.

12. The legal position is enshrined in paragraph 41 which reads as follows:-

"41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts."

13. Supreme Court in Hari Nandan Prasad Versus Food Corporation of India10, upon considering the aforementioned judgments as to whether the principles enshrined in Umadevi (3) case is applicable observed as follows:-

"34. A close scrutiny of the two cases, thus, would reveal that the law laid down in those cases is not contradictory to each other. In U.P. Power Corporation, this Court has recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Article 14 of the Constitution, on which judgment in Umadevi is primarily founded. On the other hand, in Bhonde case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in Umadevi's case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to workers on temporary/daily wage basis and taking the same work from them and making them some purpose which were performed by the regular workers but paying them much

less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction."

14. The Court in Hari Nandan Prasad case (supra) observed that keeping in mind that industrial disputes are settled by industrial adjudicator on principles of fair play and justice concluded as follows:-

"39. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art. 14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art. 14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision.

40. The aforesaid examples are only illustrative. It would depend on the facts of each case as to whether order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights"

15. A three-Judge Bench of the Supreme Court in Haryana Roadways Versus Rudhan Singh11, considered the question whether back wages should be awarded to the workman in each and every case of illegal retrenchment.

"8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may

not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily- wage employment though it may be for 240 days in a calendar year."

16. The Supreme Court in Bhuvnesh Kumar Dwivedi Versus Hindalco Industries Ltd.12, on the facts of that case, the Court held that the workman was subjected to victimization, therefore, the award passed by the Labour Court reinstating with backwages was justified. The judgment and order of the High Court granting compensation was reversed.

17. Applying the law on the facts of the present case, the workman in the written statement had clearly stated that he was engaged in 1980 as Beldar against permanent vacancy, had continuously worked till 1 December 1991. Thereupon, service was terminated by the employer without complying the terms contemplated under Section 6-N of the Act. It was further pleaded that the juniors to the respondent-workman are continuing, despite there being work, respondent was removed on the directions of the higher officials, the workman was not gainfully employed after removal, is prepared to render any service under the petitioner department.

18. In support, petitioner filed the seniority list, document dated 15 September 1990 regarding payment of bonus for 1987-88. Seniority list would show that the daily wagers employed until 1989 have continued in service. Therefore, the undisputed facts that emerges is that the respondent was appointed in 1980, the employer was taking regular work from the respondent, it is not the case of the petitioner that they did not require the service of dailywage employees on regular basis, persons junior to the respondent were continued in service. The respondent was removed from service unceremoniously by the employer without any valid or cogent reason despite the workman having put in eleven years of service. The conduct of the petitioner-employer tantamounts to unfair labour practice as provided under the VIth schedule to the Industrial Disputes Act, by employing the workmen as temporaries and to continue them for such years with the object of depriving them of the status and privileges of permanent workmen.

19. In the result, the writ petition fails and is accordingly dismissed.

20. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.10.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 7716 of 2015

Zila Panchayat Balrampur ...Petitioner
Versus
Commissioner Devi Patan Division & Anr. ...Respondents

Counsel for the Petitioner:
Mohd. Aslam Khan, Atul Kumar Singh, Ripu Daman Shahi

Counsel for the Respondents:
C.S.C., Prashant Kumar

U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961-Section 225 and 228-Power of District Magistrate-except supervision upon Zila Parishad-if any irregularity found-can send recommendation to State Government-but can not pass any restrain order-upon the decision of Parishad.

Held: Para-28 & 32
28. We are, therefore, of the opinion for the aforesaid reasons that the District Magistrate / Collector could not have exercised powers for restraining the Zila Panchayat from opening of the tenders pursuant to the resolution dated 27.12.2014 nor could the said resolution have been declared to be illegal. Thus the same also suffers from malice in law.

32. The District Magistrate also has emergency powers for urgent work as per Section 229 but such powers nowhere clothe him / her with powers of Section 228 which are exclusively with the Prescribed Authority who under the notification is the Commissioner.

Case Law discussed:
W.P. No. 9505 (M/B) 2014; JT 1991 (3) 268; (1991) 4 SCC 139; 2008 (26) LCD 987; 2013 (96) ALR 872

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel for the petitioner and Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel III for the State.

2. Supplementary counter affidavit filed on behalf of respondent no. 2, is taken on record.

3. This petition has been filed by a democratically elected local body Zila Panchayat, Balrampur through its Chairperson, Smt. Huma Rizwan assailing the order dated 23.09.2015 as well as the orders dated 08.08.2015 and 10.08.2015 whereby the tender proceedings for the purpose of execution of certain work pursuant to a resolution passed by the Zila Panchayat have been annulled by the District Magistrate/Collector, Balrampur on the ground of irregularities with a further direction to re-invite tenders as stipulated therein.

4. The matter had been heard earlier by us and the learned Counsel for the State had been called upon to file an appropriate affidavit relating to any further developments in the matter.

5. Today an affidavit has been filed in compliance of our earlier order dated 27.10.2015 bringing on record the order dated 26.10.2015 whereby the impugned order dated 23.09.2015 has been annulled and withdrawan. The affidavit has been taken on record. Thus one of the main reliefs claimed by the petitioner stands exhausted with the withdrawal of the said order.

6. Sri Mohd. Arif Khan, learned Senior Counsel for the petitioner, however vehemently urges that withdrawal of the said order does not suffice inasmuch as the second respondent namely Collector / District Magistrate, Balrampur has malafidely exercised powers by restraining the opening of tenders and as such the orders date 08.08.2015 and 10.08.2015 staying the tender process also deserves to be quashed, keeping in view the nature of the withdrawal order dated 26.10.2015 that in a guarded way proposes an action to be taken by the learned Commissioner.

7. While proceeding with the matter, we called upon the learned Counsel to

address the Court on the availability of the powers with the District Magistrate and the Prescribed Authority as contemplated under Sections 225 and 228 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 to resolve the jurisdictional issue. It appears realising the impact of the same, the second respondent passed the withdrawal order dated 26.10.2015.

8. Learned Additional Chief Standing Counsel for the respondent-State relied upon a Division Bench judgment in the case of Smt. Gajala Chaudhary vs. State of U.P. and others rendered in Writ Petition No. 9505 (M/B) of 2014, on 23.09.2014 to contend that the said Division Bench judgment clearly indicates the powers being available to the District Magistrate and as such the contention raised on behalf of the petitioner does not conform to the aforesaid legal proposition as laid down in the said judgment.

9. She also submits that even otherwise the present writ petition has become academic and as a matter of fact has become infructuous with the withdrawal of the impugned order dated 23.09.2015.

10. It is on this issue that we have to consider the rival submissions as to whether the District Magistrate possessed any such power for restraining the opening of tenders as has been attempted through the impugned communications dated 08.08.2015 and 10.08.2015 that have not been withdrawn by her.

11. The background in which the dispute arose appears to be the availability of a huge amount of funds for the Zila Panchayat from the State Finance Commission through the communication dated 27.02.2015. The Zila Panchayat had already passed resolution nos. 4 and 5 on 27.12.2014 for utilization of the grants that were proposed to be made available to the Zila Panchayat for seventy eight projects. Part of the grant was utilized on being approved after following the due process of tender and award of contracts. For the other projects, the tenders and contracts are stated to have been approved by the Chairman where after an advertisement was published in two local newspapers as well as other newspapers of repute inviting tenders / bids. Permission was sought from the competent authority through proper channel namely the Chief Development Officer and during this period a query was made by the respondent no. 2 i.e. the Collector in relation to publishing of such tenders and award of contracts.

12. The petitioner urges that even before any reply could be submitted to the query, the District Magistrate passed an order sitting in office on a second Saturday i.e. 08.08.2015, that is officially not a working day, alleging that she had received some complaints that the funds are to be misutilized for award of such contracts which have already being executed by adopting dubious methods of splitting the amount of such contracts. She therefore imposed a restraint on the opening of the tenders through the order dated 08.08.2015 and 10.08.2015, appointing a three member committee to enquire into the said allegations.

13. A three member committee was accordingly appointed to make a fact finding inquiry with regard to the said process having been adopted upon which

the matter was inquired into and a report is said to have been submitted. It is in this background that the Upper Mukhya Adhikari sent a letter dated 10.08.2015 stopping the entire tender process pursuant to the impugned orders of the District Magistrate.

14. A representation was filed by the Chairperson alleging that this was being done on account of an alleged political rivalry and personal malice, as the Chairperson had contested the election against Sri Rakesh Yadav, son of a minister in the State Government Sri S.P. Yadav and, therefore, in order to impede the functioning and carrying out of the execution work of the Zila Panchayat, this method was adopted and the District Magistrate / Collector surrendered her jurisdiction in favour of such persons so as to annul the aforesaid tender process.

15. This writ petition was filed and an interim order for holding the tenders in custody was passed by the Division Bench that had entertained the writ petition on 01.09.2015. The petition proceeded on the aforesaid allegations and affidavits were exchanged. When the matter appeared before us, upon hearing, learned Counsel and the Court were faced with the question with regard to the availability of the power with the District Magistrate to proceed in the matter as indicated in our order dated 15.10.2015. It is in the said light that the matter was heard by us and the questions so arising were framed to be answered vide our order dated 27.10.2015.

16. It is in the aforesaid context that the matter now remains alive for consideration, as the powers of the District Magistrate to intervene and stay the tender process that was an outcome of the resolution dated 27.12.2014 is still surviving for challenge. The reason is that while withdrawing the order dated 23.09.2015 on 26.10.2015, the District Magistrate / Collector has proceeded to make further recommendations to the Commissioner of the division who is the Prescribed Authority to take appropriate action in the matter and has left the orders dated 08.08.2015 and 10.08.2015 intact.

17. Sri Mohd. Arif Khan, learned Senior Counsel submits, in our opinion rightly so, that in the said background the matter does not remain merely academic on the issue involved as to whether the District Magistrate continues to have the power to either restrain the tender process or even make a recommendation to the Commissioner for taking any appropriate action in exercise of powers under Section 225 or Section 228 of the Act.

18. Before we deal with this matter it would be appropriate to first consider the impact of the Division Bench judgment in the case of Smt. Gajala Chaudhary (supra), where the Court has proceeded to presume that the power under Section 228 of the Act can be exercised by the District Magistrate / Collector as well. With all due respect to the ratio of the Division Bench judgment the same is not an authority for the proposition involved herein as what we find is that neither the comparative assessment of Section 225 and Section 228 of the Act relating to the specific scope and powers of the Collector / District Magistrate and that of the Prescribed Authority have been taken into consideration, nor the distinction of the status of the two authorities have been noticed or discussed as they appear to

have neither been pointed out nor does it appear to have been a matter of debate or consideration.

19. The Prescribed Authority as under Section 225 and 228 of the Act is an authority as defined under Section 2 (20) of the 1961 Act, the same is reproduced below:-

(20) "Prescribed Authority" means any person or authority notified by the State Government in the Gazettee as prescribed authority for any purpose under this Act;

20. Thus the District Magistrate and the Prescribed Authority are not interchangeable synonymous terms or a substitute for each other. They enjoy concurrent powers under Section 225 but under Section 228 the powers to be exercised are exclusively vested in the Prescribed Authority only and not in the District Magistrate. This distinction is clearly evident from the notification dated 13.02.1963 that has been placed on record which categorically notifies the Prescribed Authority to be a Commissioner who is a higher authority than the District Magistrate / Collector. This statutory notification has completely gone unnoticed in the Division Bench judgment of Smt. Gajala Chaudhary (supra). The question before us is as to whether the judgment at all applies in this case on account of such an omission in the judgment viz-a-viz the aforesaid provisions.

21. Sri Khan, learned Senior Counsel for the petitioner, submits that it would not be necessary to refer the matter, as, the per incuriam rule is clearly attracted and the said Division Bench decision, therefore, cannot be treated to be a binding precedent. Sri Khan relied upon on three judgments for the said proposition. The first is in the case of State of U.P. & another vs. M/s Synthetics and Chemical Ltd. & another reported in JT 1991 (3) 268 and also reported in (1991) 4 SCC 139 and the other judgment is by the full Bench of this Court reported in 2008 (26) LCD 987 in the case of Tuples Educational Society and another versus State of U.P. and another. Another decision of a full Bench of this Court reported in 2013 (96) ALR 872 in the case of Arun Kumar Singh and others vs. State of U.P. and others has also been placed before us.

22. Learned Counsel has invited the attention of the Court to paragraphs 19 to 27 of the case reported in Arun Kumar Singh (supra) and urged that applying the principles that have been consistently followed in the aforesaid decisions, the Division Bench judgment in the case of Smt. Gajala Chaudhary (supra) is per incuriam. With due and respectful deference to the judgment in Smt. Gajala's case, we are inclined to accept the said arguments of Sri Khan having noticed the provisions discussed herein above. The Division Bench judgment in the case of Smt. Gajala Chaudhary (supra) does not apply on the facts of this case as also because it completely omits to notice the distinction between the powers of the Prescribed Authority and the District Magistrate as well as the notification dated 13.02.1963.

23. The question as to whether the District Magistrate / Collector enjoys the power to restrain the opening of the tenders is still a hurdle. Section 225 of the 1961 Act is extracted here under:-

225. Powers of inspections, etc. of prescribed authority or District Magistrate over Parishad.

(1) The prescribed authority or the District Magistrate may, with the limits of its or his jurisdiction or district, as the case may be -

(a) inspect, or cause to be inspected, any movable property used or occupied by a Zila Panchayat or any Committee or joint Committee thereof, or any work in progress under the direction of any of them;

(b) by order in writing call for and inspection a book or documents in the possession or under the control of a Zila Panchayat or any Committee or joint Committee thereof;

(c) by order in writing require a Zila Panchayat, or any Committee or joint Committee thereof to furnish such statements, accounts, reports (including monthly reports of progress) or copies of documents, relating to its proceedings or duties as he thinks fit to call for; and

(d) record in writing, for the consideration of Zila Panchayat, or any Committee or joint Committee thereof any observations he thinks proper in regard to its proceedings or duties.

(2) Every officer appointed by the State Government in this behalf may, within the limits of this jurisdiction, exercise, the powers conferred upon the prescribed authority or District Magistrate by sub-section (1) in respect of any matter affecting his department and may inspect or cause to be inspected, the administration of a Zila Panchayat in respect of such matter."

24. A perusal of the said provisions clearly indicates the scope and extent of the powers of the District Magistrate who can upon assessment after inspection of such matters as are mentioned therein, record his opinion in writing and call upon the Zila Panchayat to consider the same for rectification of any such act which may require to be done in accordance with law.

25. The said powers of the District Magistrate are supervisory in nature but at the same time when it comes to interfering with any incorrect exercise of power by the Zila Panchayat then the controlling authority is the Prescribed Authority under Section 228, which is extracted hereunder:-

"228 Powers of Prescribed authority to suspended action under the Act-

(1) The prescribed authority may, within the limits of its jurisdiction by order in writing, prohibits the execution or further execution of a resolution or order passed or made under this or any other enactment by a Zila Panchayat, or Committee of a Zila Panchayat, or a joint committee, or servant of a Zila Panchayat or a Committee, if in its opinion such resolution or order is patently illegal or ultra vires or inconsistent with any order or direction given by the State Government under this Act or is of a nature to cause or tend to cause obstruction, annoyance or injury to the public or to any class or body or person lawfully employed, or danger to human life, health or safety, or a riot or affray and may prohibit the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order.

(2) Where an order is made under sub-section (1) a copy thereof, with a statement of the reasons for making it, shall forthwith be forwarded by the prescribed authority to the State

Government which may, after calling for an explanation from the Zila Panchayat and considering the explanation, if any, made by it, rescind, modify or confirm the order.

(3) Where the execution or further execution of a resolution or order is prohibited by an order made under sub-section (1) and continuing in force, it shall be the duty of the Zila Panchayat or the Committee of the Zila Panchayat or the joint committee or any officer or Servant of the Zila Panchayat or of the Committee of the Zila Panchayat or of the joint committee, if so required by the authority making the order under the said sub-section, to take any action which it would have been entitled to take, if the resolution or order had never been made or passed, and which is necessary for preventing any person from doing or continuing to do anything under cover of the resolution or order of which the further execution is prohibited."

26. Thus there is a clear distinction between the scope and powers of the Prescribed Authority and the District Magistrate viz aforesaid two sections. The aforesaid issue also does not appear to have been either argued or dealt with in the Division Bench judgment in the case of Smt. Gajala Chaudhary (supra). The Commissioner only has the power to annul the action taken by the Zila Panchayat in his capacity as the Prescribed Auhoritiy. There is yet another reason for the same, namely, the Zila Panchayat is a democratically elected local body constituted under the statute and the resolution passed by the Zila Panchayat is an expression of the will of the elected representatives of the public large at the district level. In such a situation the control over Zila Panchayat obviously was intended to be by an authority higher than the District Magistrate / Collector and it is for this reason that the Commissioner was notified as the Prescribed Authority by virtue of a notification.

27. The said control for annulling a resolution passed by the Zila Panchayat is thus in terms of the aforesaid statutory provisions where the Collector does not appear to have any role to play. If that is the position, then in that event, if the Collector / District Magistrate does not have the power to exercise any such authority as envisaged under Section 228, then the authority to pass an interim order is also out of question inasmuch as what cannot be permitted to be done directly, cannot also be permitted to be done indirectly. The Collector neither has the power to pass final orders nor can the same be done by virtue of an interim direction.

28. We are, therefore, of the opinion for the aforesaid reasons that the District Magistrate / Collector could not have exercised powers for restraining the Zila Panchayat from opening of the tenders pursuant to the resolution dated 27.12.2014 nor could the said resolution have been declared to be illegal. Thus the same also suffers from malice in law.

29. The third question is that can the Collector/District Magistrate be said to be a toothless tiger even if the Zila Panchayat transgresses the norms within which it is entitled to function.

30. It is here that we may observe that the power to inspect and to indicate in writing for the consideration of Zila Panchayat under Section 225 comes into play. The District Magistrate / Collector, therefore, in our opinion if arrives at the conclusion that the Zila Panchayat has acted deviantly he / she can always make its recommendations to the Commissioner

for taking an appropriate action if the Zila Panchayat does not respond to the recommendations made by the District Magistrate as per the provisions of Section 225 of the 1961 Act.

31. This in our opinion, would be a purposive interpretation of the powers available in the hands of the Collector / District Magistrate in order to supervise the functioning of the Zila Panchayat and make such recommendations to the Zila Panchayat that may be necessary for discharge of its obligations under the 1961 Act.

32. The District Magistrate also has emergency powers for urgent work as per Section 229 but such powers nowhere clothe him / her with powers of Section 228 which are exclusively with the Prescribed Authority who under the notification is the Commissioner.

33. Consequently for all the aforesaid reasons, the District Magistrate / Collector on the basis of any material that may be relevant for consideration of Commissioner for exercise powers under Section 228 can make such recommendations for an independent assessment . This can also be preceded by a preliminary fact finding enquiry.

34. Sri Khan, learned counsel contends that in the instant case, this is the second round of harassing the petitioner as in the previous year the Zila Panchayat had been harassed in a same fashion and the repeated action is malafide. He further submits that so far as setting up of a three member committee is concerned by the Collector even that committee has not adversely reported against the petitioner. Thus there was no material for the Collector to make any recommendations to the Commissioner as has now been done under the communication dated 26.10.2015. In our opinion it is upon the Commissioner to take an independent decision if there is no adverse material against the petitioner.

35. We, therefore, allow this petition and we also strike down the orders dated 08.08.2015 and 10.08.2015 passed by the Collector restraining the Zila Panchayat from opening of the tenders. This should not be construed as the tenders being approved by us and shall however be subject to any action which may be taken by the Commissioner in exercise of the powers under Section 228 of the 1961 Act or any other provisions under the Act if permissible without prejudice to the rights of the Zila Panchayat and its authorities to take appropriate lawful steps in respect of the tenders. The tenders shall be forthwith handed over to the Executive Officer of the Zila Panchayat that is in the custody of a Magistrate as per the orders of this Court.

36. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 8068 of 2011

Sunil Kumar Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vatsal Srivastava, Ashok Khare, V. Srivastava

Counsel for the Respondents:

C.S.C., H.N. Singh, Somveer Singh

Constitution of India, Art.-311(1)- Dismissal of Senior Assistant-working in district employment office Mathura-appointed and promoted by Director-being appointing authority under Rule 3(a) of U.P. Training and employment ministerial service Rules 1981-whether the Regional employment officer empowered to pass impugned dismissal?-held-'No' reasons discussed.

Held: Para-29
The clarification so furnished is in sync with the position of law as noted herein above. Hence, the stand taken by the respondents that the Regional Employment Officer is the person who appointed the petitioner on promotion is not borne out from the material brought on record, rather the record would reflect that appointment and promotion could have been made at the Directorate level alone, as the circular noted hereinabove, would provide. The respondents in practice have followed the circular for a prolonged period without amending the statutory Rules 1981. Even taking a case, otherwise, the order of promotion was admittedly passed and issued by the Director who being an higher officer than the appointing authority Regional Employment Officer, the impugned order of removal could not have been passed by the Regional Employment Officer nor it could have been cured in appeal by the Director.

Case Law discussed:
AIR 1964 SC 449; AIR 1957 All 439; AIR 1949 PC 112; AIR 1955 SC 70 (73); AIR 1970 SC 679; AIR 1982 SC 1407; AIR 1957 MP 126 (128); AIR 1962 Raj. 258; (1969) 2 SCC 108; AIR 1970 SC 1255 (1262); AIR 1967 SC 459 (462); (2003) 4 SCC 753, 757 (para-8); AIR 1977 SC 747 (para 13); AIR 1977 SC 1233 (paras 10, 13); (2006) 12 SCC 373, 375 (para 7); AIR 1982 SC 1394 (para 4); AIR 1977 SC 747 (paras 14-15).

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

1. The triable question raised by the contesting parties is as to whether the Regional Employment Officer, Agra Region, Agra was competent to remove/dismiss the petitioner, holding the post of Senior Assistant in the office of the District Employment Office, Mathura, being an authority subordinate to that by which the petitioner was appointed.

2. The service condition of the petitioner is governed under U.P. Training and Employment Ministerial Service Rules 19811.

3. The facts of the case, briefly is, that the petitioner was appointed Lower Division Clerk2 in the office of Government Industrial Training Institute (G.I.T.I.), Mathura, subsequently, was promoted to the post of Senior Assistant on 06 December 2006 by the second respondent, Director, Training and Employment, Lucknow3. The petitioner while working at Mathura, was placed under suspension on 06 August 2009, charge sheeted on 04 November 2009 containing eight charges issued by the Enquiry Officer, Regional Employment Officer, Jhansi, which was countersigned by the third respondent, Regional Employment Officer, Agra Division, Agra in the capacity of appointing authority/disciplinary authority. Upon conclusion of the enquiry, the third respondent, Regional Employment Officer, Agra Division, Regional Employment Office, Agra by the impugned order dated 24 July 2010 imposed major penalty of dismissal upon the petitioner.

4. Aggrieved, petitioner preferred an appeal before the second respondent, Director, which was rejected on 13 December 2010. The petitioner is assailing the aforementioned orders solely on the ground that the third respondent, Regional Employment Officer, Agra is not the appointing authority, the second

respondent, Director being the appointing authority, could have removed the petitioner, therefore, the order of dismissal is void ab initio.

5. The contention of Sri Ashok Khare, learned Senior counsel appearing for the petitioner is that the entire enquiry stands vitiated as the disciplinary proceedings were initiated by an officer subordinate to that of the appointing authority/disciplinary authority. The petitioner admittedly was promoted on the post of Senior Assistant by the Director. Pursuant thereof, petitioner was posted at District Employment Office. The suspension order, the charge sheet and the impugned dismissal order which was passed by the third respondent, Regional Employment Officer, who being subordinate in rank and status to that of the Director could not have removed the petitioner.

6. In rebuttal, Sri H.N. Singh, learned senior counsel appearing for fifth respondent, Regional Employment Officer, Agra Division, Agra and the learned Standing Counsel appearing for the State respondents would submit that the petitioner was promoted on the post of Upper Division Clerk4 which was subsequently redesignated Senior Assistant under the Rules 1981. The appointing authority of Upper Division Clerk under the Rules 1981 is the Regional Employment Officer, the petitioner being an officer under Field Staff and not an officer of the Directorate, the Regional Employment Officer was the competent authority, therefore, would urge there is no illegality or infirmity in the impugned order. The order is intra vires of Article 311.

7. Rival submissions fall for consideration.

8. It is admitted between the parties that the petitioner is an officer of the Field Staff and not of the Directorate. As to who is the appointing authority of the petitioner, the Rules 1981 governing the petitioner needs to be examined. Sub-clause (a) of Rule 3 defines 'appointing authority' which means an authority mentioned in Appendix 'A' to the Rules. The 'Directorate' means the head quarters office of the Director. Sub-clause (f) of Rule 3 defines 'Field Staff' which means the ministerial staff, other than the headquarter staff, working in the field offices; sub-clause (g) defines 'Field Office'; which means an office other than the Directorate but functioning under the administrative control of the Director. Sub-clause (j) defines 'Headquarters Staff' which means the ministerial staff of the Directorate.

9. Part III of the Rules 1981 provide for 'Recruitment', Rule 5 specifies the source of recruitment. The staff under Rule 5 are divided in two heads: (i) Headquarter Staff and (ii) Field Staff. Sub-clause (xi) under 'headquarter staff' refers to Senior Assistant and other equivalent posts/position and provides their source of recruitment. Sub-clause (xi) reads as follows:-

"Senior Assistant/Noter and Drafter/Assistant Accountant/Upper Division clerk/Inspector of Accounts Stock Verifier-By promotion from amongst permanent Compilation Assistants, Junior Noter and Drafters, Record Keepers and Accounts Clerk:"

10. Under the 'Field Staff', Sub-clause (viii) provides the source of recruitment for Head clerk/ UDC, which is extracted:-

(viii) Accountant/Accountant-cum-Cashier/ Head Clerk/Upper Division Clerk/Store Keeper (Regional Employment Exchange of Kanpur).- By promotion from amongst permanent Lower Division Clerks/ Guides/Typists/ Career Room Guides."

11. The petitioner admittedly being a field staff and not a headquarter staff, was promoted from the post of LDC to the post of Senior Assistant as is reflected from the promotion order passed by the Director. The Rules 1981 referred hereinabove, would reveal that under the head of Field Staff, there is no post of Senior Assistant. LDC gets promoted to the post of UDC/Head Clerk. In Appendix 'A' to the Rules 1981, the appointing authority for the post of Senior Assistant/UDC under 'Headquarter Staff' is the Director, whereas, Head Clerk/UDC under the Field Staff, the appointing authority is the Regional Employment Officer/Principal. There is no post of Senior Assistant under the Field Staff. The pay scales of both the post, Senior Assistant under the Headquarter staff and Head Clerk/UDC under the Field Staff are different. The pay scale of Senior Assistant is higher as compared to that of the UDC working under the Field Staff, probably, therefore, the appointing authority are different officers.

12. Learned counsel for the parties would not dispute that subsequently the pay scale of the Senior Assistant and UDC were brought at par, at the time of promotion the pay scales were equal but the appointing authority continued to be distinct.

13. In view of the position as emerges upon examining the Rule 1981, Sri H.N. Singh, Senior Counsel would submit that the petitioner being a LDC under the Field Staff, was promoted to the post of UDC which subsequently was designated Senior Assistant, therefore, the appointing authority of the Senior Assistant/UDC at the Head Quarter is the Director/Joint Director, whereas, the appointing authority of UDC for Field Staff being the Regional Employment Officer, hence, would urge there is no illegality or infirmity in the impugned order.

14. The principle enshrined in Sub-clause (1) of Article 311 is that no person who is a member of the civil service or holds a civil post under the Union or State shall be dismissed or removed by any authority subordinate to that by which he was appointed. The parties do not dispute that the petitioner is holding a civil post.

15. The clause applies only if the following conditions are satisfied.

"(a) That the person whose services are terminated is a member of a civil service or holds a civil post.

(b) That such termination amounts to 'dismissal' or 'removal5. Thus, Clause (1) need not be complied with where a person is discharged in terms of conditions of his contract of service6. Similarly, where the penalty awarded is other than dismissal or removal, e.g., reduction in rank, or suspension, it may be awarded by an authority who is empowered in that behalf by the Rules even though he is not the 'appointing authority'."

16. A dismissal by an officer subordinate to the appointing authority is null and void. The defect goes to the root of the order of dismissal and is not cured

even if that order is confirmed on appeal by the 'appointing authority' or some other superior authority7.

17. On the other hand, this clause does not require that the dismissal or removal must be ordered by the very same authority who made the appointment or by his direct superior. There is a compliance with the clause if the dismissing authority is not lower in rank or grade than the appointing authority8. It follows that dismissal by an authority superior to the appointing authority is not bad.

18. The dismissal is not invalid where the order of dismissal is passed by the appointing authority but the order is merely communicated by some subordinate officer.

19. It is for the Government servant to plead and prove who was his 'appointing authority' and also that the dismissing authority is lower in rank than the appointing authority9. 'Subordinate' refers to subordinate in rank10 and not in respect of function11.

20. Therefore, where the order of dismissal is made by an authority subordinate to the appointing authority, the unconstitutionality is not cured by the fact that the order of dismissal is confirmed, on appeal by the proper authority. On the same principle, the appointing authority cannot delegate his power of dismissal of removal to a subordinate, so as to destroy the protection afforded by the Constitution, unless the Constitution itself authorises such delegation by other provisions12. It is not possible for the proper authority to validate an order made without jurisdiction, with retrospective effect.13

21. If the dismissing authority is not subordinate in rank to the appointing authority, any difference in designation is not material14. Thus in order to ascertain who was the 'appointing authority' for the purposes of application of Art. 311(1), the formal document on the basis of which the civil servant holds his appointment must be looked into.

22. Hence, when a person is, in fact, appointed by an authority superior to the authority who is entitled, under the Departmental Rules, to appoint that person, he can be dismissed only by that authority who had, in fact, ordered that appointment and not the authority empowered by the Rules. Where a person is confirmed in a higher post in which he was officiating it is the officer who issues the order of confirmation who becomes his 'appointing, authority' and not the higher officer who may have selected him for such confirmation.15

23. Where the power to appoint is vested by a statutory provision in one authority, to be exercised on the advice of another, it is the former who is to be regarded as the 'appointing authority'.16 Recommending/approving authority does not thereby become the appointing authority.17

24. Where the conditions of service were kept intact by the States Reorganisation Act, 1956, an employee, who was appointed prior to such reorganisation, cannot be dismissed, after reorganisation, by any authority lower than the authority who had appointed him, or an authority equivalent to or co-ordinate in rank with the appointing authority. Thus, where the employee was appointed by the then Head of the

Department, he cannot be dismissed by anybody subordinate to the corresponding Head of the Department, after reorganisation;18 nor can a person appointed by the Rajpramukh be dismissed by a Financial Commissioner (who is subordinate to the Governor), except with the previous approval of the Central Government.19

25. The departmental proceeding can be initiated by a person lower in rank than the appointing authority but the final order can be passed only by the appointing authority or an authority higher than it.20

26. The onus of producing all relevant papers to show that the dismissing authority was lower in rank than the appointing authority is upon the petitioner.21

27. Dismissal order passed by a subordinate is void ab initio.22 Hence, the fact that such order was subsequently confirmed in appeal by the Head of the Department will not cure the initial defect.23

28. Having considered the legal position and binding precedent, applying it to the facts of the case. The record would reveal that in reply sought under the Right to Information Act dated 06 January 2011, respondent informed that the petitioner was promoted as Senior Assistant, the designation of the post came on the recommendation of the Fourth Pay Commission in 1986, petitioner was promoted by the Director. The information so furnished is also reflected from the other material brought on record. Promotion is a mode of appointment. The order of promotion was issued by the Director, therefore, the appointing authority of the petitioner for the purpose of Article 311 would be the Director, who vide letter dated 6 October 2011 sought an explanation from the Regional Employment Officer that under what circumstances he had passed the order of dismissal when admittedly the promotion was issued by the Director. But the second respondent, Director, while deciding the appeal of the petitioner accepted the view taken by the Regional Employment Officer that under Rules 1981 it is the Regional Employment Officer who is the appointing authority of the UDC and placing reliance on the Government Order dated 19 February 1988 rejected the plea of the petitioner. The Government Order dated 19 February 1988 (at Annexure 46) of the record was dealing with a situation, where a superior authority made the appointment/promotion, subsequently the confirmation order was passed by the appointing authority who is lower in rank, the question that arose for clarification was as to who is the competent authority to exercise power under Article 311(1). The Government Order clarified that it would be the officer who appointed the Government servant though he may not be the designated appointing authority under the Rules.

29. The clarification so furnished is in sync with the position of law as noted herein above. Hence, the stand taken by the respondents that the Regional Employment Officer is the person who appointed the petitioner on promotion is not borne out from the material brought on record, rather the record would reflect that appointment and promotion could have been made at the Directorate level alone, as the circular noted hereinabove, would provide. The respondents in practice have followed the circular for a prolonged period without amending the statutory Rules 1981. Even

taking a case, otherwise, the order of promotion was admittedly passed and issued by the Director who being an higher officer than the appointing authority Regional Employment Officer, the impugned order of removal could not have been passed by the Regional Employment Officer nor it could have been cured in appeal by the Director.

30. Therefore, the appellate authority while passing the impugned order dated 24 July 2010 misread the Government Order dated 19 February 1988, further the Directorate by Circular dated 31 August 1989 addressed to all the Regional Employment Officer/District Officer clarified that upon enforcement of the new staff proposed promotion, absorption and appointment of all senior clerks would, henceforth be made at the Directorate level. The circular in irrevocable terms would provide that promotion from the LDC to Senior Assistant shall not be made at the Regional level, in the eventuality of any such promotion being made it shall be treated to be void, consequently the employee shall not receive any benefit pursuant to such promotion. It is relevant to note that the initiation for promotion to the post of Senior Assistant was undertaken by the Directorate vide letter dated 02 November 2006, the name of the petitioner finds place at Serial No. 8. Petitioner in appeal before the second respondent, Director, raised the issue that the Regional Employment Officer was not competent to have initiated disciplinary proceedings or removed him from service. The relevant documents were placed before the Director who inspite of being aware that the Regional Employment Officer was not competent to initiate or promote an officer to the post of Senior Assistant/UDC deliberately had taken recourse to the unamended Rules 1981 to justify the illegal order passed by the Regional Employment Officer.

31. The counter affidavits filed by the respondents are prima facie false affidavits, the averments made therein do not correspond to the circulars/letters issued by the Director.

32. For the reasons and law stated herein above, the writ petition succeeds and is accordingly allowed. The impugned orders dated 24 July 2010 passed by the third respondent, Regional Employment Officer, Agra Division, Agra and order dated 13 December 2010 passed by the second respondent, Director, Training and Employment, Lucknow, respectively are quashed. The petitioner shall be entitled to all consequential benefits including lost wages from the due date.

33. I would like to record my appreciation for Sri Aishwarya Krishna, Law Clerk for research work undertaken by him in the assistance of this case.

34. The cost of litigation assessed at Rs. 50,000/-, to be paid to the petitioner by the second respondent, Director, Training and Employment, Lucknow within six weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.10.2015

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Bench No. 9441 of 2015

Asok Pande [PIL] ...Petitioner
Versus
Union of India & Ors. ..Respondents

Counsel for the Petitioner:
Asok Pande (In person)

Counsel for the Respondents:
C.S.C., A.S.G., U.N. Mishra

Bar Council of India, Rules 1975-Chapter I Part VI-Advocates Act 1961-Section 16- Restriction on appearance pleading, consolidation with clients directory-without assistance of roll advocate-as such a senior advocate can not be appointed as Solicitor General of India or Advocate General-held-misconceived-in absence of specific prohibition-can not be disturbed from functioning.

Held: Para-14
This being the position of a Senior Advocate, in our view, the Union Government and the State Government are clearly entitled to consider and offer them appointment as Law Officers so as to ensure effective representation before the Courts. The suggestions as made by the petitioner, if accepted, would lead to an entirely unacceptable position that the State Government and the Union Government can never take the services of the Advocates of eminence for their purposes once they get designated as Senior Advocates. The suggestions, as made by the petitioner, are required to be and are rejected.

(Delivered by Hon'ble Dinesh Maheshwari, J.)

1. By way of this petition, framed and styled as Public InterestLitigation, the petitioner, a practicing Advocate in this Court, hasattempted to raise the question as to whether a designated SeniorAdvocate could function as a Law Officer of the Union or of the State. Besides the others, the petitioner has arrayed the present AttorneyGeneral for India as respondent no. 3; the present Solicitor General ofIndia as respondent no. 4; and present Advocate General and two Additional Advocate Generals for the State of Uttar Pradesh as respondent nos. 5 to 7 respectively.

2. The petitioner would submit in paragraph no. 4 of the petition that he is bringing the following substantial question of law for consideration of this Court :

"Whether a senior advocate can function as a state law officer or the law officer of the Union of India by whatever name/designation their called?" (sic.)

3. The petitioner has submitted in this petition that Section 16 of the Advocates Act, 1961 ('the Act of 1961') provides for two classes of Advocates i.e., Senior Advocate and other Advocates; and the Supreme Court and the High Courts are authorized to designate the Senior Advocates with their consent and to frame the rules in that regard. The petitioner has further referred to Sections 16 (3) and 49 (1) (g) of the Act of 1961 authorising the Bar Council of India to frame the rules governing the Advocates as well as Senior Advocates and then, has referred to the Bar Council of India Rules, 1975, particularly Chapter 1 of Part-VI thereof, laying down restrictions on Senior Advocates. With reference to these Rules of the Bar Council of India, the contention of the petitioner is that when a Senior Advocate cannot appear directly, cannot accept instructions to draft pleading or affidavits, cannot give advice on evidence, cannot do any drafting work of analogous kind, cannot be approached by a client directly and cannot be briefed or instructed by the client to appear directly in the Court, and is to pay reasonable fee to his assisting counsel, he cannot function as a Law Officer of the State because these restrictions cannot be adhered to by the Senior Advocate, if appointed by the Government. With reference to the above Rules and particularly clauses (b) (i), (c), (d) and (f) thereof, the petitioner would argue that in view of such

specific prohibitions against drafting, advising and accepting briefs directly, a Senior Advocate cannot function as a Law Officer of the State; and he cannot function as Attorney-General, Advocate-General or Additional Advocate-General. It is further submitted that when a Senior Advocate cannot appear without an Advocate on Record in the Supreme Court or without an Advocate in Part II of the State Roll in any Court or Tribunal, appointment of a Senior Advocate as Advocate-General or Additional Advocate-General entails extra liability on the State to engage an assisting counsel who is to be paid fees by the Senior Advocate as required by clause (f) of the Rules aforesaid. The petitioner has also referred to the names of two Advocates, who were earlier holding the office of Chief Standing Counsel, but they resigned after being designated as Senior Advocate. The petitioner has submitted that the question of appearance of one of the Senior Advocates as Additional Advocate General in the Court on behalf of the State was raised in Writ Petition No. 4618 (M/B) of 2015 and as he was asked to file a proper application, hence is filing the present petition. The petitioner has prayed for the following reliefs :

a) To issue a writ of mandamus directing the respondent no. 1 Union of India to remove the respondent no. 3 and 4 from the office of attorney General for India and Solicitor General of India respectively and to direct the respondent no. 2 State of Uttar Pradesh to remove the respondent no. 5,6 and 7 from the post of Advocate General and Additional Advocate Generals as being a senior advocate, these persons cannot function as law officer of the Union or the State.

b) To issue a writ of certiorari for quashing the appointment of the respondent no. 3 to 7 after summoning the same from the concerned respondents.

c) Issue any other writ, order or direction which this Hon'ble Court deem fit, proper and reasonable regarding this matter."

4. On taking up this matter and having gone through the record, we have posed a query to the petitioner appearing in person as to the specific prohibition whereby and wherefor a Senior Advocate cannot hold the office of the Attorney General, the Advocate General or any other office so as to represent the Government concerned before the Court? In response, the petitioner frankly submitted that such a prohibition is not stated in specific words in the concerned Rules but contended that a conjoint reading of various clauses appearing in Chapter 1 of Part-VI of Bar Council of India Rules leads to the deduction that a Senior Advocate cannot be a Law Officer of the State. The petitioner has submitted that only for the want of specific words of prohibition that this writ petition is necessitated and by appropriate interpretation, the deduction would be that the Senior Advocate cannot be appointed as Law Officer of the State. The petitioner has also referred to certain privileges and facilities as extended and allowances as paid to the Law Officers of the State. According to the petitioner, in the present set up of Rules, the Senior Advocate designated by the Court cannot function as Law Officer of the State and, therefore, this writ petition deserves consideration.

5. Having given thoughtful consideration to the submissions made and having examined the record, we are not persuaded to entertain this petition.

6. Article 76 of the Constitution of India provides for an Attorney General of India in the following terms:

"76. Attorney-Geneal for India.-(1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to giveadvice to the Government of India upon such legal maters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine."

7. Article 165 of the Constitution of India provides for Advocate General for the State in the following terms :

"165. Advocate-General for the State. -(1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine."

8. The relevant part of Section 16 of the Act of 1961 providing for Senior and other Advocates could also be taken note of as under:-

"16. Senior and other advocates .— (1) There shall be two classes of advocates, namely, senior advocates and other advocates.

(2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability standing at the Bar or special knowledge or experience in law he is deserving of such distinction.

(3) Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe.

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9. Bar Council of India Rules as referred by the petitioner read as under :

"Senior Advocates shall, in the matter of their practice of the profession of law mentioned in Section 30 of the Act, be subject to the following restrictions:

(a) A Senior Advocate shall not file a vakalatnama or act in any Court, or Tribunal, or before any person or other authority mentioned in Section 30 of the Act.

Explanation : "To act" means to file an appearance or any pleading or application in any court or Tribunal or before any person or other authority mentioned in Section 30 of the Act, or to do any act other than pleading required or authorised by law to be done by a party in such Court or Tribunal or before any person or other authorities mentioned in the said Section either in person or by his recognised agent or by an advocate or an attorney on his behalf.

(b)(i) A Senior Advocate shall not appear without an Advocate on Record in the Supreme Court or without an Advocate in Part II of the State Roll in any court or Tribunal or before any person or other authorities mentioned in Section 30 of the Act.

(ii) Where a Senior Advocate has been engaged prior to the coming into force of the rules in this Chapter, he shall not continue thereafter unless an advocate in Part II of the State Roll is engaged along with him. Provided that a Senior Advocate may continue to appear without an advocate in Part II of the Sate Roll in cases in which he had been briefed to appear for the prosecution or the defence in a criminal case, if he was so briefed before he is designated as a senior advocate or before coming into operation of the rules in this Chapter as the case may be.

(c) He shall not accept instructions to draft pleading or affidavits, advice on evidence or to do any drafting work of an analogous kind in any Court or Tribunal or before any person or other authorities mentioned in Section 30 of the Act or undertake conveyancing work of any kind whatsoever. This restriction however shall not extend to settling any such matter as aforesaid in consultation with an advocate in Part II of the State Roll.

(cc)A Senior Advocate shall, however, be free to make concessions or give undertaking in the course of arguments on behalf of his clients on instructions from the junior advocate.

(d) He shall not accept directly from a client any brief or instructions to appear in any Court or Tribunal or before any person or other authorities in India.

(e) A Senior Advocate who had acted as an Advocate (Junior) in a case, shall not after he has been designated as a Senior Advocate advise on grounds of appeal in a Court of Appeal or in the Supreme Court, except with an Advocate as aforesaid.

(f) A Senior Advocate may in recognition of the services rendered by an Advocate in Part-II of the State Roll appearing in any matter pay him a fee which he considers reasonable."

10. It is not in dispute that so far this Court is concerned, the Senior Advocates are designated under the Rules framed under Designation of Senior Advocate Rules, 1999 which provide, inter alia, that a Senior Advocate shall be subject to such restriction as the High Court or Bar Council of India or the Bar Council of State may prescribe. It has not been stated that the High Court or the Bar Council of the State has placed any such prohibition on any Senior Advocate against his accepting engagement as a Law Officer of the State or the Union.

11. We are unable to accept the interpretation, as sought to be put and deduction as sought to be drawn by the petitioner on the Rules aforesaid. True it is that a Senior Advocate cannot appear in the Court without an assisting counsel as per the requirement of the Rules but that by itself cannot be considered prohibitive

on the Union or the State against appointing a Senior Advocate as its Law Officer. As to how the appearance of such a Senior Advocate as Law Officer of the Union or State in the Court is to be ensured is again a matter for consideration of the Government and Advocate concerned but it is too far-stretched to suggest that the Senior Advocate cannot be a Law Officer of the State.

12. So far the restrictions in clause (c) aforesaid are concerned, it is but clear that the restrictions are put on Senior Advocate that he would not accept instructions to draft pleadings or affidavits and he cannot do any drafting work of analogous kind in any Court or Tribunal or authorities mentioned in Section 30 of the Advocates Act or conveyancing work of any kind whatsoever. The Senior Advocate, however, is still entitled to settle any matter in consultation with an Advocate in Part II of the State Roll. Senior Advocate is not to advice on evidence but it is difficult to accept that the Senior Advocate is otherwise prohibited from giving the necessary advice on legal matters. So far the pleadings are concerned, it is for the Union or the State to arrange its affairs as to the manner in which the pleadings are drafted and placed in the Court; and, even in that regard, a Senior Advocate is entitled to settle the pleadings.

13. So far clause (d) is concerned, the Senior Advocate has been put under restriction against accepting directly any brief or instructions to appear in any Court or Tribunal or before any person or authority. However, it is again too far-stretched to suggest that the prohibition against accepting directly any brief or instructions to appear in a Court on behalf of client could prohibit a Senior Advocate from taking any instructions whatsoever from the client.

14. We need not to dilate much further for the simple reason that under the Rules aforesaid, no such prohibition of accepting engagement by the Senior Advocate as a Law Officer of the State is seen. It is noteworthy that under Section 16 of the Act of 1961, an Advocate with his consent is designated as a Senior Advocate only when the Supreme Court or the High Court is of the opinion that by virtue of his ability, standing at Bar, or special knowledge or experience in the law he is deserving of such distinction. In the Rules of 1999, as framed by this Court, the standing at Bar has been defined as the position of eminence attained by an Advocate at Bar by virtue of his seniority, legal acumen and high ethical standards maintained by him both inside and outside the Court. It is, thus, clear that an Advocate gets designation as Senior Advocate by the Court in recognition of his ability, acumen and standard. This being the position of a Senior Advocate, in our view, the Union Government and the State Government are clearly entitled to consider and offer them appointment as Law Officers so as to ensure effective representation before the Courts. The suggestions as made by the petitioner, if accepted, would lead to an entirely unacceptable position that the State Government and the Union Government can never take the services of the Advocates of eminence for their purposes once they get designated as Senior Advocates. The suggestions, as made by the petitioner, are required to be and are rejected.

15. So far the suggestion of any particular resignation by any particular

Advocate or any particular officer from any office is concerned, that by itself cannot be considered binding on any other Senior Advocate or the Government. The privileges and concessions, as given to the Law Officers by virtue of their office concerned, is again a matter between the Government and Law Officer and that hardly correlates with the issue sought to be raised in this petition. Such submissions seem to be entirely irrelevant.

16. In view of the above, the petition fails and stands dismissed.

17. The petitioner has prayed for certificate under Article 132 of the Constitution of India.

18. The prayer stands rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.10.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 9835 of 2015

Prem Singh ...Petitioner
Versus
The State Consumer Dispute Redressal Commission Lko & Ors. ...Respondents

Counsel for the Petitioner:
Lalji Prasad Shukla

Counsel for the Respondents:

Constitution of India, Art.-226-Petition-seeking direction for expeditious disposal of Appeal-argument under section 13(4) and (A) District Consumer Forum-shall be deemed to Civil court-direction can be issued-held-such direction can be issued under Art.-227-before Single Judge-petition consigned to record-with liberty to invoke appropriate jurisdiction.

Held: Para-6
This being the position and the manner in which the State Commission is to function, we are clearly of the opinion that if a direction is required to be given for expeditious disposal of an appeal then the State Consumer Dispute Redressal Commission would also fall within the superintendence of the High Court under Article 227 of the Constitution of India. Consequently, a writ petition ought to be filed under Article 227 of the Constitution of India, which shall obviously be entertainable by a learned Single Judge.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioner.

2. The petitioner prays for a mandamus for an early disposal of the appeal filed before the State Consumer Forum. The petitioner has relied on a Division Bench order in Writ Petition No. 511 (MB) of 2014: Bala Devi versus The State Consumer Dispute Redressal Commission, U.P. and others. dated 22.1.2014 to contend that such a direction for expeditious disposal of the appeal can be issued by this Court.

3. The status of a District Consumer Forum and a State Consumer Dispute Redressal Commission which is hearing an appeal is to be gathered from the nature of the composition of such forum and the jurisdiction exercised by it. The District Consumer Forum is chaired by a person who has held the rank of a District Judge, whereas the State Consumer Dispute Redressal Commission is chaired

by a person who has held the office of Judge of a High Court. It is thus, clear that these forums are chaired by the persons having occupied judicial offices. The Consumer Protection Act in sub-sections (4) to sub-section (7) of Section 13 clearly provides that the District Consumer Forum shall be deemed to be a civil court for the purpose of Section 195, and Chapter XXVI of the Code of Criminal Procedure, 1973. The provisions of Code of the Civil Procedure, to the extent indicated therein, have been made applicable.

4. An appeal is preferred against any order passed by the District Consumer Forum to the State Commission. The State Commission has jurisdiction, powers and authority which are to be exercised by the Benches as constituted under Section 16. The jurisdiction under Section 17 is against appeals as also against the complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore.

5. The power to be exercised by the State Commission while deciding an appeal also indicates that all such powers are available in appeal which are available to the District Forum and, therefore, the status is that of the forums, which begins with the district level organisation, that has been described under Section 13 (5) as being a civil court. Consequently, the State Consumer Dispute Redressal Commission is the appellate court of the District Forum.

6. This being the position and the manner in which the State Commission is to function, we are clearly of the opinion that if a direction is required to be given for expeditious disposal of an appeal then the State Consumer Dispute Redressal Commission would also fall within the superintendence of the High Court under Article 227 of the Constitution of India. Consequently, a writ petition ought to be filed under Article 227 of the Constitution of India, which shall obviously be entertainable by a learned Single Judge.

7. The writ petition, therefore, is consigned to records with liberty to the petitioner to invoke the appropriate jurisdiction of this Court for redressal of any such grievance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2015

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Misc. Writ Petition No. 11158 of 2015

Gyanesh Rai & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
R.P. Singh, Dhirendra Singh

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-226-custodian torture-in spite of direction given under Section 156(3) Cr.P.C.-no FIR lodged-Court expressed its serious concern with direction to lodge FIR and complete investigation by Officer not below in rank of Circle Officer-petition allowed.

Held: Para-24
Coupled with this, in the present case, once such is the factual situation that is so emerging that prima-facie there has been custodial violence, then FIR ought

to have been lodged and investigation ought to have been carried out. Here, we find that despite application under Section 156(3) Cr.P.C. being moved and Superintendent of Police, Mau being aware of the entire situation, till date, FIR has not been lodged and no action has been taken by undertaking free, fair and impartial investigation, in view of this, we proceed to pass an order asking Superintendent of Police, Mau to forthwith ensure that FIR is lodged against erring police incumbents as per the law laid down by Apex Court, in the case of Lalita Kumari vs. Government of U.P. 2014 (2) SCC 1 and the investigation in question is carried out under his supervision by an officer not below the rank of Circle Officer, who will proceed to carry out investigation in free, fair and transparent manner.

Case Law discussed:
1997 (1) SCC 416; 1980 (3) SCC 70; 1985 (1) SCC 552; 1993 (2) SCC 746; 1997 (1) SCC 416; 2003 (7) SCC 749; 2006(3) SCC 178; 2012 (1) SCC 10; 2012 (3) SCC Cr. 733; 2014 (10) SCC 635.

(Delivered by Hon'ble V.K. Shukla, J.)

1. Gyanesh Rai s/o Ganga Prasad Rai through the next friend his father Ganga Prasad Rai and Ganga Prasad Rai s/o Raj Narayan Rai have approached this Court, complaining of custodial violence and requesting therein for payment of compensation for physical sufferings and mental agony as well as for initiation of action against erring police personnel.

2. Factual matrix of the case is that petitioner no.1-Gyanesh Rai is a young man and claims that he had applied for the post of Constable in I.T.B.P. (Central Force) and qualified the physical test held in Dehradun on 23rd February, 2015 and after qualifying the physical test, he was busy in preparation of written examination scheduled to be held in May, 2015 and in between, petitioners submit that, police personnel from police station Doharighat, came to petitioners' house and petitioner no.1 was informed that he was required for interrogation. Petitioners submit that petitioner no.1 was taken to the police station on 9th April, 2015 at 5 pm and in the name of carrying out interrogation, petitioner no.1 was detained at police station uptil 16th April, 2015 and during this period, petitioners' grievance is that petitioner no.1 has been subjected to brutal police torture by using third degree methods like electric shock, severe beating and insertion of aluminium wires through his mouth.

3. Petitioners' submit that immediately thereafter, petitioner no.2 proceeded to send information to each and every responsible official inclusive of Hon'ble the Chief Justice of this Court, District Magistrate, Mau, State Human Rights Commission, Lucknow and others. Petitioner no.1 was taken to hospital in the city of Mau in serious condition where he was admitted by the police and thereafter he was shifted to Varanasi and at Varanasi x-ray was conducted at Singh Medical Research Centre wherein aluminium wire has been seen in the throat and abdomen of petitioner no.1. Petitioner no.1, thereafter, was taken to Banaras Hindu University but as there was no reference letter he was not admitted there and thereafter he was taken to P.M.C. Hospital, Durga Kund, Varanasi and thereafter, as his condition was very serious, he was referred to K.G.M.C. Lucknow where he was admitted on 18th April, 2015 and thereafter after getting operated upon, petitioner no.1 has been released. Petitioners have contended that petitioner

no.1 has been subjected to custodial torture and thereafter for the relief mentioned above, present writ petition in question has been filed.

4. As complaint before this Court has been that third Degree method has been applied by police officials namely respondent no.3 to 9 in complete violation of directives issued by the Apex Court in D.K. Basu vs. State of West Bengal 1997 (1) SCC 416, this Court on 6th May, 2015 proceeded to ask Superintendent of Police, Mau to file counter affidavit within four days and thereafter on 12.05.2015, a short counter affidavit was filed and this Court was of the opinion that the short counter affidavit is not at all in consonance with the directives issued by this Court and this Court took serious note of the matter and asked Superintendent of Police, Mau to file his personal affidavit.

5. Pursuant to order dated 12th May, 2015, detailed counter affidavit has been filed appending therein the report of the inquiry officer as well as the report of preliminary inquiry and the action that has been so taken. To the said counter affidavit, rejoinder affidavit has been filed giving therein details of the discharge tickets dated 18th May, 2015.

6. After pleadings mentioned above have been exchanged, present writ petition has been taken up for final hearing and disposal.

7. Shri R.P. Singh, Advocate appearing for the petitioners submitted with vehemence that this is a glaring case wherein petitioner no.1 has been subjected to custodial violence by adopting third degree methods and the brutality in question is much more compounded from the fact that wire in question has been put in in his body and without maintaining any records for six days, he has been confined at the police station and till today, departmental action that has been proposed to be taken, same is an eye-wash and no criminal action has been taken whereas the police officials on the face of record have proceeded to misuse their position, and have committed criminal offence, in view of this, compensation be awarded and directives be issued for lodging of FIR against erring police personnels.

8. Shri Vimlendu Tripathi, learned A.G.A., on the other hand, has contended that there has been no excess on the part of the police personnel and the totality of the circumstance would speak for itself, as here anxiety of police personnel has been to crack the serious offence of loot and murder, that has shocked the entire society.

9. Police atrocities in India is not new and same has always been a subject matter of controversy and debate in consonance with the provisions of Article 21 of the Constitution of India, as any form of torture or criminality in human or degrading treatment is inhibited. Torture is not at all permitted whether it occurs during investigation, interrogation or otherwise. Custodial violence is in effect direct invasion of human rights. Torture in custody flouts the basic rights of citizens recognized by the Indian Constitution and is affront to human dignity. "Custodial Torture" is a calculated assault on human dignity and nothing can be more dehumanizing as the conduct of police in practising torture of any kind on a person in their custody.

Mahatma Gandhi in one of his quotes has said as follows:

"I object to violence because when it appears to do good, the good is only temporary, the evil it does is permanent."

10. By resorting to custodial torture, for the time being, police with a view to secure evidence or confession may achieve their goal but in long run, police will have to substantiate and will have to face the scrutiny of Court, as to whether evidence secured or confession made was voluntary or same has been sheer outcome of custodial violence inflicted upon. Evidences and Confessions that come through the route of custodial violence, in long run, do no good and prosecution has to pay heavy price for the same, on such facts being substantiated, otherwise police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.

11. Time and again custodial torture has been at the radar of the Apex Court and Apex Court, at all point of time, has viewed custodial torture with all seriousness.

12. Apex Court in the case of Raghbir Singh vs. State of Haryana 1980 (3) SCC 70 proceeded to mention that State at the highest administrative and political levels would organize special strategies to prevent and punish brutality by police methodology, otherwise, the credibility of the rule of law in our Republic vis-a-vis the people of the country will deteriorate. Relevant extract of said judgement is as follows:

"We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scarce in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torture some poignancy when violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case, Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.

The State, at the highest administrative and political levels, we hope, will organise special strategies to prevent and punish brutality by police methodology. Otherwise, the credibility of the rule of law in our Republic vis-a-vis the people of the country will deteriorate.

We conclude with the disconcerting note sounded by Abraham Lincoln:

'If you once forfeit the confidence of your fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time.'

These observations have become necessary to impress upon' the State police echelons the urgency of stamping out the vice of 'third degree' from the investigative armoury of the police."

13. Apex Court in the case of State of Uttar Pradesh vs. Ram Sagar Yadav and others 1985 (1) SCC 552 has proceeded to took a note of the fact that at the point of time when a person is in

custody and he is subjected to any atrocity, then, at the said point of time, police officials alone and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Relevant extract of said judgement is as follows:

"Police Officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station, are left without any evidence to prove who the offenders are."

14. Apex Court, in the case of Nilabati Behera @ Lalit Behera vs. State of Orissa and others, 1993 (2) SCC 746 proceeded to take view that even convicts, prisoners and undertrials have right under Article 21 and once an incumbent is taken into custody and there are injuries on his body, then State will have to explain, as to how he sustained the injuries, and compensation can be awarded under public law remedy.

15. Apex Court in the case of D.K. Basu vs. State of West Bengal 1997 (1) SCC 416, has dealt with the issue of custodial violence, and has clearly ruled, interrogation through essential must be on scientific principles, third degree methods are impermissible, balanced approach should be there so that criminals don't go scot free. Various guidelines have been issued and same are holding the field, even as on date, in addition to constitutional and statutory safeguards. Relevant extract of said judgment is as follows:

"The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

"Torture" has not been defined in Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous wit the darker side of human civilisation.

"Torture is a wound in the soul so painful that sometimes you can almost

touch it, but it is also so intangible that there is not way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

-Adriana P. Bartow

No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture'- all aiming at total banning of it in all forms, but inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread not that ever before, "Custodial torture" is a naked violation of human dignity and degradation with destroys, to a very large extent, the individual personality. IT is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast.

In all custodial crimes that is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law.

"Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1984, which market the emergency of worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to curel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty expect according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life of personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and the shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguard provided to a person with a view to protect his personal liberty against and unjustified assault by the State, In tune with the constitutional guarantee a number statutory provisions also seek to project personal liberty, dignity and basic human rights of the citizens. Chapter V. of Criminal Procedure Code, 1973 deals

with the powers of arrest of a person and the safeguard which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Section 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold and enquiry into the cause of death.

However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that tp happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer,

indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

Instances have come to out notice were the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrest person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometime resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co- prisoners who are highly reluctant to appear as prosecution witness due to fear of letaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors. [1995 (3) Scale, 343 =] is an apt case illustrative of the observations made by us above. In that case, Nathu Bnjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu Banjara had been released from police custody at about 10.30 p.m. after interrogation 13.10.1986 itself vide entry EX. P/22A in the Roznamcha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank riggling with pain in his chest and that as a soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1- Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr.P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a panchnama EX. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No. society can permit it.

How do we check the abuse of police power? Transparency of action and accountability perhaps are tow possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personal handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation.

There is one other aspect also which needs out consideration, We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals, Many hard core criminals like extremist, the terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay to much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota or criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.

There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statures has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est supreme lex

(the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the state is the supreme law) co-exist an dare not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eleminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met wit innovative ideas and approach. State terrorism is not answer to combat terrorism. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. that the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of this human rights expect in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

We therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name togs with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest a such memo shall be attested by atleast one witness. who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organisation in the District and

the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of he next friend of the person who has been informed of the arrest an the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned Stare or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaga Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

16. Apex Court in the case of Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhoble and another 2003 (7) SCC 749 has proceeded to make a mention that who are at the helm of affairs who proclaim from rooftops to be the defenders of democracy and protectors of people's rights and do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, reigning ignorance of what happens and pretending to be peace-loving puritans and saviours of citizens' rights. Relevant extract of said judgement is as follows:

"If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short the 'Constitution') and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The Article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e.

personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the 'Code') deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. Justice Brandies's observation which have become classic are in following immortal words:

"Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites every man to become a law into himself". (in (1928) 277 U.S. 438, quoted in (1961) 367 U.S. 643 at 659)."

The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghubir Singh's case (supra) more than two decades back seems to have fallen to leaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma v. State of U.P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U.P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995(3) SCC 702), State of M.P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262) and by now celebrated decision in Shri D.K. Basu v. State of West Bengal (JT 1997 (1) SC 1) seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration -

as to how one after the other police witnesses feigned ignorance about the whole matter."

17. Apex Court in the case of Sube Singh vs. State of Haryana and others 2006 (3) SCC 178 has taken note of custodial violence to be torture and third degree methods used by police during interrogation and has discussed in detail the reasons behind such practice and has also given preventive measures as to how such violence can be tackled. Relevant extract of said judgement is as follows:

"Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a practice. Lack of training in scientific investigative methods, lack of modern equipment, lack of adequate personnel, and lack of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time consuming and lengthy process. Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes. The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow 'catch' the 'offender'. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may.

Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurances. Following steps, if taken, may prove to be effective preventive measures:

a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the Police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

b) The functioning of lower level Police Officers should be continuously monitored and supervised by their superiors to prevent custodial violence and adherence to lawful standard methods of investigation.

c) Compliance with the eleven requirements enumerated in D.K. Basu

(supra) should be ensured in all cases of arrest and detention.

d) Simple and fool-proof procedures should be introduced for prompt registration of first information reports relating to all crimes.

e) Computerization, video-recording, and modern methods of records maintenance should be introduced to avoid manipulations, insertions, substitutions and ante-dating in regard to FIRs, Mahazars, inquest proceedings, Port-mortem Reports and Statements of witnesses etc. and to bring in transparency in action.

f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against Police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation etc."

18. Apex Court in the case of Prithipal Singh and others vs. State of Punjab and another 2012 (1) SCC 10 has considered that the State has to protect the victim of torture and State cannot be permitted to negate such a right. Relevant extract of said judgement is as follows:

"Police atrocities in India had always been a subject matter of controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim salus populi est suprema lex - the safety of the people is supreme law; and salus reipublicae suprema lex - safety of the State is supreme law, 14 co-exist. However, the doctrine of the welfare of an individual must yield to that of the community.

The right to life has rightly been characterised as "`supreme' and `basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

The State must protect victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State

must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/police force.

In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provide for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th report, the Law Commission of India recommended the amendment to the Indian Evidence Act, 1872 (hereinafter called "Evidence Act"), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes."

19. Apex Court, in the case of Mehmood Nayyar Azam vs. State of Chattisgarh and others 2012 (3) SCC Cr.733, has extensively dealt with the issue of custodial humiliation and mental torture and the way and manner in which compensation can be awarded under public law remedy.

20. Apex Court in the case of People's Union for Civil Liberties and another vs. State of Maharashtra and others 2014 (10) SCC 635 has clearly mentioned that Article 21 of Constitution of India guarantees "right to live with human dignity" and any violation of human rights is viewed seriously. Relevant extract of said judgement is as follows:

"Article 21 of the Constitution of India guarantees "right to live with human dignity". Any violation of human rights is viewed seriously by this Court as right to life is the most precious right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every person and even the State has no authority to violate that right.

In some of the countries when a police firearms officer is involved in a shooting, there are strict guidelines and procedures in place to ensure that what has happened is thoroughly investigated. In India, unfortunately, such structured guidelines and procedures are not in place where police is involved in shooting and death of the subject occurs in such shooting. We are of the opinion that it is the constitutional duty of this Court to put in place certain guidelines adherence to which would help in bringing to justice the perpetrators of the crime who take law in their own hands.

Article 21 of the Constitution provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". This Court has stated time and again that Article 21 confers sacred and cherished right under the Constitution which cannot be violated, except according to procedure established by law. Article 21 guarantees personal liberty to every single person in the country which includes the right to live with human dignity.

In line with the guarantee provided by Article 21 and other provisions in the Constitution of India, a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights. In spite of Constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, the cases of death in police encounters continue to occur. This Court has been confronted with encounter cases from

time to time. In Chaitanya Kalbagh3, this Court was concerned with a writ petition filed under Article 32 of the Constitution wherein the impartial investigation was sought for the alleged killing of 299 persons in the police encounters. The Court observed that in the facts and circumstances presented before it, there was an imperative need of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens.

We are not oblivious of the fact that police in India has to perform a difficult and delicate task, particularly, when many hardcore criminals, like, extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following rule of law. We are of the view that it would be useful and effective to structure appropriate guidelines to restore faith of the people in police force. In a society governed by rule of law, it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done."

21. Consistent message has been sent to the members of police force that an incumbent in custody cannot be put to tremendous psychological pressure by cruel, inhuman and degrading treatment, and police officers should have greatest regard for personal liberty of citizens as they are the custodians of law and order and hence, they should not flout the law by stooping to bizarre act of lawlessness.

22. On all these parameters, the case in hand is being looked into and what we find, in the present case, is that it reflects a sorry state of affairs as the factual situation that is so emerging that in reference of investigation of Case Crime No.185 of 2015 under Sections 394 and 302 IPC, the petitioner has been up picked for investigation and thereafter without maintaining any record whatsoever, he has been detained at the police station w.e.f. 9th April, 2015 upto 15th April, 2015 and during this period, the condition of petitioner no.1 has deteriorated and he has been taken to various hospitals and in the x-ray report that has been so brought on record, wire has been found in the body of petitioner no.1 and in Magisterial Enquiry that has been so conducted on 18th June, 2015, this much fact has been recorded that without any record being maintained, petitioner no.1 has been illegally detained at the police station and in the Magisterial Enquiry positive opinion has not been given and on the surmises and conjectures, it has been mentioned that it cannot be said with surety as to whether he has inserted the wire himself or police personnel has done the same. There is no occasion or convincing reason to believe this theory that petitioner no.1 would insert wire on his own. Once petitioner no.1 has been in police custody, then it was the obligation of police officials to explain, as to from where the wire has come in the body of petitioner no.1. Finding recorded that he has been illegally detained at the police station and in his body wire has been found is fully supported from the documentary evidence maintained at police station as well as from the medical evidence available on record.

23. Once such is the factual situation that is so emerging in the present case that petitioner no.1 has been subjected to

torture by police taking recourse to violence, then, in the facts of the case, the request that has been made by the petitioner for awarding him compensation being victim of custodial violence has to be accepted, inasmuch as, petitioner no.1 has been forced to suffer lot of physical and mental agony as is reflected from the photograph at page 46 of paper book and for number of days he has been forced to spent in hospital. Awarding of compensation is demand of the situation, looking to the agony that a young man has to undergo, and the fact that his career to join I.T.B.P. has been withered away. Treatment meted to petitioner is purely inhuman, that has inflicted immense mental pain leading to sense of insecurity and helplessness in him. In this background, we proceed to award compensation of Rs.5 lacs to petitioner no.1 to be paid by the State Government within two months from the date of receipt of certified copy of this order. In case petitioners have a strong feeling that they are entitled for much more quantum of damages, they can always invoke common law remedy for additional compensation.

24. Coupled with this, in the present case, once such is the factual situation that is so emerging that prima-facie there has been custodial violence, then FIR ought to have been lodged and investigation ought to have been carried out. Here, we find that despite application under Section 156(3) Cr.P.C. being moved and Superintendent of Police, Mau being aware of the entire situation, till date, FIR has not been lodged and no action has been taken by undertaking free, fair and impartial investigation, in view of this, we proceed to pass an order asking Superintendent of Police, Mau to forthwith ensure that FIR is lodged against erring police incumbents as per the law laid down by Apex Court, in the case of Lalita Kumari vs. Government of U.P. 2014 (2) SCC 1 and the investigation in question is carried out under his supervision by an officer not below the rank of Circle Officer, who will proceed to carry out investigation in free, fair and transparent manner.

25. With these observations/directions, writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SHASHI KANT. J.

C.M.W.P. No. 12239 of 2003

Raj Narain ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan, Sri J.H. Khan

Counsel for the Respondents:
S.S.C., B.N. Singh, Sri H.C. Dubey

Constitution of India, Art.-226-Back wages-dismissal on criminal prosecution-FIR lodged by employer-if conviction-altered in appeal or fair acquittal-held-entitled for full back wages for the period not allowed to work-the employer has to face the consequences-to the extent the order by Tribunal stand modified.

Held: Para-15
According to the petitioner, the observation made in the judgment that if the criminal proceeding ultimately resulted in acquittal of the employee concerned where included at the behest

of the employer, perhaps different considerations may arise clearly applies to the facts of the present case in as much as the petitioner was required to undergo criminal trial in pursuance to a first information report by an employer. Once the employee has been acquitted of the criminal offence, the employer should bear the consequences and petitioner must be paid full salary for the period he was kept out of employment.

Case Law discussed:
2014 (4) AWC 3643 (SC); JT 2015 (3) SC 344; (2004) 1 SCC 121; (1996) 11 SCC 603.

(Delivered by Hon'ble Arun Tandon, J.)

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

2. The Petitioner before this Court was employed as Sorting Assistant in Railway Mail Service. He was suspected to be involved in racket of payment of bogus heavy value money orders. An FIR was lodged. The criminal trial with reference to the first information report resulted in conviction of the petitioner for offences under Sections 419,420, 467, as per order of the Additional Chief Judicial Magistrate, Varanasi dated 29.1.1997 passed in Criminal Case No. 509 of 1996. Because of the conviction of the petitioner in the criminal case under Sections 419, 420, 467 I.P.C., the railways had no other option but to dismiss the petitioner from the service vide order dated 28.2.1997 in exercise of power under Rule-9(1) of Central Civil Services (Classification, Control and Appeal) Rules, 1965.

3. The petitioner, preferred an appeal against the order of conviction being Appeal No. 14 of 1997, which was finally allowed under judgment and order of the District and Sessions Judge, Varanasi dated 31.8.2001. The petitioner was not reinstated, he filed Original Application No. 907 of 2002 before the Central Administrative Tribunal. The original application was allowed vide order dated 11.12.2002 and in pursuance thereof he was reinstated.

4. There is no dispute with regard to the payment of salary and other allowances to the petitioner subsequent to reinstatement in terms of the order of the Tribunal referred to above on behalf of the petitioner-employee. He is however, not satisfied with the part of the order of the Tribunal whereunder the Tribunal has held that the petitioner will not be entitled to back wages i.e. for the period from the date of dismissal till the date of reinstatement. Challenging the order so passed, the petitioner has approached this Court.

5. On behalf of the petitioner, it is contended that once it has been found that the criminal offence as alleged against the petitioner was not made out and he has been acquitted by the criminal court, he becomes entitled for full salary for the period, he was kept out of employment. It is submitted that the FIR was lodged by the employer and the entire proceeding had been taken at the behest of the employer.

6. Counsel for the petitioner in support of his plea has placed reliance upon the judgment of the Apex Court in the case of Tapash Kumar Paul Vs. BSNL and Anr., reported in 2014 (4) AWC 3643 (SC), paragraphs-10, 11 and 12. He has also placed reliance upon the judgment of the Apex Court in the case of State of U.P. Vs. Charan Singh, reported in JT 2015(3)SC 344, paragraph-16 as well as paragraph 18 of the said judgment. It is lastly stated that the Apex Court itself in the case of Union of India and others Vs.

Jaipal Singh, reported in (2004) 1 SCC 121, has explained that if the prosecution which ultimately resulted in acquittal of the employee concerned was at the behest of or by the department itself, perhaps different considerations may arise. He submits in the facts of the case the prosecution had been initiated at the behest of the employer and therefore, the judgment in the case of Ranchhodji Chaturji Thakore Vs. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) and Another, reported in (1996) 11 SCC 603 will not apply.

7. Counsel for the respondents however, with reference to the judgment of the Apex Court in the case of Rannchhodji Chaturji Thakore (supra) submits that the Supreme Court had made a distinction in the matter of payment of back wages in respect of employees who are proceeded departmentally and then dismissed from service vis a vis the employees, who are dismissed from service after convicting by the competent court of law. The Supreme Court has held that the employer has no other option, but to dismiss an employee once he is held guilty of criminal offence. In these circumstances, the employer could not obtaine the services of the employee concerned because of the law applicable, therefore, question of payment of back wages would not arise. He further submits that the judgment in the case of Rannchhodji Chaturji Thakore (supra) has been approved by the Supreme Court in the case of Union of India and others Vs. Jaipal Singh (supra).

8. We have heard learned counsel for the parties and have examined the records of the case.

9. There is hardly any dispute on the facts between the parties.

10. So far as the judgments relied upon by the counsel for the petitioner in the cases of Union of India and others Vs. Jaipal Singh (supra), Tapash Kumar Paul Vs. BSNL and Anr (supra) and State of U.P. Vs. Charan Singh (supra), are concerned, we find that they deal with a dispute pertaining to the dismissal of an employee after departmental enquiry and the Apex Court in the said judgments has opined that unless there are exceptional circumstances, the normal award by Industrial Tribunal should be of reinstatement with back wages once the dismissal is found to be unjustified.

11. But these judgments in our opinion, will have no application in the case at hand in as much as the Apex Court in the case of Rannchhodji Chaturji Thakore (supra) has clearly made a distinction in the matter of dismissal of an employee because of conviction for a criminal offence vis a vis dismissal after departmental enquiry.

12. The Apex Court has held that where dismissal is a result of a conviction in a criminal case, then the employer is duty bound under law to dismiss the employee concerned and in that circumstance, the employer is denied the service of the employee concerned, therefore, the question of back wages could not be agitated. It has been explained that the question of back wages would be considered only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law.

13. The facts of the present case are more alein to the facts in the case of Rannchhodji Chaturji Thakore (supra).

14. This takes the Court to the judgment in the case of Jaipal Singh (supra), the Apex Court has held that if conviction of the employee concerned was at the behest of employer different consideration may arise.

15. According to the petitioner, the observation made in the judgment that if the criminal proceeding ultimately resulted in acquittal of the employee concerned where included at the behest of the employer, perhaps different considerations may arise clearly applies to the facts of the present case in as much as the petitioner was required to undergo criminal trial in pursuance to a first information report by an employer. Once the employee has been acquitted of the criminal offence, the employer should bear the consequences and petitioner must be paid full salary for the period he was kept out of employment.

16. Sri Ashok Mehta, counsel for the employer submits that the Apex Court while making the observation that different consideration may prevail, had not laid down any such proposition that the employee would be entitled to full salary, if he is acquitted in the appeal in all cases where FIR was registered by the employer.

17. Having considered the judgments of the Apex Court in the case of Rannchhodji Chaturji Thakore (supra) and Union of India and others Vs. Jaipal Singh (supra), we find that although there is an observation passed by the Apex Court that different considerations may result if the criminal case was instituted at the behest of the employer but what will be these considerations have not been spelled out in the said judgment of Jaipal Singh (supra).

18. We may record that unless and until it is established that the FIR was registered for malafide intentions deliberate motive to keep the employee out of employment, there cannot be any difference in the considerations which follow in the matter of dismissal because of conviction in a criminal trial and ultimate acquittal thereof vis a vis a case where the FIR was registered by an independent person. The observations of the Supreme Court in respect of different considerations need be examined, in light of the facts leading to the FIR.

19. In the facts of this case, there is hardly any pleading of malafide against the employer in the matter of lodging of the FIR.

20. In our opinion, general principle as laid down in the case of Rannchhodji Chaturji Thakore (supra), that the employer has no other option but to dismiss the employee, if he is held guilty in criminal offence, because of which the employer is deprived of the service of the employer in view of statutory provision has to be applied in this case. The employer cannot be directed to pay back wages for the period, the employer was out of employment.

21. But we are conscious of the fact that the Apex Court in the case of Union of India and others Vs. Jaipal Singh (supra) has laid down that the the employee would be entitled to his back wages from the date he is acquitted of the criminal charges.

22. In view of the aforesaid, we hold that the petitioner would be entitled to his full back wages from the date of the order of the acquittal i.e. 30.8.2001. Therefore, the order of the Director in so far as it

refuses back wages for the period between 30.8.2001 till date of reinstatement cannot be legal and is hereby quashed. The order of the Tribunal dated 11.12.2002 to that extent is set aside.

23. It is held that the petitioner would be entitled to back wages for the period commencing from 30.8.2001, till the date of reinstatement with all consequentil benefits The amount in that regard may be computed within two months and be paid to the petitioner within a further period of two months.

24. The writ petition is disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2015

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

C.M.W.P. No. 14756 of 2009

Bandhu Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nasiruddin Warsi, Sri R.P.L. Srivastava, Sri S.C. Srivastava

Counsel for the Respondents:
C.S.C.

Civil Services Regulation 378 (ii)-qualifying period of Service-for pension purpose-work charge employes-whether period of work charge can be considered for pension after regularization?-held-'No'-in view of Division Bench case of Jai Prakash as well as of Apex Court-in Punjab State Electricity Vs. Narata Singh-in absence of any rule or policy-functioning of work charge can not be taken into consideration-petition dismissed.

Held: Para-13

In view of the aforesaid decision of the Division Bench in the case of Jai Prakash (Supra) wherein it has been categorically held that the work- charge employees are not entitled to the benefit which are permissible to regular employee under the Rules, which was further affirmed by Hon'ble the Apex Court holding that there is nothing on record to suggest any rule or scheme framed by the State to count the work charge period for the purpose in the regular establishment. In absence of any such Rules or Scheme the Hon'ble Apex Court did not find any merit to interfere with the impugned judgement and the Special Leave Petition was dismissed. In the present case also there are no Rules or Scheme providing for grant of pension in work charge establishment.

Case Law discussed:

Writ-A No. 17150 of 2015; Special Appeal Defective No. 264 of 2013; Special Leave Petition-C No. 22271 of 2013; (2010) 4 SCC 317; (ADJ) 382 (DB).

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. The present petition has been filed for order or direction in the nature of mandamus directing the respondents to release the pension of the petitioner due from the date of his retirement forthwith.

3. According to the petition, the petitioner was initially appointed on the post Beldar on 1.12.1969. Thereafter he was appointed as Telephone Operator from 1.10.1982 and worked till 1.7.1996. On 1.7.1996 he was promoted to the post of Seench Pal and worked till 31.1.2006 and he has thus completed 37 years of continue work without any break

4. The averments made in paragraphs 6,7 and 8 of the counter affidavit is quoted as under:-

"6. That it is stated that the petitioner Bandhu Prasad was employed in the office of the answering respondent as Daily-wages employee from 1.12.1996 to 31.12.1974, and thereafter, the petitioner worked for the post of Beldar in the Work Charge Establishment from 1.1.1975 to 30.6.1996. it is further stated that the petitioner's services have been regularized in the regular establishment by an order dated 29.6.1996 issued by ther Executive Engineer, Irrigation Divison, Ist, Deoria and in pursuance thereof, the petitioner joined his duties on 1.7.1996 and continued to work as Sinchpal and superannuated from the said post of Sinchpal on 31.1.2006. A true copy of the order dated 29.6.1996 issued by the Executive Engineer, Irrigation Divison, Ist, Doria, is being filed herewith and marked as Annexure No.CA.1 to this counter affidavit.

7. That the answering respondent further submits that as per the Civil Services Regulation, 370, as applicable in U.P./Services, rendered by the employee in the Work Charge Establishment, shall not be counted for the purpose of pension . The petitioner has worked in the regular establishment for the post of Sinchpal from 1.7.1996 to 31.12.2006, and therefore, he has served the department for 9 years and 7 months, as such, he is not qualified to be granted regular pension, because the petitioner has not completed 10 years of regular services in the department, which is condition precedent. It is further stated that as per the Government Order dated 1.7.1989, the petitioner is not entitled for the pension, because before his service have been regularized in the regular establishment, the petitioner was working in the Work Charge Establishment, as Beldar from 1.1.1975 to 30.6.1996. The answering respondent further submits that the gratuity for the period of services rendered by the petitioner in Work Charge Establishment has already been paid by an order dated 21.6.2007 and the amount of Rs.32,907/- has been paid to the petitioner. A true copy of the Government Order dated 1.7.1989, and a true copy of the order dated 21.6.2007, are being filed herewith and marked as Annexure Nos. CA.2 and CA.3 to this Counter affidavit."

8. That it is relevant to mention here that the gratuity amount of Rs. 38,190/- relating to the services rendered by the petitioner in the regular establishment has also been paid on 12.7.2006. A true copy of the forwarding letter by Joint Director, Treasury and Pension, Gorakhpur Divison to the Treasury Officer, Kushinagar is being filed herewith and marked as Annexure No.CA.4 to this counter affidavit.

5. Thus, the case of respondent is that the petitioner has served in the department for 9 years and 7 months and as such, he could not be granted regular pension because the petitioner has not completed 10 years in regular service therefore has not been given any pension.

6. Learned counsel for the petitioner has placed various judgement of this Court to contend that the petitioner is entitled for pension. He has referred various decision of this Court rendered in Writ -A No.17150 of 2015, Kedar Ram Vs. State of U.P. and 4 others and Special Appeal (Defective) No.264 of 2013, State of U.P Vs. Prem Chandra decided on 13.5.2013 against which Special Leave Petition- C No.22271 of 2013, State of U.P. Vs. Prem Chandra was dismissed on 17.1.2014 with the following orders.

" Delay condoned.
Special leave petition is dismissed."

7. He further placed reliance on decision of Hon'ble Division Bench in Special Appeal No.1891 of 2013, Parmatma Ram Vs. State of U.P. and other against which Special Leave Petition (C) No.2255 of 2015, State of U.P. Vs. Parmatma Ram, was dismissed on 30.2.2015 with the following order:-

"Delay condoned.
The special leave petition is dismissed.
The question of law is kept open."

8. He further relied on a decision of Hon'be Apex Court in Punjab State Electricity Board Vs. Narata Singh (2010) 4 SCC 317.

9. The submission is that the service rendered as work charge employee is liable to be counted for the purpose of completing 10 years service and granting pension.

10. However, in the judgement rendered by Hon'ble Division Bench of this Court in Jai Prakash Vs. State of U.P, 2014 (ADJ) 382 (DB), wherein the judgement of Hon'ble Single Bench, whereby the writ petition which was filed for quashing the order denying the benefit of service rendered by the appellant in a work charge establishment for computing the qualifying service for grant of pension was dismissed, was under challenge. While dismissing the special appeal the Hon'ble Division Bench observed as under:-

" It, therefore, follows from the aforesaid judgements of the Supreme Court that the work charged employees constitute a distinct class and they cannot be equated with regular employees and that the work charged employees are not entitled to the services benefits which are admissible to regular employees under the relevant rules. ."

(Emphasis supplied)

11. In this case decision of Punjab State Electricity Vs. Narata Singh (Supra) was also considered by Hon'ble Division Bench.

"We are conscious that in Special Appeal Defective No.842 of 2013 (State of U.P. & Ors. Vs. Panchu) that was decided on 2 December 2013, a Division Bench, after taking notice of the judgment of the Supreme Court in Narata Singh (supra), observed that the rationale which weighed with the Supreme Court should also govern the provisions of the Civil Service Regulations, but what we find from a perusal of the aforesaid judgment of the Division Bench is that the decisions of the Supreme Court in Jagjiwan Ram (supra), Jaswant Singh (supra) and Kunji Raman (supra) as also the Full Bench judgment of this Court in Pavan Kumar Yadav (supra) had not been placed before the Court. These decisions of the Supreme Court and the Full Bench of this Court leave no manner of doubt that in view of the material difference between an employee working in a work charged establishment and an employee working in a regular establishment, the service rendered in a work charged establishment cannot be clubbed with service in a regular establishment unless there is a specific provision to that effect in the relevant Statutes. Article 370(ii) of the Civil Service Regulations specifically, on the contrary, excludes the period of service rendered in a work charged establishment for the purposes of payment of pension and we have in the earlier part

of this judgment held that the decision of the Supreme Court in Narata Singh (supra), which relates to Rule 3.17(i) of the Punjab Electricity Rules, does not advance the case of the appellant. In this view of the matter, the appellant is not justified in contending that the period of service rendered from 1 October 1982 to 5 January 1996 as a work charged employee should be added for the purpose of computing the qualifying service for payment of pension."

12. The aforesaid judgement was challenged by the appellant Jai Prakash before Hon'ble the Apex Court by means of filing Special Leave to Appeal (C) No.12648 of 2014, Jay Prakash Vs. State of U.P and others which was dismissed with the following order dated 5.9.2014.

'There is nothing on the record to suggest that any Rule or Scheme framed by the State to count the work-charge period for the purpose of pension in the regular establishment. In absence of any such Rule or Scheme, we find no merit to interfere with the impugned judgement.

The special leave petition is dismissed.'

(Emphasis supplied)

13. In view of the aforesaid decision of the Division Bench in the case of Jai Prakash (Supra) wherein it has been categorically held that the work- charge employees are not entitled to the benefit which are permissible to regular employee under the Rules, which was further affirmed by Hon'ble the Apex Court holding that there is nothing on record to suggest any rule or scheme framed by the State to count the work charge period for the purpose in the regular establishment. In absence of any such Rules or Scheme the Hon'ble Apex Court did not find any merit to interfere with the impugned judgement and the Special Leave Petition was dismissed. In the present case also there are no Rules or Scheme providing for grant of pension in work charge establishment.

14. The other two decisions of Hon'ble Apex Court, simply dismissing the Special Leave Petition against the judgements of this Court leaving this question of law open, are of no help to the petitioner in as much as this question as to whether work charge period for the purpose of pension in regular establishment as on date stood affirmed by Hon'ble Division Bench in the case of Jai Prakash (Supra) and S.L.P.-C No.12648 of 2014, Jai Prakash Vs. State of U.P. as noted above.

15. During course of arguments the learned counsel for the petitioner has also supplied a copy of this letter dated 7.1.2015 written by the Chief Engineer Irrigation Department,Lucknow to Executive Engineer Work Charge Establishment. The same is taken on record. This letter indicates only this much that this demand to count work charge period for grant of pension is under consideration. Moreover it also establishes that on the date of retirement of the petitioner i.e 31.1.2001 no such Rules or Scheme framed by the State to count the work charge period for the purpose of pension in the regular establishment was in existence. Perhaps the same is still not in existence. Be that as it may, at present no such relief can be granted to the petitioner.

16. The petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

C.M.W.P. No. 16982 of 2012

Fahim Baig ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kr. Yadav, Sri A.R. Nadiwal

Counsel for the Respondents:
C.S.C., Sri Amit Kumar Asthana, Sri Kripa Shanker Yadav, Sri M.N. Singh, Sri Yatindra, Sri R.J. Shahi

U.P.Z.A. & L.R Act-Section 123-B-Punishment for occupation of Gaon Sabha land-no eviction proceeding ever initiated-against petitioner-no question of re occupies-provisions of Section 123-B not applicable-order quashed.

Held: Para-9
In other words, the punishment and the procedure prescribed under Section 123-B of the Act is to be followed after the proceedings for eviction under Section 122-B have been completed. Secondly, the provisions of Section 123-B of the Act are applicable only if a person re-occupies the land of the Gaon Sabha after his eviction therefrom. It is not the provision for punishment or eviction of unauthorized occupant in first instance.

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

1. Heard learned counsel for the petitioner and learned Standing Counsel appearing for respondents No.1 to 4. Notice on behalf of respondent No.6 has been accepted by Sri M.N. Singh.

2. The petitioner by means of this writ petition has challenged the order dated 17.3.2012 passed by the Up-Ziladhikari, Sadar, Azamgarh. The said order directs the petitioner to vacate part of Arazi No.106 which is in his unauthorized occupation for the last two months failing which he would be dispossessed from the same and the expenses for his dispossession shall be recovered from him as arrears of revenue and a first information will be lodged against him under Section 3/5 of the Prevention of Damage to Public Property Act, 1984.

3. On the basis of the pleadings exchanged between the parties on record, the aforesaid land is the land of Gaon Sabha recorded as manure pit which cannot be occupied by any person otherwise than with the permission of the Gaon Sabha. The said land is not allotted to the petitioner and that he is in unauthorized occupation of the same.

4. Learned Standing Counsel has filed supplementary counter affidavit stating that no proceedings under Section 122-B of the U.P. Zaminari Abolition and Reformed Act, 1950 (hereinafter referred to as the 'Act') were ever drawn against the petitioner for his eviction from the said land. He also submits that the petitioner was never evicted from the said land earlier.

5. The impugned order is said to have been passed by the authority concern in purported exercise of power under Section 123-B of the Act. The aforesaid provision provides for punishment for occupation of the Gaon Sabha land and for summary eviction of person who has re-occupied Gaon Sabha land after his eviction. Section 123-B of the Act for the sake of convenience is reproduced below:

"123-B. Punishment for occupation of Gaon Sabha land. - (1) Where any

person has been evicted under this Act from any land vested in a Gaon Sabha, and such person or any other person, whether claiming through him or otherwise, thereafter occupies such land or any part thereof without lawful authority, such occupant shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) Any Court convicting a person under sub-section (1) may make an order for evicting the person summarily from such land and such person shall be liable to such eviction, without prejudice to any other action that may be taken against him under any law for the time being in force.

(3) Without prejudice to the provisions of sub-section (1) and (2), the Collector may, whether or not a prosecution is instituted under sub-section and may for that purpose, use or cause to be used such force as may be necessary for evicting any person found in occupation thereof."

6. It provides that where any person has been evicted under the Act from any land vested in Gaon Sabha and such person or any other person claiming through him occupies the said land without any lawful authority, he can be punished with imprisonment or fine or both. It further provides that the court apart from convicting the person as aforesaid may also make order for his summary eviction and that the Collector is authorised to retake the possession of such land.

7. The manner of eviction of a person in unauthorized occupation of the Gaon Sabha land has been provided under Section 122-B of the Act. It provides for initiation of proceedings by the Assistant Collector and for passing order of eviction of such unauthorized occupant.

8. A simple reading of Section 122-B and 123-B of the Act reveals that it is only after an order of eviction is passed against the unauthorized occupant of the Gaon Sabha land and he is so evicted therefrom under Section 122-B of the Act that when he again occupies the Gaon Sabha land, he can be punished with imprisonment or fine or both and may be summarily directed to be evicted from the Gaon Sabha land under Section 123-B of the Act.

9. In other words, the punishment and the procedure prescribed under Section 123-B of the Act is to be followed after the proceedings for eviction under Section 122-B have been completed. Secondly, the provisions of Section 123-B of the Act are applicable only if a person re-occupies the land of the Gaon Sabha after his eviction therefrom. It is not the provision for punishment or eviction of unauthorized occupant in first instance.

10. In view of the aforesaid legal position, as it is no once case that the petitioner after eviction under Section 122-B of the Act has reoccupied the Gaon Sabha land, no order against him could have been passed under Section 123-B of the Act.

11. In view of the aforesaid facts and circumstances, the impugned order dated 17.3.2012 is not only illegal but is also without jurisdiction and is accordingly quashed.

12. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

C.M.W.P. No. 17261 of 2015

Committee of Management, BDSUM Vidyalaya, Ballia & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gopal Ji Rai

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Principle of Natural Justice-refusal of grant in aid-impugned order passed by adopting unique method talking on mobile phone-held-not fair-principle of Natural Justice violated-order quashed.

Held: Para-14
In view of the aforesaid facts and circumstances, as the Principal Secretary deviced a noval method of hearing which is completely alien to the legal jurisprudence; failed to give any notice to the parties for hearing fixing a date; and proceeded to talk about the matter with the parties on mobile phone in the absence of the other, it is plain and simple that he acted in utter violation of the principles of natural justice and against the doctrine of fair play in passing the impugned order.

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

1. The institution of the petitioners has been refused grant in aid by the impugned order dated 15.09.2010.

2. The said order has been passed by Principal Secretary, Sanskrit Shiksha Anubhag, U.P. Shasan, in pursuance of the directions of this Court contained in the order dated 03.04.2014 passed in Writ -C No. 15335 of 2014, C/M Sri Deena Nath Tiwari Sanskrit Uchchattar Madhyamik Vidyalaya and another.

3. In disposing of the above writ petition this Court, had directed the respondent no. 1 of the said writ petition to consider the grievance of the petitioners with regard to entitlement of grant in aid after hearing the petitioners.

4. One of the ground on which the above order has been assailed is that without hearing the petitioners no order could legally be passed on the basis of talk on the telephone/mobile with the parties concern.

5. Learned Standing Counsel was directed to file counter affidavit within four weeks on 01.04.2015, but till date no counter affidavit has been filed.

6. Learned Standing Counsel after going through the impugned order is himself surprised and submits that there appears to be no hearing in the matter and the Adjudication Authority had simply talked with the parties on mobile. In such circumstances, the Court may quash the order and sent the matter back for reconsideration.

7. The Court is surprised at the manner in which the impugned order has been passed by non else than a Senior Officer of the Indian Administrative Service holding the post of the Principal Secretary.

8. The principles of natural justice are the backbone of the any administrative/judicial system. No order of any administrative authority or the court of law can be sustained until and unless it has

been passed following the principles of natural justice. It is a cardinal principle of law that no one can be condemned unheard. Therefore, it is fundamental to give opportunity of hearing to the litigating parties before adjudicating their civil rights. This opportunity of hearing to the parties is not an empty formality and has to be an opportunity in real sense.

9. In this context, it is pertinent to note that the purpose of giving opportunity of hearing is to give prior notice to the parties of the date fixed so that the party affected may prepare himself on facts and the proposition of law to answer the contention of the other party or the queries raised by the Court or authority. No party can be taken by a surprise and asked to make submission without allowing sufficient time to enable him to prepare on the subject.

10. In addition to the above, it is cardinal to the principles of natural justice that the hearing of any matter has to be in presence of the respective parties. The adjudicating authority must ensure that the contesting parties are present before him when one of them is being heard to enable the other party to listen and make effective reply. Any hearing in the matter in the absence of the other party would again not be an effective hearing in true spirit of the principles of natural justice.

11. In the instant case, a plain reading of the impugned order, as has also been accepted by the learned Standing Counsel, reveals that the adjudicating authority had not given any notice to the parties fixing any date of hearing in the matter; rather he has simply chosen to converse with the parties on their mobile. It is only on the basis of the aforesaid talk with the parties on mobile that he proceeded to pass the impugned order.

12. The conversation he had with the parties on mobile was not in presence of the other party. The said party could not have any idea or estimation of the conversation that took place between adjudicating authority and the other party putting him to a loss to reply in defence. In this way, in effect no proper opportunity of hearing was given to the parties.

13. The Court hastens to add that an adjudicating authority in all fairness is not supposed to talk or discuss any matter which is before him for adjudication with any party much less the litigating party outside the office or in the absence of the other party.

14. In view of the aforesaid facts and circumstances, as the Principal Secretary deviced a noval method of hearing which is completely alien to the legal jurisprudence; failed to give any notice to the parties for hearing fixing a date; and proceeded to talk about the matter with the parties on mobile phone in the absence of the other, it is plain and simple that he acted in utter violation of the principles of natural justice and against the doctrine of fair play in passing the impugned order.

15. Accordingly, the impugned order dated 28.10.2014 passed by the Secretary, Sanskrit Shiksha Anubhag, U.P., Lucknow is hereby quashed and a writ of certiorari is accordingly directed to be issued with liberty to him to pass a fresh order in accordance with law, as expeditiously as possible, preferably within a period of six weeks from the date

of production of a certified copy of this order.

16. The writ petition is allowed with no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2015

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Misc. Writ Petition No. 19074 of 2015

Arvind & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Faizan Ahmad, S.F.A. Naqvi, Sri M.M. Tripathi, Sri N.S. Mishra, Sri P.C. Dwivedi

Counsel for the Respondents:
A.G.A., Sri Anurag Khanna, Sri Sumit Daga

Constitution of India, Art.-226-quashing of FIR-offence under section 420; 467, 468, 471, 406 IPC-argument that allegation relates Civil in nature-no offence for criminal prosecution made out court explained difference between civil and criminal wrong-further apprehension of harassment and foul investigation-SSP concern shall look into the matter-petition dismissed-till credible evidence there or till submission of charge sheet-arrest stayed.

Held: Para-20
The difference between civil wrong and criminal wrong turns on two different objects, for civil wrong, the wrong doer is not punished rather contrarily the suffers gets a definite benefit from the law, whereas for criminal wrong the main object of law is to punish the wrong doer. In the present case, there is prima facie amalgam of both, that the firm in question has been put to loss and has been cheated.

Case Law discussed:
1992 (1) SCC 1; 2011 (7) SCC 59; (1996) 5 SCC 591; 2008 (9) SCC 677; [2014 (4) SCC 453]; [1994 (4) SCC 260].

(Delivered by Hon'ble V.K. Shukla, J.)

1. Petitioners who are two in number are before this Court with a request to quash the FIR dated 16.07.2015, registered as Case Crime No. 362 of 2015, under Sections 420, 467 ,468, 471, 406 IPC, Police Station Parta pur, District Meerut and for sommanding the Respondents not to harass the petitioners.

2. Petitioners before this Court are stating that they are partners of M/s A.M. Associates, a partnership firm that functions in the name and style of M/s O.S.G. Exim Services Private Limited. Said firm is engaged in providing and uploading all the required documents and information of the export and bank realization details on the DGFT website and generate an application for obtaining the Licenses and acting as a liaison agent. Petitioners submit that Sharda Exports executed power of attorney in the name of its employees namely Prabhash Chandra Sharma, the Manager as well as Gurnam Singh, Senior Executive to be the authorised signatory for signing of application, Bank Realisation Certificates, shipping bills and other documents required for issuance and obtaining of the Focus Product Licenses and to make and to make necessary amendments and changes in the document. Petitioners are stating that whatever activity has been carried out by them, same has been at the instruction and directives of Prabash

Chandra Sharma, Manager and Gurnam Singh, Senior Executive and Sharda Export has proceeded to lodge FIR by mentioning that petitioner nos. 1 and 2 who are allegedly operating a firm in the name and style of A.M. Associates in connivance with Gurnam Singh, sold 56 licences within a period of 5 years i.e. from 2009-2014 and by such activity Rs.4.50 Crores has been swindled as said amount has been distributed amongst the relative of Gurnam either incash or in their accounts, whereas said amount was liable to be deposited in the account of Sharda Exports, but the same was misappropriated. In the FIR it has been mentioned that sum of Rs. 60.35 lacs has been paid back to the informant by the petitioners. Petitioners' submission is that whatever transaction has been undertaken, same are valid transaction and in case first informant has any grievance, his grievance should be with Gurnam Singh and as far as petitioners are concern, unnecessarily in designed manner they have been arrayed as an accused in the present case and under threat they have been forced to make payment of Rs. 60.35 lacs.

3. Supplementary affidavit has been filed on 14.08.2015 and therein once again same set of facts have been repeated that petitioners have nothing to do with the affair of Gurnam Singh, who is actually employee of respondent no.4. In the said affidavit in question, statement of account have been appended to show that regularly Sharda Exports made payments to the petitioners firm and amount was debited that was paid on behalf of Sharda Exports relating to fee and miscellaneous charges etc. It has been further mentioned therein that Sharda Exports is partnership firm, changes its character every five years by just changing sequences of partners/directors or by adding some new names by deleting previous names. Petitioners have proceeded to mention that no amount had been transferred un-authorizedly, but on the directive of authorised representative said exercise has been undertaken.

4. Supplementary affidavit has been filed on 25.08.2015 appending therein copy of the account of A.M. Associates and copy of the account of Kotak Mahindra Bank Pvt. Ltd. and in the said supplementary affidavit, it has been submitted that there has been various cash transaction and on the asking for amount has been deposited.

5. Another supplementary affidavit has been filed on 28.08.2015 mentioning therein that 40 licenses have been sold by the petitioners and details of transaction has also been sought to be provided for giving therein net payable amount by the petitioner is sum of Rs. 3.5 Crores, whereas amount that has been paid is over and excess to the same.

6. Counter affidavit has been filed on 07.09.2015 and therein it has been mentioned that under the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992), the Central Government periodically notifies the Foreign Trade Policy, for a period of 5 years. The Foreign Trade Policy for 2009-2014 (hereafter as ("FTP") came into effect on 27.08.2009. The Director General of Foreign Authority is an authority established under the Ministry of Commerce & Industry, created under the above mentioned Act. It has been further mentioned that in order to promote

export and boost the Indian industry, the Central Government runs various promotional schemes. Sharda Exports is eligible for incentive, called the Duty Credit Slip, under two such schemes, namely , Vikas Krishi and Gram Udyog Yojna and Focus Product scheme. The said Duty Credit Slip, also called Focus Product License, is issued by the Director General of Foreign Trade (hereinafter ("DGFT"), after submission of documents and verification. The license is issued on the basis of the goods exported and the value of such exports. The benefit or advantage which accrues to the License holder under the Vikas Krishi and Gram Udyog Yojna and Focus Product Scheme is that the value/amount mentioned in the License can be utilized for payment of import duty, as provided in paragraph 3.17.5 of the FTP. Further, the said licences can also be utilised to pay additional Customs Duty, as provided in paragraph 3.17.6 of the FTP. The said Licenses are freely transferable, according to the provisions of FTP in paragraph 3.17.4. It has been further mentioned that there are two modes in which the Focus Produce License can be obtained from the office of DGFT, as prescribed in the Handbook of Procedures, Vol. 1(a part of FTP)- first, a self addressed envelope with affixed stamps to be provided by the Applicant and second, an identity card is issued to proprietor/partner/director/authorised employee of the exporter. The complete process for issuance and obtaining said License from the office of DGFT is as follows:

On export, a Commercial Invoice is generated by Sharda Exports, on the basis of which the Custom House Agent (authorised by Central Board of Excise & Customs) is required to furnished and upload details on the website of Central Board of Excise and Customs, after which a Shipping Bill is generated, in triplicate.

After the produce is exported, a Export Promotion copy of Shipping Bill is issued to the exporter by the Department of Customs.

A Bank Realisation Certificate is sussed by the banker once export remittances are received in foreign currency.

Thereafter, an application for obtaining the said License is generated on-line through the DGFT website, after filing required details of the export and bank realization, and uploading of necessary documents.

The said application is required to be signed by the authorised signatory after which a copy of all the above mentioned documents along with the duly signed application form and a covering letter, is required to be submitted in the DGFT office.

Subsequent to verification of documents and issuance of the License by the DGFT, only the authorised personnel in whose favour an identity card is issued by the DGFT)as mentioned above) can collect license from the office of the DGFT after presenting his identity card.

7. It has been further mentioned that the license issued by the DGFT contains the value of the license and the name in whose favour the said license is issued. It has also mentioned that A.M Associates was a liaison agent and its role was to provide and upload all the required documents and information of the export and bank realization details on the DGFT website and generate an application for obtaining the Licenses. Sharda Exports executed a power of Attorney (annexed as

Annexure No. 2 of the writ petition) in favour of Gurnam Singh, Senior Executive and Mr. Prabhash Chandra, Manager to be the authorised signatory for signing of Applications, Bank Realisation Certificates, Shipping Bills and other documents required for issuance and obtaining of the Focus Produce Licenses, and to make necessary amendments and changes in the said document. The exporter in whose name the said Focus Produce License is issued can transfer the license to any person. The following documents are required to transfer the said license.

1. Physical/printed Focus Produce License.

2. An invoice, wherein the percentage of face value at which the license is being sold at , is mentioned by the transferor, and

3. A Transfer Letter duly signed by the Director/Partner/Proprietor of the exporter, in whose favour the license was issued. (The signature of such person on the transfer letter is to be duly attested by the banker of the transferor)

8. It has been mentioned that in the present case, after obtaining the Focus Produce Licenses, Gurnam Singh fraudulently obtained signature of the partner of Sharda Exports on blank transfer letters, which he alongwith the petitioners, used to commit cheating and other illegal activities. Further in the normal course of effecting transfer of licenses, the License number of the Focus Produce License being transferred is typed in the Transfer letter, after which the said Transfer Letter is printed and thereafter signed by the Partner. However, with respect to the 56 illegally sold licenses, as has been found in the illegally sold licenses arranged from third parties that the License number is manually written by hand, in the transfer letters, which clearly shows foul play and unfair dealing. It has been mentioned that after fraudulently obtaining signatures on the blank transfer letters, Gurnam Singh forwarded the same to A.M. Associates. Thereafter, A.M. Associates created a false invoice (third document required for transferring Licenses) showing A.M. Associates as the seller of the License, thereby fraudulently and illegally having all the documents required for selling of the Licenses. It is pertinent to mention that the wrongful consideration received by selling of licenses in illegal and fraudulent manner, was received in the accounts of A.M. Associates, even though Sharda Exports were the rightful owners of the Licenses. After receiving the illegal consideration, petitioners distributed the money amongst themselves, by giving Gurnam Singh's share to him in cash also via bank transfer to Gurnam Singh account and in the accounts of Gurnam Singh's relatives. The details of such distribution and bank transfer are stated in detail in the FIR. It is important to mention that it is an admitted fact that the petitioners have paid Rs. 60,35.000 (Rupees Sixty Lakhs Thirty Five Thousand) to Sharda Exports. It is submitted that this act of returning the said amount by the petitioners is an admission of guilt. There is absolutely no reason for the petitioners to give such a big amount of money to Sharda Exports, other than return the money which they have illegally and fraudulently taken from Sharda Exports. On the contrary, in normal course of business, it is the firm which has to pay A.M. Associates for its services. This, it is abundantly certain that petitioners have engaged in illegal

activities, have returned Rs. 60,35,00/- out of guilt and for no other reason.

9. Para wise reply has also been given therein same set of fact has been repeated, and the averments mentioned in the writ petition has been disputed.

10. After pleadings mentioned above, have been exchanged, thereafter, present writ petition has been taken up for final hearing/disposal with the consent of the parties.

11. Sri Madhu Mukul Tripathi, learned counsel for the petitioners contended with vehemence that in the present case as far as petitioners are concern, they have not committed any offence worth name and unnecessarily petitioners' names have been dragged in the FIR and based on the same petitioners have been forced to pay sum of Rs. 60,35,00/- and in case grievance of the first informant that any amount is due to be paid to him, then there is alternative remedy of filing Suit, and lodging of FIR is misuser of criminal forum and as such this Court should come to the rescue of petitioners by protecting their personal interest.

12. Averments made on behalf of the petitioners, has been resisted by learned A.G.A. by contending that FIR does discloses cognizable offence, as such there is no occasion for this Court to entertain the request of petitioners.

13. Sri Anurag Khanna, Senior Advocate, assisted by Sri Sumit Daga, Advocate on the other hand contended that this is glaring case of fraud and manipulation made by the petitioners' firm in active collusion with the employee of the first informant company, and once clear cut offence is made out from the reading of the FIR, no interference should be made.

14. We have proceeded to examine the pleadings in question along with contents of FIR and as far as FIR goes it clearly contains categorical statement of fact that first informant firm has been engaged in the business of Carpet Exports, in the name and style of Sharda Exports. In the said firm Gurnam Singh had been performing and discharging his duty as Senior Executive and said Gurnam Singh in active collusion with the petitioners, who are running the firm in the name and style of A.M. Associates have illegally proceeded to sell 56 licenses and has swindled Rs. 4,50,00,000 Lacs based on the fictitious document and said amount has been transferred in the account of A.M. Associates. Thereafter, entire amount has been transferred in the name of Gurnam Singh and his relative, whereas Gurnam Singh has no authority. Once such fact has been mentioned in the FIR then the FIR on its face value does disclose prima facie cognizable offence.

15. The other side of the story narrated by petitioners is that Sharda Exports had proceeded to issue "Transfer of Debiting Credit Entitlement Certificate" and Focus Product License, authorising the petitioners. In the said certificate in question clear cut mention was made that said certificate has not been transferred to anybody else and same will be property of said transferee and Sharda Exports will have no right whatsoever on the above, it is irrevocable confirmation certifications is also there, that full and final compensation has been received and Sharda Export will have no

lien over the same. Submission of the petitioners is that once said documents has been issued and said documents have been acted upon, then to say that any offence is committed, is too for fetched.

16. From the side of first informant, it has been sought to be contended that after such Transfer of Debiting Credit Entitlement Certificate and Focus Product License is prepared, and in case it is to be transferred, then it has to be preceded by invoice certificate, wherein full details would be given such as License number, value of licence and part of registration etc. and thereafter, consignee is entitled to get the same en-cashed. Here in the present case no invoice certificate has been issued in favour of any consignee to get aforementioned 56 licences, rather it is reflected from the record in question that A.M. Associates proceeded to prepare debit note and based on the same transfer in question have been acted upon.

17. As far as appending of signature on documents namely Transfer of Debiting Credit Entitlement Certificate and Focus Product License are concern, same has been accepted, but an attempt has been made to dis-own the same by contending that Gurnam Singh has fraudulently obtained transfer letter of 56 licences. Thus, this much fact is admitted that on 56 licenses that has been so issued, there is signature of partner that has been got obtained by Gurnam Singh and as to whether said Gurnam Singh has practised fraud, certainly same has to be subject matter of investigation.

18. Once such is the factual situation that is so emerging from the reading of FIR that transfer letter bears signature of partner of Sharda Exports, and it has also been stated that blank transfer letters were got signed, and they have been misused by Gurnam Singh in active collusion of petitioners, as the name of parties in whose favour transfer has been effected upon has been filled subsequently, by hand, and said transfer letter could have gone out of Sharda Export alongwith invoice, and here admittedly no invoice note had been issued, rather said certificate in question along with debit note of A.M. Associates has been transferred in favour of other company. Consequently, once the first informant is accepting this fact that said transfer certificate bears signature of member of partner of Sharda Exports, but as it has been alleged that Gurnam Singh has succeeded in getting signature on blank transfer letter and said document has been passed on by Gurnam Singh to the petitioners and thereafter under covering debt note, same has been transferred. In view of this, once element of cheating, misappropriation and diversion of fund has been attributed to Gurnam Singh then the matter has to be investigated and what has been the actual role played by the petitioners would also be reflected once free/fair/transparent investigation is carried out.

19. Once such is the factual situation i.e. so emerging from the reading of FIR that 56 licenses have been sold and this much is also clear that said amount has not reached in the account of company and defence of petitioners is that said amount has been transferred in the account as has been asked for by Gurnam Singh, who has been dealing with the petitioners, then as to whether there has been any dis-honesty and petitioners have been acting bonafide or not, certainly has to be matter of investigation.

20. The case in hand has prima facie criminal taint, and does not fall in any of the category enumerated in the case of State of Haryana Vs. Bhajan Lal 1992 (1) SCC 1, for exercising authority to quash the FIR in quesdtion For recovery of the amount Suit can always be filed, and case in hand cannot be said to be dealing with pure civil wrong, as has been in the case of Joseph Salvaraj A Vs. State of Gujrat 2011(7) SCC 59, wherein appellant failed to pay sum of Rs. 10 Lacs as promised and suit for recovery of money had already been filed. Here monetary loss has been allegedly caused to the firm, for recovering the said amount suit is the remedy. The difference between civil wrong and criminal wrong turns on two different objects, for civil wrong, the wrong doer is not punished rather contrarily the suffers gets a definite benefit from the law, whereas for criminal wrong the main object of law is to punish the wrong doer. In the present case, there is prima facie amalgam of both, that the firm in question has been put to loss and has been cheated. Apex Court in the case of CBI Vs. Duncans Agro Industries Ltd. (1996) 5 SCC 591 and Nikhil Merchant Vs. CBI 2008(9) SCC 677 came to hold "that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the person accused thereof including the officials of the Bank, criminal proceedings indisputably be maintainable". Once such is the factual situation i.e. so emerging from the reading of FIR, then to say that no offence is made out, cannot be accepted, in view of this, request made for quashing of FIR is turned down and certainly matter has to be investigated.

21. Petitioners' counsel has also expressed apprehension, that local police has not been acting fairly, as they have been illegally detained w.e.f. 11.11.2014 to 14.11.2014 and were forced to pay Rs. 60.35 lacs. Petitioners have stated that they have already requested for free/fair/transparent investigation.

22. Accordingly, in the facts of the case, we proceed to ask Senior Superintendent of Police, District Meerut, for ensuring free/fair/impartial investigation, to nominate a officer of the rank of Dy. S.P. to supervise the on going investigation, so that truth comes on surface and the role played by petitioners in the transaction in questioned is also clear.

23. Learned counsel for the petitioners next contended that in the facts of the case as criminal forum is being misused the arrest of petitioners be stayed by this Court.

24. Apex Court in the case of Hema Mishra Vs. State of U.P. and others [2014 (4) SCC 453] has considered the matter and has clearly ruled therein that once request for quashing of the FIR is turned down then second prayer for according interim order of staying arrest should not be accorded. In view of this, request that has been so made on behalf of petitioners to stay the arrest cannot be accepted by this Court.

25. Petitioners' counsel next contended that petitioners would be mechanically arrested in the present case even without there being any credible evidence, connecting them with the crime in question.

26. Apex Court in the case of Joginder Kumar Vs. State of U.P. [1994

(4) SCC 260] has mentioned that law of arrest is one of balancing individual rights, liberties and individual rights on one hand and individual duties, obligations and responsibilities on other hand. The existence of power is one thing and justification for exercise thereof is another. Arrest cannot be made in routine manner. Para 20 of the aforesaid judgment is quoted below:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

27. Registration of FIR under Section 154 Cr.P.C. and arrest of accused person under Section 41 are two entirely different concepts. Apex Court in Criminal Writ Petition No. 68 of 2008 Lalita Kumar vs. Government of U.P. decided on 12.11.2013 has clearly ruled that it is not correct to say that just because FIR is registered, the accused person can be arrested immediately. In the said judgment itself, as to why legislature has consciously used the expression information in Section 154(1) of the Code as against the expression used in Section 41(1)(a) and (g) where the expression used for arresting person without warrant is "reasonable complaint" or "credible information" has been dealt with as the expression under Section 154(1) of Code is not qualified by the prefix "reasonable" or "credible". In the matter of arrest various safeguards have been provided and once again Joginder Kumar (Supra) has been reiterated in paragraph 99.

28. Authority to arrest without warrant has been conferred with the police officer under Chapter V Section 41 of the Code of Criminal Procedure, and it is for the police officer to decide as to what action is required to be taken while effectuating arrest and certainly this decision has to be taken on the basis of material/information. In cognizable offences where maximum sentence is 7 years, arrest is not to be made in routine manner, and provisions of Section 41 (1) (b) and 41-A has to be complied with, and in cases when there is credible

information of committing cognizable offence punishment with imprisonment of term for more than 7 years whether or without fine or with death sentence and the police officer has reason to believe that such person has committed the said offence arrest can be effectuated straightway. In reference of the offence committed, information received, it is the police officer, who has to decide as to what offence has been committed by the accused and as to whether arrest is warranted in the facts of the case, and as to what criteria is to be adhered to. In case any infringement of law is there in effectuating arrest, the Magistrate concerned, before whom accused is produced for remand, can remedy the grievance, so raised by the arrested person, at the point of time of according remand under Section 167 Cr.P.C.

29. Consequently, keeping in view the peculiar facts and circumstances of the case and the factum alleged that no credible evidence worth name is available against petitioners, we proceed to pass an order that investigation may go on and petitioners shall extend full cooperation in the investigation and shall not hamper with the investigation, but pursuant to impugned FIR dated 16.07.2015, registered as Case Crime No. 362 of 2015, under Sections 420, 467, 468, 471, 406 IPC, Police Station Partapur, District Meerut, petitioners may not be arrested till credible evidence is collected or till submission of police report under Section 173 (2) Cr.P.C., whichever is earlier.

30. With these observations, writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 03.09.2015

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Writ-C No. 20863 of 2015

Akash Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Jeet Bahadur Singh

Counsel for the Respondents:
C.S.C.

U.P. Intermediate-Education Act 1921, Chapter-III-Regulation-7-Rectification of date of birth-petitioner appeared in High School examination 2007-in certificates cum mark sheet date of birth recorded 01.01.90-while school record show 01.01.93-rejected on time barred ground-held-illegal-limitation is provided for candidate-and not for authorities concern-by exercising inherent power-such clerical mistake ought to have corrected-order impugned base upon without application of mind-quashed.

Held: Para-19
The Regional Secretary of the Board has simply rejected the application of the petitioner on the ground of limitation without application of mind to the facts and circumstances of the case. Thus, he failed in discharge the pious obligation to rectify the mistake occurring in the public record which are supposed to maintain correctly.

Case Law discussed:
(1998) 7 SCC 123

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents no. 1 and 2.

2. The petitioner by means of this writ petition is seeking a direction upon the respondents to correct his date of birth as appearing in his High School Certificate of 2007. He has also prayed for quashing of the order dated 21.10.2014 issued by the Regional Secretary, Madhyamik Shiksha Parishad, Regional Office, Meerut, refusing to correct his date of birth in the High School Certificate on the ground of limitation.

3. The facts are not in dispute that the petitioner appeared in the High School Examination of the year 2007 as a regular student of Shrimad Brahmanand Inter College, Ramghat Road, Aligarh conducted by the Board of High School and Intermediate Education U.P.

4. The certificate-cum-mark-sheet of the said examination was issued to the petitioner on 05.06.2007. The said certificate mentions 01.01.90 as the date of birth of the petitioner.

5. The petitioner after passing High School obtained Transfer Certificate as well as Character Certificate from the above institution. Both the above certificates mentions 01.01.93 as his date of birth. The petitioner, thereafter, passed Intermediate from Dharam Samaj College, Aligarh, and took Transfer Certificate for the purposes of further studies from that institution also. His date of birth in the said certificate is again mentioned as 01.01.1993.

6. The institution, from where the petitioner appeared in the High School Examination has certified that the correct date of birth of the petitioner is 01.01.1993 as per the record of the school.

7. In the background of the aforesaid facts, the contention of the petitioner is that his actual date of birth is 01.01.1993 and it also appears in the records of the School/College as well. The Board of High School and Intermediate Education U.P., however, in issuing the certificate-cum-mark-sheet to the petitioner has committed a clerical mistake in mentioning it to be 01.01.90. Therefore, the date of birth of the petitioner as appearing in the High School Certificate is liable to be corrected, accordingly.

8. The application of the petitioner for correction of his date of birth in the High School Certificate has been rejected on the ground that it has been moved after more than two years of the issuance of the certificate.

9. Learned Standing Counsel submits as the Regulation provides for applying for the correction of the certificate within a period of 2 years of the issue of the certificate, there is no illegality in rejecting the application of the petitioner.

10. It is not disputed that the petitioner had not applied for correction of his date of birth as appearing in the High School Certificate immediately on receipt of the certificate, rather the application was filed on 01.10.2012, i.e., after about five years of issuance of the certificate.

11. Regulation-7 of Chapter-III of the Regulations framed under the Intermediate Education Act, 1921 provides for a limitation of two years for seeking correction in the High School Certificate which has now been increased to three years. The said Regulation as in

existence at the relevant time reads as under:-

विनियम –-7

सचिव परिषद की ओर से सफल उम्मीदवारों को परिषद की परीक्षा में उत्तीर्ण होने का प्रमाण–पत्र विहित प्रपत्र में देगा और बाद में उसकी प्रविष्टियों में कोई शुद्धि करेगा, बशर्ते कि प्रमाण–पत्र में किसी ऐसी गलत प्रविष्टि किसी अविचारित लिपिकीय भूल या लोप के कारण या किसी ऐसी लिपिकीय भूल के कारण की गयी हो, जो असावधानी से परिषद के स्तर के या उस संस्था के जहॉ से अन्तिम बार शिक्षा प्राप्त की हो स्तर पर अभिलेख में हो गई हो।. यह शुद्धि सचिव द्वारा उसी स्थिति में की जा सकेगी, जबकि अभ्यर्थी ने सम्बन्धित परीक्षा के प्रमाण–पत्र परिषद द्वारा निर्गमन की तिथि से दो वर्ष के अंदर ही लिपिकीय त्रुटि की ओर ध्यान आकृष्ट करते हुये सम्बन्धित प्रधानाचार्य/केन्द्र व्यवस्थापक को त्रुटि के संशोधन हेतु प्रार्थना–पत्र प्रस्तुत कर दिया हो और उसकी प्रति पंजीकृत डाक से सचिव, परिषद को भी प्रेषित की हो।

12. A bare reading of above Regulation indicates that the clerical mistake occurring in the certificate, issued by the High School and Intermediate Education Board U.P. is rectifiable provided the candidate applies for its correction within a period of two years from the date of issuance of the certificate.

13. It is important to note that it is not the case of any party that the mistake of date of birth appearing in the High School Certificate of the petitioner had occurred due to any mistake on the part of the petitioner or that his correct date of birth is not 01.01.93 as appears in the records of the School/College, meaning thereby the correct date of birth of the petitioner is 01.01.93 and not 01.01.90 as mentioned in the High School Certificate.

14. An authority vested with the jurisdiction to issue a certificate and to maintain record of it has inherent power to rectify the mistake, if any, that may occur in the certificate so issued provide the mistake is genuine and the person concern has no role attached to it. Therefore, any mistake of a clerical nature accruing in the certificates can be rectified on the application of the candidate concern or even by the authority concern in suo motu exercise of its inherent power whenever the mistake comes to its notice. In other words, any mistake in the High School Certificate can always be rectified either on an application by the person concern or by the authority/Board itself in suo- motu exercise of its inherent power.

15. The limitation of moving an application for rectification of the mistake of a clerical nature appearing in the High School Certificate is for the candidates and not for the Board to take suo-motu action in exercise of inherent power.

16. The law of limitation is founded on public policy so as to limit the life span of a litigation or the legal remedy. It does not aims to defeat the rights of the parties. In the case of N. Balakrishnan vs. M. Krishnamurthy,; (1998) 7 SCC 123 the Supreme Court of India observed if the remedy availed by the party who has been wronged does not smack of malafides or is not by way of dilatory tactics, the Courts must show utmost consideration to the suitor. In other words, a bonafide delay may not by itself be treated as sufficient to debar the remedy particularly where the record exfacie shows miscarriage of justice.

17. In the instant case, there is no dispute that the correct date of birth of the petitioner is 01.01.1993 and that in the High School Certificate it has been incorrectly mentioned as 01.01.90.

18. The limitation of two years provided in applying for rectification of the certificate is applicable to the candidates but there is no limitation for the Board to exercise its inherent power to correct the certificate issued by it. Thus, the Board certainly in exercise of its suo motu inherent power is authorised to correct a clerical mistake or error appearing in the High School Certificate once it is brought to its notice. It is incumbent duty of the Board to ensure that the certificates issued by it are correct and does not suffer from any error or mistake. Therefore, in order to put its records straight, the Board is under an obligation to correct all certificates issued by it irrespective of the limitation placed under Regulation-7 of Chapter-III of the Regulation in exercise of its inherent power in the particular facts and circumstances of the each case. The law of limitation cannot be pressed into service by the Board while exercising its inherent power so as to defeat the right of the petitioner to have his incorrect date of birth recorded in the High School Certificate rectified.

19. The Regional Secretary of the Board has simply rejected the application of the petitioner on the ground of limitation without application of mind to the facts and circumstances of the case. Thus, he failed in discharge the pious obligation to rectify the mistake occurring in the public record which are supposed to maintain correctly.

20. Accordingly, even if the application of the petitioner was beleted the Board ought to have corrected the mistake in exercise of suo-motto jurisdiction. The Regional Secretary of the Board has failed to exercise the jurisdiction so vested in him in law in passing the order dated 21.10.2014. Thus the said order is quashed and the writ petition is allowed with a direction to the Secretary, Board of High Schools and Intermediate Education U.P. to verify the record and, to correct the High School Certificate of 2007 as issued to the petitioner by mentioning his correct date of birth therein in exercise of his inherent power within a period of three months from the date of production of a certified copy of this order.

21. The writ petition is allowed but the parties shall bear their own costs.
